

<b>Local Members' Interest</b>	
Jeremy Pert	Stafford- Eccleshall

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

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

#### **Application for the addition of an alleged Public Footpath at Eccleshall Road to the Footbridge over the River Sow, Creswell.**

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

#### **Recommendation**

1. That the evidence submitted by the applicant and that discovered by the County Council is sufficient to show that the alleged public footpath at Eccleshall Road to the Footbridge over the River Sow, Creswell subsists along the route shown marked A to B on the plan attached at Appendix B and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order made be made to add the alleged right of way shown on the plan attached at Appendix B and marked A to B to the Definitive Map and Statement of Public Rights of Way for the District of Stafford Borough Council as a Public Footpath.

#### **PART A**

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

1. Staffordshire County Council is the authority responsible for maintaining the Definitive Map and Statement of Public Rights of Way as laid out in section 53 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). Determination of applications made under the Act to modify the Definitive Map and Statement of Public Rights of Way, falls within the terms of reference of the Countryside and Rights of Way Panel of the County Council's Regulatory Committee ("the Panel"). The Panel is acting in a quasi-judicial capacity when determining these matters and must only consider the facts, the evidence, the law and the relevant legal tests. All other issues and concerns must be disregarded.
2. To consider an application attached at Appendix A from Mr Martin Reay for an Order to modify the Definitive Map and Statement for the District of Creswell. The effect of such an Order, should the application be successful, would:
  - (i) add an alleged Public Footpath between Eccleshall Road to the Footbridge over the River Sow, Creswell to the Definitive Map of Public Rights of Way under the provisions of Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981.
  - (ii) The lines of the alleged Public Footpath 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 his claim evidence from the 1910 Finance Act Plans and Field Book dated 9<sup>th</sup> January 1911, Ordnance Survey Maps for 1888, 1902 and 1925 and an extract from a book about the River Sow.
2. The 1910 Finance Act material refers to two plots which cover the area of land which the claimed route runs. These are plot numbers 63 and 67. Copies are attached at Appendix C.
3. In the Field Book there is a deduction allowed for a Footpath and a right of way. The only reference made in relation to a Footpath in the Field Book is, "Public Footpaths through enclosures no 63 and 67 Creswell".
4. On the section of the map that covers plots 63 and 67 there is a route shown as dotted lines which bear the depiction FP and appears to follow the same line as the alleged route.
5. The applicant sent a letter dated 5<sup>th</sup> January 2000, enclosing evidence he had taken from a modern book about the River Sow. The applicant did not provide the name of the book and there is nothing on the page provided to identify the book it has come from. Copy attached at Appendix D.
6. The applicant has identified one paragraph of note in relation to this application and a second paragraph in relation to a separate application. The paragraph of note in relation to this claim is on page 32 and is the third paragraph down. The applicant has noted one sentence of particular relevance and is as follows: "For generations of Stafford children a public footpath has lead past the chapel ruins to Shaky Bridges, a cherished play area beside (and in) the Sow. The path continues on after crossing the river and heads towards the village of Seighford". The applicant alleges that this mentions the path he has claimed as it mentions a path leading past the chapel ruins.
7. The 1888 Ordnance Survey Map shows a route shown as dotted lines running from Eccleshall Road to a chapel, which has been noted on the map. However, it appears that the route terminates at this point. Copy attached at Appendix E.
8. On the 1902 Ordnance Survey Map it shows a similar route to the 1888 OS map with a route shown as dotted lines running from Eccleshall Road but instead of terminating at the chapel, continues passed the chapel across the land connecting to a footbridge to the River Sow. The dotted line bears the depiction FP and appears to follow the same line as the alleged route. Copy attached at Appendix F.
9. The 1925 Ordnance Survey Map shows no evidence of any route running from Eccleshall Road, to the footbridge connecting to the River Sow in the area of the alleged route. Copy attached at Appendix G.

## **Evidence submitted by the Landowners**

10. When the application was submitted, the applicant revealed three landowners for the whole of the land over which the application route runs.
11. Keepers Lodge joint owners Mr Henry Hilderley and Amy Hilderley, along with the owner of Creswell Farm, Mr John Henry Hilderley jointly completed an owner evidence form on 15<sup>th</sup> December 1998, a copy of which is attached at Appendix H. They have stated that they do not consider the route to be public. They have had an interest in the land for 75 years and the land has been with the family since 1900. They have confirmed that they have never felt it necessary to erect any "No private/trespassers" signs, as no one has ever tried to use the alleged path. They

do confirm that permission is given to use the alleged route for a chapel service once a year. They have further stated that there are high locked wrought iron gates at the road entrance, (the assumption is Eccleshall Road), which are 100 years old but are rarely used for the farm. They have advised that on the 1923 Ordnance Survey Map a new parallel path appears 200 yards north off the Eccleshall Road to the same bridge over the River Sow. They assume this path replaced the alleged route. They have not provided a copy of the 1923 Ordnance Survey Map. They have further advised that occasionally people wander off the existing right of way to look at the chapel, but they are not particularly walking on the claimed route and they are always directed back to the right of way. To conclude they have stated that no one uses the alleged route, so they had no reason to presume a dedication by way of usage.

12. A further owner evidence form was jointly completed on the 19<sup>th</sup> December 1998 by Mr Henry Hidderley and Mrs Amy Hidderley of Keepers Lodge, Mr John Henry Hidderley of Creswell Farm and Mr Mark William Hidderley of New Lodge, a copy of which is attached at Appendix I. They reiterate what was stated in the evidence form completed on the 15<sup>th</sup> December 1998 and state that no one has tried to use the alleged route and if anyone had they would have been seen as there is a Lodge either side.
13. A further owner evidence form was completed on the 30<sup>th</sup> December 1998 by Mr Mark William Hidderley of New Lodge, a copy of which is attached at Appendix J. Mr Mark Hidderley disputes a public right of way exists on the alleged route. He confirms that he has had an interest in the land for 14 years and that no members of the public have ever asked to use the alleged route.

#### **Comments received from statutory consultees**

14. Creswell Parish Council responded on 10<sup>th</sup> December 1998 with a letter advising that they were of the understanding that the landowner would be making representations and that the matter was in hand. They had no further comments to make. They have not submitted any evidence which supports or refutes the application.

#### **Comments on Evidence**

15. The 1910 Finance Act was concerned with mapping lands throughout the UK for purposes of taxation. A landowner could claim tax relief for public rights of way and these deductions would be shown in the Field Book. Where a deduction was made this would appear under public rights of user and in the entry under restrictions.
16. In this case under the “public rights of user” section it confirms that a deduction was made of £10.00. In the “entry under restrictions” it states that a £10.00 deduction was made for a footpath. Also, in the Field Book, under the section “Charges, Easements and Restrictions affecting market value of Fee Simple” it refers to “Public footpaths through enclosures no 63 & 67 Creswell”. There is no mention of any other routes or public rights of way in the Field Book.
17. The Plan that accompanies the Field Book shows a route showing two dotted lines going through both plots 67 and 63, corresponding with the entries in the Field Book. The two dotted lines also bear the depiction FP, again corresponding with what is in the Field Book. The dotted lines follow a similar route to the alleged route being claimed. The route goes from Eccleshall Road, passed a chapel, across the land to a footbridge crossing the River Sow.

18. Taking into consideration what is recorded in the Field Book and on the Plan this gives weight that this route physically existed and was classed as a public right of way at that time. Claims for deductions were investigated by the valuers to ensure that these were valid. The legislation set out that it was an offence to make a false claim under the Act and was punishable by a fine and up to six months imprisonment. Given this consideration it would have been most unlikely that the landowner would have made a claim unless it was well founded.
19. The purpose of Ordnance Survey Maps is to show physical features on, and the contours of the ground. They do not distinguish between public and private rights of way.
20. The 1902 Ordnance Survey Map reflects what was recorded on the Plan that was part of the 1910 Finance Act material, showing a route, depicted by two dotted lines, from Eccleshall Road, running parallel to a chapel and connecting to a footbridge crossing the River Sow. Next to this route is the annotation FP, which is evidence of a physical existence of a way on the ground, but it does not indicate whether the way was public or private. However, considering what is recorded in the Finance Act this is suggestive that the route was likely to be a public footpath and right of way.
21. The 1888 Ordnance Survey Map depicts a route running from Eccleshall Road up to a chapel, but this is where the route terminates and there is no evidence of a route connecting to the River Sow. There is no annotation on the route to identify the type of route. This supports that there was a physical route in existence up to the chapel at this time but there is no evidence of a physical route passed this point or whether the route was public or private.
22. By 1925, the Ordnance Survey Map does not show the existence of a physical route along the alleged right of way. The route that is recorded on the 1902 Ordnance Survey Map and in the 1910 Finance Act material is not depicted on the 1925 Map. This would imply that the route was no longer in existence or in use by this point. However, there is no clear evidence as to why the route is not depicted on the 1925 map.
23. In relation to the extract from the book regarding the River Sow this would seem to indicate that there was a public footpath in the area of the alleged right of way that specifically passed a chapel and connected to the River Sow. However, it is not conclusive from the description that this relates to the alleged route or that the footpath mentioned was a public right of way. There is no map or visual aid to confirm that the footpath mentioned relates to the alleged route. The evidence from the book alone cannot confirm or refute whether the alleged route is a public right of way.

### **Comments of Draft Report**

24. Following circulation of the report comments were received from the legal representatives of the landowners, Lanyon Bowdler Solicitors. They state that Creswell Farm has been in the ownership of the Hilderley family since it was purchased by John Henry Hilderley in 1927. They advise that none of the family can remember the alleged footpath being used by members of the public.
25. They advise that the alleged footpath passes between two lodges, known as Keepers Lodge and New Lodge and through Creswell Farm. The part of the farm through which the route passes is used for grazing cattle.

26. From the sales particulars it would appear that New Lodge was built in 1914 and from the plans there has always been a gate between the two lodges and a fence around them, which obscures the alleged footpath.
27. The premise of the landowner's objection is in their opinion the alleged footpath must have been either diverted or extinguished before 1923. A copy of their response and your officer's reply is attached at Appendix K.
28. In response to the above correspondence the County Council investigated Parish Survey Cards for the area of Creswell and neither the parish cards nor the plans have any reference to a path along the same line as the alleged route. No legal or other document or map evidences the alleged route. It appears that the alleged route appears on ordnance survey maps for approximately 20 years and then the route disappears.
29. Between the years 1902 and 1911 there is evidence from the Finance Act material that the alleged route exists. By 1923, however there is no evidence that the alleged path is still in use or existence, which may coincide with the construction of New Lodge in 1914. However, there is no clear evidence that the route has ever been legally extinguished or diverted, it may be that the route fell into disuse and therefore was no longer deemed a significant enough route to be included on maps. In conclusion there is no additional evidence which would alter the conclusions of the report.

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

30. In this instance the applicable section of the Wildlife and Countryside Act 1981 is Section 53 (3) (c) (i). This section relates to the discovery of evidence of two separate events:
  - (a) Evidence that a right of way which is not shown on the maps subsists: or
  - (b) Evidence that a right of way which is not shown on the map is reasonably alleged to subsist.
31. Thus, there are two separate tests, one of which must be satisfied before a Modification Order can be made. To answer either question must involve an evaluation of the evidence and a judgement on that evidence.
32. For the first test to be satisfied it will be necessary to show that on a balance of probabilities the right of way does subsist.
33. For the second test to be satisfied the question is whether a reasonable person could reasonably allege a right of way subsists, 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 by definition be less than that which is necessary to establish the right of way "does subsist".
34. If the conclusion is that either test is satisfied, then the Definitive Map and Statement should be modified.

### **Summary**

35. In relation to the Finance Act evidence, where the plans do show public highways, this provides good evidence of their public status. As the survey was carried out under statute by a public body and misrepresentation carried severe criminal penalties, evidence of a public right of way is given considerable weight even though the recording of rights of way was not the primary purpose of the survey.

36. The Field Book and Plan support that there was a route that existed through plots 63 & 67, which was recorded as a footpath and a deduction was made for this as a “public rights of user”. This is supportive evidence that a footpath existed at this time, which was a public right of way.
37. The Ordnance Survey Maps provide conflicting evidence. Out of the three maps provided only the 1902 map provides evidence that a route was recorded all the way from Eccleshall Road to a footbridge to the River Sow and this was depicted as a footpath. The 1888 map is only supportive of a route running along part of the alleged way, with no indication as to what the route was. By 1925 the route no longer appears on the map and no evidence has been found as to why the route appears to have disappeared from the map.
38. 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.
39. It appears that between 1888 and 1902 the route was extended and reviewed in conjunction with the evidence from the Finance Act it can be surmised that there was a public right of way, at the very least during the period 1902- 1911.
40. The extract from the book about the River Sow does not provide any weight as to whether the alleged route exists but merely suggests that there was a route in this location that was perhaps at some time used as a footpath.

## Conclusion

41. The application is to be considered under s53 (3) (c) (i) as mentioned above, and so the question of whether the application should succeed needs to be evaluated against both tests in that section.
42. When the totality of the evidence is considered it is finely balanced as to whether it would satisfy the first part of the test set out in s53 (3) (c) (i) above, that is whether on the balance of probabilities a public footpath subsists.
43. The evidence provided by the Finance Act Field Book and the Ordnance Survey Map of 1902 is good evidence. Although there is conflicting evidence from the 1925 Ordnance Survey Map which does not record the alleged route, it is unlikely that the route would have been included in the Finance Act material due to the strict penalties in place for misrepresentation, if it did not actually in fact exist as a public right of way. Therefore, this could be taken to mean that the application has passed the test on the balance of probabilities.
44. When the lesser test is considered, that of reasonable allegation, this is satisfied. In the case of Bagshaw, the Judge said in relation to s53 (3) (c) (i): *“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”*.
45. Taking everything into consideration it is apparent that the evidence shows that a public right of way, with the status of a footpath, which is not shown on the map and statement is reasonably alleged to subsist.

## Recommended Option

46. To make an order adding the public footpath, on the lines shown on the map attached at appendix B to the Definitive Map and Statement.

## **Other options Available**

47. To reject the application and refuse to make an Order to add the claimed way to the Definitive Map and Statement.

## **Legal Implications**

48. The legal implications are contained within the report.

## **Resource and Financial Implications**

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

51. 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, Food and Rural Affairs under Section 14 of the Wildlife and Countryside Act 1981. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence. 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.
52. 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.
53. Should the Council decide not to make an Order the applicant 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.
54. 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**

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

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J Tradewell

Director of Corporate Services

**Report Author:** Hannah Titchener

Ext. No: 854 190



## INDEX TO APPENDICES

Appendix A	Copy of application and associated submitted letters and documents
Appendix B	Plan of claimed route
Appendix C	The 1910 Finance Act materials, including Field Book and Plan
Appendix D	Extract from a book about the River Sow
Appendix E	1888 Ordnance Survey Map
Appendix F	1902 Ordnance Survey Map
Appendix G	1925 Ordnance Survey Map
Appendix H	Owner evidence questionnaire- Mr Henry Hidderley, Mrs Amy Hidderley and Mr John Hidderley dated 15 <sup>th</sup> December 1998.
Appendix I	Owner evidence questionnaire from Mr Mark Hidderley, My Henry Hidderley, Mrs Amy Hidderley and Mr John Hidderley dated 19 <sup>th</sup> December 1998.
Appendix J	Owner evidence questionnaire from Mr Mark Hidderley dated 30 <sup>th</sup> December 1998
Appendix K	Correspondence from Lanyon Bowdler Solicitors in response to the draft report and officer's response.