

# Report

<b>Local Members' Interest</b>	
Cllr. J Pert	Stafford - Eccleshall

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

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

#### **Application for Upgrading Public Footpath 18 Swynnerton to Bridleway Status**

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

#### **Recommendation**

1. That the evidence submitted by the Applicant and that discovered by the Council is insufficient to show, on the balance of probabilities, that a public bridleway subsists along the route marked "A to B" on the plan attached at Appendix B to this report, and therefore **should not** be upgraded to a public bridleway on the Definitive Map and Statement of Public Rights of Way as such.
2. That the evidence submitted by the Applicant in the application is sufficient to show, on a balance of probabilities, that a public bridleway subsists along the route marked "B to C" on the plan attached at Appendix B to this report and therefore **should** be upgraded on the Definitive Map and Statement of Public Rights of Way as such.
3. That an Order be made to upgrade the footpath marked "B to C" on the attached map at Appendix B to the definitive map and statement of public right of way for the District of Stafford.

### **PART A**

#### **Why is it coming here – what decision is required?**

4. 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.

5. To consider an application attached at Appendix A for an Order to modify the Definitive Map and Statement for the District of Stafford. The effect of such an Order, should the application be successful, would:
  - (i) upgrade existing footpath 18 Swynnerton Parish to a bridleway 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 lines of the route which are the subject of the application are shown highlighted and marked "A to B" and "B to C" on the plan attached at Appendix B.
6. 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.

### **User Evidence Submitted**

7. The evidence of use takes the form of 14 user statements made by members of the public who claim to have used the route over varying periods of time. Some user evidence forms were submitted with the original application in 1996 and the remaining forms have been submitted more recently in 2020. Copies of their statements are attached at Appendix C.
8. The salient points from the user evidence forms have been compiled into a user matrix which can be seen at Appendix D.

### **Documentary Evidence Submitted**

9. The Applicant, through their representative, also submitted emails and documentary evidence in support of the application in 2023 the correspondence can be seen at Appendix E.
10. The documentary evidence in support of the application is a Finance Act Map dated 1910 which can be found at Appendix F.
11. A 1986 Ordnance Survey Map has also been submitted in support of the claim and this evidence can be found at Appendix G.

### **Other Evidence Discovered by the County Council**

12. Officers have conducted research into the extent of the footpath and have discovered that a landowner declaration form is in place over some of the land in question regarding Public Footpath 18 Swynnerton. This application was lodged with Staffordshire County Council in October 1992 and again in 2016. A copy of the landowner declaration forms can be found at Appendix H.
13. Section 31(6) Highways Act 1980 allows landowners to state their intentions by depositing with the authority a map and statement. This highlights any ways over their land which they accept to be public rights of way. The landowner then reaffirms this every twenty years. It is

pertinent to the claim that any public use of the land during this period will not count towards the establishment of new or upgrading existing public rights of way.

14. It is significant to note however, that the lodging of a s31(6) application will not defeat an application where it is possible to establish a 20-year period *before* the initial deposition of the statement and plan as considered further in the report.
15. Officers obtained a copy of the Parish Survey Card and evidence in relation to Public Footpath 18 Swynnerton. This can be found at Appendix I.
16. According to the records, Public Footpath 18 was originally assumed to be private, but following an exchange of letters, it was added to the parish survey as a public footpath in 1953.
17. Swynnerton Parish Council were consulted by the County Planning Development Officer on 6<sup>th</sup> July 1953 in connection with the route in question following a survey of public rights of way in Swynnerton Parish.
18. The path was originally surveyed under the National Parks and Access to the Countryside Act 1949 and a letter addressing the queries which arose from the inspection included that path 18 which had originally been considered by the survey as a private path.
19. A letter to the County Planning Officer dated June 1953 addressed the issues in respect of the gates along the route and confirmed that HM Forestry Commission states that "the only known public footpath within the area is the one from Dukes Lodge to Hobgoblin Gate". "On reforestation the field gates on the Duke's Lodge – Hobgoblin Gate portion were chained and padlocked, but on representation being made by the society, the state Forests Officers at Upton Grange wrote "on making inquiries I find that the Forester has fenced the area and erected a gate across the Right of Way from Dukes Lodge to Hobgoblin Gate. I have therefore instructed him to unlock the gate and leave it unlocked and I trust that this arrangement will be acceptable to you".
20. The Parish Council responded to the query raised by the County Planning Officer and confirmed on 4<sup>th</sup> August 1953 that the path in question "should be included as a public footpath".
21. The Parish Survey record card in respect of Public Footpath 18 Swynnerton details the route and confirms it has been used by members of the public for more than 20 years.
22. There is no evidence to suggest that there were any other objections at that time to the status of the route in question being included on the Definitive Map and Statement with the classification of a public footpath.
23. Officers also examined the Parish Survey card records in respect of Public Bridleway 9 Whitmore, which joins Public Footpath 18 Swynnerton at a section to the south-east of Acton Hill Farm. This can be found at Appendix J.
24. It can be seen from the records, that whilst this was recorded originally as a footpath, this was queried at the time, and upgraded due to the mention

of the use of “motors” recorded on the Parish record card. The route was added to the Definitive Map as a bridleway.

25. The map shows that Public Bridleway 9 Whitmore finishes south-east of Action Hill Farm.

### **Evidence Submitted by the Landowners**

26. The Forestry Commission provided confirmation in their letter dated May 1996 that there was permissive use granted over the land. A number of the users have provided confirmation that this was also in place. Their letter dated 2<sup>nd</sup> May and 19<sup>th</sup> May 1996 are attached at Appendix K.
27. The letter from the Forestry Commission indicates that Lord Stafford was persuaded to allow the Forestry Commission to “use the woodland for public recreation and in particular horse riding through a permit system, policed by local riders”. Permissive use can be fatal to a claim.
28. John German on behalf of the Freehold landowner, responded to the initial consultation and completed a landowner evidence form. They confirmed that the land was leased to the Ministry of Agriculture, Fisheries and Food in 1948 on a 999-year lease.
29. John German also noted that the Forestry Commission lodged with Staffordshire County Council a notice accepting a public right of way across the land a “few years ago” and have been operating a system of riding by permit only for some of the time.
30. A copy of their evidence form and letter can be found at Appendix L.
31. When Officers consulted the Forestry Commission in 2023, in contrast to that evidence received in May 1996 and the evidence provided by users, a short reply indicating that they were not aware of a permit system for horse riders at “Swynnerton Old Park”. There were no other comments or evidence provided in relation to the land over which the claimed path runs. A copy of the email can be found at Appendix M.
32. Landowner A has evidenced within their form that they do not own the land affected by the proposal but the land adjacent to it. Their evidence form states that they have been resident at their current address for 23 years and have always believed the path referred to is a bridleway and in the ownership of Staffordshire County Council.
33. A copy of the evidence form can be found at Appendix N.
34. Landowner A indicated that “a kissing gate” was erected but removed by the Council due to objections to the S.C.C” in May 2020.
35. Landowner B returned a landowner evidence form in 2023, owning land adjacent to the path subject to the claim. Landowner B considers the route to be a footpath only and contends that the route into the wood is private land with “no public access” and there are signs on the gates in place to suggest this.

36. Landowner B has seen people using the way on foot and horse back on a daily basis.
37. Landowner B clarified their position in relation to the erection of kissing gates along the route in 2020. Upon taking ownership of the adjoining land; discussions were held with the Council "to agree to work to reinstate the footpath for its intended use. The Council agreed to carry out drainage, base preparation and resurfacing of the footpath the over growth of trees and shrubs were trimmed back to footpath width, the Council would only agree to the repairs if two sets of kissing gates were installed, on the route. This work was completed in spring 2020, the Council then removed the gates within 2 weeks due to complaints from horse riders who would not have been able to use the path".
38. At this time landowner B highlighted concerns regarding tree surveys and the impact to the woodland that would be affected by the widening of the existing right of way.
39. Landowner B objects to the application and the path being upgraded to a bridleway as the path is not wide enough.
40. A copy of the landowner response form and landowner email can be found at appendix O.
41. Landowner C returned a landowner evidence form in 2023, indicating that they own land adjacent to the claimed path.
42. The evidence form can be seen at Appendix P.
43. Landowner C claims that their family has owned their part of the land adjacent to a section of the route in question for "over 150 years" and this is used for grazing and crops.
44. Landowner C states, "I am aware this has been a bridleway for my lifetime and my father's lifetime" and the path has been regularly used by horses, walkers and cyclists on a daily basis.
45. Landowner C also indicates that a "gate was erected but immediately requested to be removed by the Council as not permitted".

### **Comments Received from Statutory Consultees**

46. Swynnerton Parish Council responded to the initial consultation upon receipt of the application, and they confirmed that no objections had been made to the application.
47. This response can be seen at Appendix Q.
48. Stafford Borough Council also responded to the initial consultation and confirmed that they had no comments to make in connection with the application.
49. This can be seen at Appendix R.
50. The Ramblers Association responded to the initial consultation and confirmed that they had no further information to provide at that time and their letter can be found at Appendix S.

## **Comments on Evidence**

### **User Evidence**

51. Section 31 of the Highways Act 1980 sets out the test that must be satisfied for a way to become a public highway through usage by the public.
52. 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.
53. 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.
54. 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 has been accepted by the public.
55. For the purposes of the report the application route has been split into two sections marked "A to B" and "B to C" on the map attached at Appendix B.
56. The land marked "A to B" of the attached plan is Crown Land and is owned by the Forestry Commission. A landowner declaration form is also lodged in respect of this land, and this is discussed earlier within the report.
57. The statutory test will therefore fail in relation to the section of the route marked "A to B" and so the legal test to be applied to the route marked "A to B" is Common Law.
58. For the route marked "B to C" on the attached plan at Appendix B both the Statutory test and the Common Law test will be considered.
59. Therefore, in order to consider the application; the legal tests will need to be considered independently in respect of the two sections of the route.
60. For section "A to B" of the route the landowner lodged a S31(6) declaration over the land, 1992. The relevant period has been taken to be from 1972 to 1992 - as this is 20 years prior to the challenge date.
61. The evidence of use is relatively low, in that only 14 users testified to using the route and have submitted user evidence forms. Of these users, 7 users claim to have used the section of the route marked "A to B" after the landowner declaration was submitted in 1992.
62. There are 8 users who have used the route during the relevant twenty-year period, but only 2 of these are for the entirety of that period.

63. Four of the user evidence forms submitted are for use 8 years prior to the relevant 20-year period. Two of these users are father and daughter as detailed below.
64. There is also 6-year period where there is no evidence of use.
65. User A is the owner and resident at a local riding school and has indicated that *"when the forestry permit system was introduced, Hobgoblin gate was replaced by a vehicle gate which is locked". "At Dukes lodge the bridle gate was replaced by a kissing gate for pedestrians and a bridle gate was replaced on the other side of the vehicle gate as part of the permit systems key holders only gate"*. This notation of a permit system is fatal to the claim as this identifies that permission has been granted to users for use on horseback. This evidence supports the evidence received from the Forestry Commission in respect of the route.
66. User B has purported to use the route since 1920 to 1960 on horseback with family and has indicated there have never been any stiles or gates along the route in question.
67. User B had always considered the way to be a public bridleway.
68. It is crucial to note from correspondence from the County Planning Officer dated June 1953 and referred to at paragraph 17 - that the gates had been padlocked and chained in 1953 and subsequently unlocked. This is not mentioned in the user evidence form of User B.
69. This use does not fall within the relevant 20-year period, however, it does raise uncertainty to the continuous use of the route of users B and C without obstruction until 1960. There is no mention in the forms that there had been padlocked gates along the route which was used.
70. User C is of the same abode as user B and rode the route on horseback frequently together. User C indicates in their statement that *"my father and I were riding our horses along the side of the path with the locked gate on it"*. The form was signed and dated in 1992 and the assertion clause accompanying the form is dated 1994.
71. In relation to the dates stated on the form, the user claims to have known the way for 40 years, however the date of use has been calculated when the user turned 16. It is from this age they are considered to have used the route, as of right.
72. There is no evidence of use provided after 1960 for users B and C despite the form being completed and signed in 1994, 34 years after use discontinued.
73. User D has confirmed they used the route 4 times a week for pleasure purposes and reported two locked gates along the route in 1992 and marked these on the attached map.
74. User E's use has again been calculated from when they were post 16 years of age and considered using the route as of right. Any use prior to the age of 16 would not be considered as of right.



75. User E has used the route on foot and horseback for pleasure purposes and indicated that there was a "*swing gate attached to a large gate.. at the top corner of hobgoblins gate - and double gates attached to a swing gate following out on road opposite Hanchurch Picnic area*".
76. User F, who's use has again been calculated from when they reached 16, referenced wooden gates at each end of the route that were "usually open". (sic)
77. There is no evidence of use for 29 years for user F between 1963 and the time at which the evidence form was signed in 1992.
78. User G, again who's use has been calculated from when they reached 16 provides further exposition. They stated there was a 10-year break in the use of the route between 1962 and 1972.
79. The user claimed there was a permit in place by the Forestry Commission from 1992 and the user paid for a permit to use the way.
80. User G also states that "*the bridleway used to be fenced so there was no riding in the wood*". (sic)
81. User H, again whose use has been calculated from when they reached 16, stated their use was for pleasure and on a regular basis. The user indicates that there were "*gates along the route but were clearly marked for horses*".
82. User H also claims that gates were chained and padlocked along the route, with wicket gates still open for use, but there is no date given for when this occurred. The user claims a hand painted horse-shoe sign was placed to the side of the gate.
83. User I claims to have used the route for 16 years, and during that time the Forestry Commission closed the woods to riders except those holding permits.
84. Of the users A to I, 4 of them claimed to have paid for a permit to use the route.
85. The following users submitted evidence in 2020.
86. User J claims to have used the route for "about" 40 years.
87. User J claims that two kissing gates were erected along the route in 2020 by a local landowner, and these were removed shortly after.
88. There are inconsistencies with the evidence in that user J claims to have used the route from 1980, however there is no mention of the locked gates into Hanchurch Woods which had been mentioned by previous users who submitted their evidence forms with the original application in 1996.
89. User J suggested that when the kissing gates were erected in 2020, they took a "long diversion was taken through Hanchurch woods".
90. User K kept their horse at the local stable and has known the way for 26 years. The user refers to the erection of the two kissing gates along the route in 2020 which were removed shortly after.

91. User L has used the route for 25 years and again kept their horse at a local stable and used the route as a circular route.
92. This user also states that there were kissing gates erected along the route in 2020 and these were subsequently removed.
93. User M has used the route for 23 years, for pleasure purposes on a circular route and on a weekly basis, keeping their horse at a local stable.
94. Again, the user identifies the obstruction of 2 kissing gates along the route in 2020, however, these were removed shortly after.
95. User N has used the route for 41 years. Again, use has been calculated from when the user reached 16 and purports that there were no stiles or gates along the route.
96. The route map provided with the evidence form does not highlight the route used, although it suggests that the route identified "*clearly a lane on map. Not just a footpath*".
97. Again, there are discrepancies with the evidence in that user N claims to have used the route from 1978, however there is no mention of interruption or gates into Hanchurch woods which does not correspond with users who signed their forms in 1994 and submitted their evidence with the original application.
98. User N has also provided a copy of an extract from a book and labelled this "local Acton history". The source of the evidence is not identified. There is no map or plan provided within the 2-page extract and there is little that can be gleaned from this evidence.
99. There are inconsistencies in respect of some of the claims particularly regarding the route used in Hanchurch Woods, it would appear that 6 of the users have referred to locked gates and the requirement of permits to use the way on horseback in respect of access via Hanchurch Woods and these are potentially fatal to the claim.
100. The users J – M submitted their forms in 2020 - none of which have referred to any mention of gates or access into Hanchurch Woods.
101. These users however do mention the erection of gates in 2020 along the section of the path marked "B to C" which were removed within 2 weeks.
102. Users J – M have claimed to have used the section of the route "A to B" during the time which the landowner declaration form has been in place, since 1992 and therefore this use cannot be considered in connection with that section of the route. There is a clear intention by the landowner not to dedicate the route by lodging the s36 declaration with the local authority.
103. The erection of the kissing gates along the route mentioned by users J - M, whilst this is considered an obstruction along the route, the application was submitted in 1996 and therefore use of the route had already been brought to question by the time of the gate's installation. Following investigation at the time, the Council removed the gates following complaints.

104. In relation to the section of the route marked "A to B" the statutory test would not be applicable as the land is subject to Crown Immunity.
105. Therefore the test to be applied in respect of the section of the route marked "A to B" is the common law test; this is based on a somewhat similar criteria to the statutory test although the use does not necessarily have to be for 20-years or more.
106. The test needs to demonstrate that that the landowner firstly intended to dedicate the route and secondly that he had the capacity to do so.
107. It is a test that applies to the Crown, the Forestry Commission, the Duchies of Lancaster and Cornwall and government departments - unless expressly excluded by statute.
108. Under the common law test it may be necessary to show higher levels of use in urban areas during shorter periods of time. This enhances the overall integrity of the claim.
109. Given that there were a low number of users in this case it is necessary to have a more substantial timeframe.
110. The conduct of the landowner by submitting a landowner declaration is held to be evidence that the route had not been dedicated for use on horseback – this in itself is fatal to the claim – as in the case of *Nicholson v Secretary of State for Environment (1996)*.
111. The essential point in the common law test is that there must be a capacity to dedicate, and only the owner of the freehold title can, by his actions, dedicate a right of way.
112. All of the users A to I have identified that there were gates along the route into Hanchurch Woods and many of whom contend that there was also a permit required for use of the route through the wood on horseback.
113. Of the remaining users since 1992 it can only be reiterated that a landowner declaration was in place over the land, and that this is fatal to the claim.
114. In respect of the length of the route marked "A to B", it is Officers opinion that there is insufficient compelling user evidence to satisfy the common law test and thus this test would also fail in respect of this section of the route.
115. Turning to the section of the route marked "B to C" on the map attached at Appendix B, the evidence here can be considered under statute and under the common law test. There are no landowner declarations in place for this section of the route and this section of land is not owned by the Crown or Forestry Commission.
116. Therefore, the relevant 20-year period here would begin retrospectively from the date of challenge on the route.
117. We are aware that there were kissing gates erected along the route in 2020, however this application was made prior to the said obstruction and therefore the date of the application will be considered as the date

- of challenge and therefore the relevant 20-year period will be 1976 – 1996.
118. There is not one user identified who claims to have used this the path for the full duration of the relevant 20-year period from 1976 – 1996.
  119. However, when we calculate evidence of use together, that of user G and user J, this would constitute 1 user for the duration of the 20-year period.
  120. Also, user H and user N calculated together would constitute another user for the duration of the 20-year period.
  121. So, when considered collectively, it can be said that there are 2 users who have used the route for the full relevant 20 year period.
  122. In addition, there are another 4 users who have returned user evidence forms who claim to have continued to use the route in question after the date of application, this use is all for 20 years or more, however, it does not fall within the relevant 20-year period.
  123. There are a further 4 users who have claimed to use the route during the relevant 20 year period but not for its entirety.
  124. Another 3 users claim to have used the route, however this is prior to the relevant 20 year period.
  125. Whilst, when calculated together, there are 2 users who have used the route for the duration of the relevant 20 year period, this is not considered enough evidence to satisfy the test under statute – for clarity being the path marked “B to C” on the attached map at Appendix B.
  126. In the case of R. v. SSETR (ex p. Dorset) [1999] it was accepted that, although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.
  127. Therefore the section of the route marked “B to C” on the plan should be considered under the common law test.
  128. Whilst the level of user evidence forms submitted is fairly low, we do have 14 users who have used the route, for long periods of time prior to the route being brought into question - the amount of usage described by each user is relatively frequent.
  129. It would appear from the evidence that the users were accessing the section of the route marked “B to C” on the attached plan, as of right.
  130. The land over which the section of the path marked “B to C” runs is not recorded at the Land Registry.
  131. There is a rebuttable presumption in law that operates where for example there is a track that is unregistered and has no apparent owner, despite the land either side having registered owners.
  132. This principle is the ad medium filum rule and in respect of highways, which are often not the property of the Highway Authority, it is used to determine the ownership of the subsoil.

133. In the absence of any other evidence, the rule holds that the interest is vested in the adjoining landowners despite it being unregistered land.
134. In the terms of the right of way, the ad medium filum rule will apply, in that the subsoil to the midline of the right of way will belong to each of the adjoining landowners.
135. It is apparent from Landowner A that they believe that the path adjoining their land is a bridleway and has been so for 23 years.
136. In respect of Landowner B, as their evidence form would suggest, their ownership of the adjoining land commenced in 2014, after the date of the S53 application; they accept that the route is a footpath only.
137. For clarity, all users of the alleged route claim to have used it on a regular basis - and landowners of the adjoining land claim to have seen members of the public accessing the route on a daily basis either on foot, horse or cycle.
138. Therefore, it is evident that the frequency of use was sufficient enough to bring it home to a landowner that they were present and that a right on horseback was being asserted across their land.
139. Despite the implied intention to prevent horses accessing the route in 2020 by the erection of kissing gates, these were subsequently removed following complaints and the matter was addressed by the Council at that time.
140. In connection with the rejection and removal of the kissing gates along the path, the Council found that the gates were erected with the intent for them to aid repair works to the surface of the route and the installation of a drainage system. This was to alleviate the muddy deteriorating condition of the route.
141. The Council found that whilst this was the intention, the action was somewhat precipitous and on review ought not to have been carried out. Consequently, the Council accepted that the structures should be removed, and this was subsequently achieved shortly after.

### **Historical Evidence**

142. The 1910 Finance Act shows the application route - "B to C" into Hanchurch Woods as "uncoloured" and separate from the adjoining hereditaments.
143. Its exclusion from the Incremental Duty Tax is indicative of its likely public status.
144. Public footpaths were included in land value assessments under the 1910 Act and also noted in the accompanying Field Books. There was a deduction in Duty Value for the negative burden on land value they created.
145. If a route in dispute is external to any numbered hereditament, then there is a good possibility that it was considered public.

146. The Finance Act Plan submitted does not evidence the full length of Public Footpath 18 Swynnerton.
147. It can be seen from the map that whilst the top section of the route to Hanchurch Woods is uncoloured, this does not remain the same for the continuation of the route into Hanchurch Woods, and therefore this evidence does not support the contention that the entirety of the route could have a higher status due to it being separate from adjoining land.
148. No field book has been provided to accompany the map and therefore no inference can be made in relation to the hereditaments of the route in Hanchurch Woods, marked "A to B" on the plan, however this section appears to be included within a hereditament.
149. It should be noted however that there may be other reasons to explain the exclusion of the path from the Finance Act Map, in respect of the section "B to C" of the plan. In some cases a private road set out in an inclosure award for the use of a number of people but without its ownership being assigned to any individual may also be excluded from hereditaments.

### **Tinted OS Map 1896**

150. The Applicant, through their representative submitted an 1896 Ordnance Survey tinted map for consideration in respect of the application.
151. Again, the map is limited to the northern section of the route and this is depicted tinted in sienna leading up to Hanchurch Woods. The colouring could be suggestive of rights higher than that of a footpath as this appears to be shown in a similar way connecting routes in the local area, however this is not conclusive.
152. This could suggest that the alleged route is of a higher status than a footpath, as it is shown by two solid lines and entirely separate from the adjoining landholdings, and in a similar way to other highways, however this is not conclusive.
153. Ordnance Survey Maps do provide evidence of the physical existence of features on the ground extant at the time of the survey, however they are usually unable to provide any evidence of status.
154. 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.

### **Legal Tests**

155. With regard to the status of the route, the burden is on the Applicant to show, that on the balance of probabilities, that it is more likely than not, that the Definitive Map and Statement is incorrect. The existing classification of the route, as public footpath, must remain unless and until the Panel is of the view that the Definitive Map and Statement are wrong.

156. If the evidence is evenly balanced, then the existing classification of the route as a public footpath on the Definitive Map and Statement prevails.

## **Summary**

157. 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)(i) of the Act.
158. The Panel need to be satisfied that, on the balance of probabilities, the evidence shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
159. 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 ('the 1980 Act').
160. 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.
161. 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.
162. 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 have 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.
163. 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.
164. In this case, we have separated the route to be considered into two sections. In terms of the section marked "A to B" on the map attached at Appendix B, the view taken is that the status of the route was brought into question in 1992, when the landowner declaration was submitted to the Council.
165. As explained, in this case the statutory test fails or is inapplicable in respect of the section marked "A to B" due to Sovereign Immunity. As such the application in respect of section "A to B" must succeed or fail under common law.
166. As a landowner declaration has been in place since 1992, it would appear from the evidence submitted by the Forestry Commission and quantified by users that access for horse riders was via a permit only or restricted

- via locked gates and therefore this does not satisfy the test under common law.
167. As such, it is Officers opinion that the evidence is insufficient to give rise to dedication beyond use as a public footpath and the application will fail under the common law test in respect of this section of the route marked "A to B".
  168. For clarity, the landowner has shown a clear intention not to dedicate the route on horseback.
  169. The historical evidence - Parish Survey Cards and information in support of these, the Finance Act Map 1910 and the 1896 OS Map, in respect of the route "A to B", (the section of the route through the woods at Hanchurch Hills) would all appear to be consistent with that of a public footpath.
  170. The Forestry Commission, the Parish Council and the County Surveyor have all contented that the route is a public right of way with the status of a public footpath.
  171. It should be noted that no objections were received regarding the designated status at the time of the initial definitive map and statement.
  172. In terms of the section of the path that is not subject to the landowner declaration, marked "B to C" on the attached map at Appendix B, the view taken was that the status of the route was brought into question in 1996, when the application to upgrade Public Footpath 18 was submitted to the Council.
  173. For this section it needs to be demonstrated that there was public use between 1976 to 1996 to satisfy the first part of the statutory test.
  174. As outlined all 14 users do show a degree of consistency in their evidence, however there are also some apparent inconsistencies.
  175. In terms of section "B to C" of the map the *as of right* status can be determined as use has clearly been *nec vi, nec clam, nec precario* – without force, secrecy, or permission.
  176. From the frequency of use claimed, combined with the preceding points above it can be demonstrated that adjoining landowners to the section of the route marked "B to C" on the attached plan, did show an intention to dedicate the route as a bridleway and that the public had accepted this.
  177. When added together there are 2 users who satisfy the test for use throughout the relevant 20 year period, although, this use alone is not strong enough to satisfy the statutory test, 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.
  178. 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 that dedication.



179. As with the statutory test the use must have been *as of right* and without challenge and enjoyed by the public at large – all of which appear to have been satisfied in terms of the northern most section of the route marked “B to C”.
180. There are discrepancies in the evidence of use submitted, and no use recorded between 1963 – 1969, a duration of 6 years.
181. That said, the use after that time from 1969 – 2020 has seen no interruption - quantified by no challenge in respect of the section of the route marked “B to C” until the erection of the kissing gates in 2020.
182. In respect of the historical evidence submitted by the Applicant through their representative, the 1910 Finance Act Map is suggestive of higher rights over the northern section of the route, being the section marked “B to C” on the attached map however this is not conclusive.
183. The Finance Act Map does not support the contention that the section of the route marked “A to B” is of the same status. The entirety of the route cannot be seen from this evidence, however what can be seen is a coloured route, within a plot of land; this is suggestive that higher rights do not exist in relation to the southern section of the footpath marked “A to B”.
184. The 1896 Ordnance Survey map would appear to show the route-coloured sienna and linked with other local routes in the area, in particular with Public Bridleway 9 Whitmore. Again, this is suggestive that the section marked “B to C” on the attached map was considered to have higher rights over it than a footpath.
185. The correspondence and evidence considered does refute the claim as to the status of the route in respect of the land marked “A to B”.
186. The Applicant, through their representative, also provided information in their email dated the 16 June 2023 in respect of the complaints raised regarding the kissing gates and the obstruction along the route in 2020.
187. This associated complaint was investigated by the Council at the time and resolved in May 2020. The response to the complainant can be found at Appendix T.
188. The legal aspects in connection with the section 53 application of the complaint have been fully investigated and commented upon within the report.
189. In terms of the comments made in respect of the sale particulars referred to and sent to Officers for consideration as part of the investigation of the section 53 application, this was considered as part of the complaints procedure and the Council responded as follows: “I appreciate the sale particulars and their mention of a bridleway but they are produced for a particular purpose, to sell a property. They are not legally binding documents.”
190. All of the evidence when considered together, would indicate that the section of the route marked “B to C” on the attached map would succeed

under the common law test, that is a dedication by the landowner and acceptance of this dedication by the public.

## **Conclusion**

191. It is the opinion of 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 a Public Bridleway, which is not shown on the map and statement does not subsist along the section of the route marked "A to B" on the attached map.
192. It is the opinion of Officers that the County Council should not make a Modification Order to upgrade the route marked "A to B" on the attached plan to Public Bridleway status on the Definitive Map and Statement of Public Rights of Way.
193. It is the opinion of 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 a Public Bridleway, which is not shown on the map and statement subsists along the section of the route marked "B to C" on the attached map.
194. It is the opinion of Officers that the County Council should make a Modification Order to upgrade the route marked "B to C" on the attached plan to Public Bridleway status on the Definitive Map and Statement of Public Rights of Way.

## **Recommended Option**

195. To **reject** the application in respect of the section of the route marked "A to B" on the attached map at Appendix B based upon the reasons contained in the report and outlined above and to decide not to make an Order to upgrade the section of the route to the Definitive Map and Statement of Public Rights of Way.
196. To **accept** the application in respect of the section of the route marked "B to C" on the attached map at Appendix B based upon the reasons contained in the report and outlined above and to decide to make an Order to upgrade the section marked "B to C" of the route of Public Footpath 18 Swynnerton to a Public Bridleway on the Definitive Map and Statement of Public Rights of Way.
197. It is further recommended that this should be to the minimum width of 2 metres throughout its length.

## **Other Options Available**

198. The Panel has the authority to reach a different decision and therefore:
  - a) can *accept* to upgrade the entirety of the route to make an Order to upgrade the alleged route to the Definitive Map and Statement of Public Rights of Way or;

- b) can *reject* to upgrade the entirety of the route to and not make any Order to upgrade the alleged route to the Definitive Map and Statement of Public Rights of Way or;
- c) can *accept* to upgrade the section "A to B" of the route to make an Order to upgrade the alleged route to the Definitive Map and Statement of Public Rights of Way or;
- d) can *reject* to upgrade the section "B to C" of the route to not make an Order to upgrade the alleged route to the Definitive Map and Statement of Public Rights of Way.

### **Legal Implications**

199. The legal implications are contained within the report.

### **Resource and Financial Implications**

- 200. The costs of determining applications are met from existing provisions.
- 201. 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**

- 202. 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.
- 203. 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.
- 204. 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.
- 205. 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**

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

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J Tradewell

Director for Corporate Services

**Report Author: Laura James**

**Background File: LF602G**

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