

Countryside and Rights of Way Panel**Wildlife and Countryside Act 1981****Application for Upgrading of Public Footpath 73 Audley Rural Parish to a Public Bridleway and the Addition of a Public Bridleway, Newcastle****Report of the Director of Corporate Services****Recommendation**

1. That the evidence submitted by the applicant, in the application at Appendix A is sufficient to show that a Public Bridleway subsists along the route marked A to B along PF73 Audley Rural Parish and that a Public Bridleway may be reasonably alleged to subsist along the route marked C to D, Newcastle on the same plan attached at Appendix B to this report and should therefore be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order should be made to add the alleged right of way shown on the plan attached at Appendix B and marked A to B and C to D to the Definitive Map and Statement of Public Rights of Way for the Borough of Newcastle-under-Lyme.

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 made by Mrs P J Whalley for an Order to modify the Definitive Map and Statement for the area by upgrading Public Footpath 73 Audley Rural Parish to a Public Bridleway and adding a Public Bridleway, Newcastle, under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. The lines of the alleged public bridleways as claimed by the applicant are shown on the plan attached at Appendix B.
3. To decide, having regard to and having considered the Application and all the available evidence, and after applying the relevant legal tests, whether to accept or reject the application.

4. For the application to be successful under section 53 (3) the user evidence is required to be significant enough to determine that a route exists irrespective of whether there are any physical features remaining on the ground.

Evidence Submitted by the Applicant

5. The applicant originally submitted an application for the upgrade of PF73 Audley Rural Parish and for the upgrade of PF39 Newcastle Town to bridleway status. However, within a few days of the application it became clear that the applicant had not intended to include PF39 and that the correct application was for the *addition* of a section of public bridleway as marked on the attached plan.
6. The routes applied for are shown between points A to B (coloured black) and points C to D (coloured green) on the plan attached at Appendix B. Collectively the applicant refers to the entire route as running from “Apedale Road to Springwood Road.”
7. In support of the application the applicant Mrs P Whalley has submitted a petition with over 130 witnesses who have claimed to use the route for horse riding – and the length of use in each particular case. This can be found at Appendix C.
8. The applicant has also submitted 20 user evidence forms. The salient points of which are shown in Appendix D.

Evidence Submitted by the Landowners

9. When the application was submitted in 1994 the applicant identified two owners or occupiers of the relevant land, i) Staffordshire County Council, County Buildings, Martin Street, Stafford, ST16 2LH and ii) British Coal, Regional Headquarters, Staffordshire House, Berry Hill Road, Fenton, Stoke on Trent, ST4 2NH
10. Staffordshire County Council was later found not to be a landowner.
11. British Coal was unable to submit any information to either support or refute the application. As shown at Appendix E
12. A further landowner was later identified as Mr B M Pepper.
13. Mr B M Pepper stated that he believed the path floods in winter and was sometimes quite dangerous. Mr Pepper highlighted the nuisance caused by motorcycles on paths used by horses, citing damage to fences, verbal abuse and added dangers of motorbikes riding around. Mr Pepper remained neutral as to whether the paths should be upgraded to bridleways or not. As shown at Appendix F.

Other Evidence Discovered by the County Council

14. A site inspection carried out by Staffordshire County Council identified the anomaly in the original application. The inspection revealed that the line of PF39 that had originally been claimed “was difficult to follow on the ground” and that the public “appear to have been using an alternative route”. Staffordshire County Council clarified the position with the applicant who confirmed that the alternative route was indeed the line she had intended to claim. The correspondence relating to this clarification can be seen at Appendix G.
15. Mrs L Golding MP contacted Staffordshire County Council directly in response to a letter received by the applicant querying why Staffordshire County Council had fenced off the footpath alongside the Wood Lane Club. This was believed to have been done to prevent motorcycles using the paths although had also blocked the path for use by horses. The belief was the land was owned by British Coal.
16. Staffordshire County Council investigated the possibility of “amending the barriers in question to enable horses to use the path whilst still preventing motorcycles”.
17. Mr A.M. Manifold contacted Staffordshire County Council to complain about the increased use of motorcycles on PF73 stating the stiles had been removed on 21st November 1994. He stated that the path was only 3 feet wide in places and suggested that this was not wide enough to accommodate walkers, horse riders and motorcyclists. Reference was made to uninsured motorcyclists and horses as big as 16-17 hands tall. Further safety/ antisocial aspects were highlighted in that the entrance to the path was stated to be facing a senior citizens bungalow complex. As shown at Appendix H.
18. Staffordshire County Council replied to Mr Manifold stating that they had authorized the erection of stiles on the line of PF73 following complaints about motorcycles accessing the route. After the erection of the stiles further complaints were received from horse-riders complaining they were unable to access Apedale Valley and were forced to ride on roads presenting concerns from a road safety point of view. The stiles were removed to allow horse access but given the risk to walkers caused by motorcycles using the route the stiles were reinstated. Staffordshire County Council confirmed that the reinstatement of the stiles was without prejudice to the application to upgrade the route to bridleway status.
19. An unsigned letter and petition dated 29th November 1994 to Staffordshire County Council referencing PF73 objected to the removal of stiles on the path and stated that without the stiles the path had become “a quagmire of mud”, with “underage motorcyclist” accessing the path. The width of the path was stated to be “too narrow” with “steep sides” in places leaving nowhere for walkers to turn if confronted by a horse. In summary the letter highlighted both antisocial concerns and health and safety concerns which had arisen from removing the stiles and gates. The letter was attached to a list of 51 signatories, complete with addresses, all wishing the route to

remain as a footpath and objecting to its upgrade to a bridleway. As shown at Appendix I.

20. Mrs JM Lewis representing “all local horse owners and carriage drivers” expressed concern that the Apedale Woods paths would be lost in a new development forcing them to use the very busy and precarious roads. She stated that the relationship between horse riders and walkers was good and the main concern being that “motorbikes churn up the ground and are very noisy”.
21. Further examination of the user evidence forms by Staffordshire County Council revealed minor anomalies in the total number of years claimed by some users. These differed by just one or two years in the evidence submitted by Sheila Griffiths, Margaret Buckley, Tonya Taylor, Miss S Hambleton and Terrance Harvey.
22. The entire route forms part of the Two Saints Way – a walk promoted as a pilgrimage route approximately 92 miles long between the cathedral cities of Chester and Lichfield.

Comments Received from Statutory Consultees

23. Audley Rural Parish Council stated that they did not support the application. They considered it had always been used as a footpath and that if a bridleway was needed it should go elsewhere. Access from Woodhouse Farm into Apedale was suggested as preferable. They also objected to the “diversion of the route (PF39)”. This clearly referred to the alternative route as amended in the application to an addition. As shown in Appendix J
24. Newcastle under Lyme Borough Council stated that the actions of the landowner had now made it only possible for pedestrians to use the PF73 where once allegedly both walkers and horse riders shared the facility. They had no objection to the application. As shown at Appendix K.

Comments on Evidence

25. 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.
26. 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 20 years usage as of right and without interruption. This presumption could be rebutted by the landowner proving that he had no such intention. However, the onus is on the landowner to do so. The land that the path crosses is not of a character that would prevent the dedication of a way.
27. The claimed bridleway submitted by the applicant was originally an upgrade of two definitive public footpaths, PF73 Audley Rural Parish and PF39 Newcastle. However, this was subsequently changed by the applicant who retained the upgrade of PF73 but decided to claim a different route along a track to the south of PF39.

28. For clarity the application is for the upgrade of PF73 to bridleway status and for the addition of a new length of bridleway which joins PF73 and continues in the same general direction. It is this latter route that the applicant meant to indicate in the original application.
29. It is clear from the available user evidence that there have been no interruptions to usage over the relevant 20 year period. The application was only made as a consequence of a challenge in 1994 to horse riders accessing the path - barriers being erected to prevent motorcycles using the route. The relevant period will therefore be from 1974-1994.
30. The barriers had been erected to prevent the access of motorcycles on both antisocial and safety grounds. This was an acceptable solution from a rights of way perspective as the route had the status of a Public Footpath and no higher rights. The stiles were installed without prejudice to the application and this was reiterated by Staffordshire County Council to the applicant.
31. The horse riders who had used the public footpath for the relevant 20 year period had done so without either seeking or being granted permission and had done so without secrecy. The land in question being largely in the ownership of British Coal whose open cast operations had ceased rendering them absentee landlords.
32. From the attached user map evidence, the path used by all the users is on the same line and there is no indication that they have deviated from this line. However, this was later amended as can be seen in point 26 above as the route along PF39 was subsequently revised.
33. It was accepted by Staffordshire County Council within one week of the application that this alternative route was indeed the intended route and this was further supported by a site visit. This anomaly regarding PF39 was repeated in the other user statement plans although as the applicant had explained the position, it was accepted as such and not considered further.
34. Clearly as the route of the claimed addition is a linear continuation of PF73 and its use has been confirmed with a site visit by Staffordshire County Council – along with it being found (during the same visit) that the route of PF39 was “difficult to follow on the ground” - then the user evidence would appear to be applicable to the entirety of the route claimed.
35. The statutory test refers to use over 20 years and in the evidence submitted there are 15 users who have used the path throughout the relevant 20 year period calculating back from the date of challenge. There are an additional 12 users who claim to have used the path for a period exceeding 33 years although dates are not given to clarify exactly the periods covered. These latter 12 users could refer to an earlier period or a period overlapping into the relevant period. Without further details their only value is supportive to reaffirm the route was used by riders.
36. Neither the legislation nor the applicable case law set 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, ie. “as of right”.

37. The amount of user evidence that spans the relevant period of 20 years is over half of the amount of submitted users. This could be considered sufficient to bring that use home to a landowner.
38. Of the 15 users a total of 4 claimed to have used the route on a daily basis, 11 users on a weekly basis and 1 user several times yearly. In addition, 2 users stated they used the path daily to weekly. The frequency of use, mostly on a weekly basis could be considered sufficient to bring that use home to a landowner. This is further emphasised by the fact the users in question were horses and riders. It would be difficult for any landowner to claim he had no knowledge of such use as horses are more noticeable than people, and horses affect the surface of a path leaving longer lasting evidence than walkers. Surface impact and hoof marks being some of the more visible markers.
39. A total of 13 users stated that a gate or stile had been present on the route although from the evidence it seems that these were those installed due to motorbike use and associated antisocial behaviour at the point of challenge.
40. The user evidence forms and signed statement testifying to many years use of the route provide significant evidence that this has been done as of right, without permission and by its nature without secrecy. The fact that stiles were only installed when motorbikes became a problem suggests that no one prior to this had complained about horses accessing the path. The evidence records periods of over 33 years use and there is no evidence that the landowner had intended not to dedicate.

Comments on All Available Material

41. There is no evidence that we are aware of that would support any higher rights than those applied for. The motorbike access was a new event on the path that ceased after barriers were erected and was of only short duration – weeks to months.
42. The material when taken together appears to be consistent – and remains consistent even after the amendment from PF39 to the alternative route is taken into account.

Burden and Standard of Proof

43. This will be considered in two parts. Firstly, in relation to the upgrade of PF73 and secondly in relation to the addition of the new section of bridleway.
44. With regard to the status of the route in relation to the upgrade, the burden is on the applicant to show, that on the balance of probabilities, that it is more likely than not, the way subsists. The existing situation must remain unless and until the Panel is of the view that the Definitive Map and Statement should be amended. If the evidence is evenly balanced, then the existing Definitive Map and Statement prevails.
45. With regard to the status of the route in relation to the addition, the burden is on the applicant to show 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”.

46. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.
47. The application is made under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(c) (ii) of the Act.
48. 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”) which sets out the requirements for both the statutory test and common law dedication.
49. 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 period of twenty years. In this case, the view taken was the status of the route was brought into question in 1994.
50. Therefore, it needs to be demonstrated that there was public use between 1974 to 1994 to satisfy the first part of the statutory test. In total 15 out of the 20 users have over 20 years recorded usage that covers the relevant 20 year period. This is over half of all users and therefore significant enough to have alerted the landowner to its use.
51. If the test in the first part of Section 31 is considered as to whether the way subsists and the balance of probabilities, the courts have indicated that this can be satisfied by considering whether it is more probable, or more likely than not. As Lord Denning in the case of Miller said, “If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not”.

Summary

52. In this instance your officers consider that the use is sufficient to satisfy the statutory test set out in s31 when considered on the balance of probabilities.
53. An implication of dedication may also be shown at common law level 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 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.
54. No evidence has been submitted to show that the usage has been challenged by the landowner or that there has been an intention not to dedicate during the 20 year relevant period. In light of this it can be reasonably considered that there has been a common law dedication of the route as a public footpath.
55. For clarification all points appear to be satisfied in this case, there is a “way over land”, the character of the land does not prohibit use by statute, it has been enjoyed by the public, and in sufficient numbers over a sufficient period of time. It has been used without force, secrecy and permission.

Conclusion

56. In light of the evidence, as set out above, it is your Officers opinion that the evidence does show that a public right of way subsists along the route of PF73 and that a bridleway is reasonably alleged to subsist along the route which is the subject of the addition.
57. It is the opinion of your officers that the County Council should make a Modification Order to add the public bridleway which is the subject of this application to the Definitive Map and Statement of Public Rights of Way for the Borough of Newcastle-under-Lyme and with a width of 3 metres.
58. That the line of the route that was originally alleged to follow that of FP39 shall be taken as the alternative route that appears to have been the route most commonly used and that which the applicant originally intended to identify on the plan. Again, for clarity this is shown on the Plan at Appendix B.

Recommended Option

59. To accept the application based upon the reasons contained in the report and outlined above.

Other Options Available

60. To decide to reject the application and not to make an Order to add the route to the Definitive Map and Statement of Public Rights of Way.

Legal Implications

61. The legal implications are contained within the report.

Resource and Financial Implications

62. The cost of determining applications are met from existing provisions.
63. 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

64. 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 14 of the 1981 Act. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.
65. 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.
66. Should the Council decide not to make an Order the applicants 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.

67. 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

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

J Tradewell

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Background File: LD603G

Index to Appendices:

Appendix	
A	Application
B	Plan
C	User Evidence - Petition
D	(i) User Evidence – Forms x 20 (ii) Key Points of Forms
E	Landowner Reply – British Coal
F	Landowner Reply – Mr Pepper
G	Clarification of Route – Correspondence
H	Evidence Letter – Mr Manifold
I	Petition and Letter
J	Statutory Consultee Reply – Audley Rural Parish Council
K	Statutory Consultee Reply – Newcastle under Lyme Borough Council