

Local Members' Interest	
Cllr Gill Heath	Staffordshire Moorlands - Leek Rural

## Countryside and Rights of Way Panel

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### Wildlife and Countryside Act 1981

#### Application to Upgrade Public Bridleway 29 Bradnop and Cawdry to a Restricted Byway

#### Report of the Director for Corporate Services

#### Recommendation

1. That the evidence submitted by the applicant at Appendix A is **not** sufficient to show that a Restricted Byway subsists along the route marked B to C along Public Bridleway 29, Bradnop and Cawdry and shown on the attached plan at Appendix B.
2. That an Order should **not** be made to upgrade the right of way shown marked B to C on the plan attached at Appendix B to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands.

#### 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 Brian Smith on behalf of the Staffordshire Moorlands Bridleways Group for an Order to modify the Definitive Map and Statement for the area by upgrading Public Bridleway 29 to a Restricted Byway under the provisions of section 53(3) of the Wildlife and Countryside Act 1981. The line of the alleged Public Right of Way is shown on the plan attached at Appendix B and marked B to C.
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. This application (referenced LW602G) was submitted at approximately the same time and by the same applicant as another application (referenced LW604G). The two applications are to be considered together as they form a linking route, one currently being a public footpath and the other being a public bridleway. The claim is for both to be upgraded to the status of Restricted Byway.
5. The two application routes are shown on the plan attached at Appendix B. The subject of this application being marked B to C and the subject of the other

application being marked A to B. This clearly shows the routes linking at point B and places each application within the context of the other.

### **Evidence Submitted by the Applicant**

6. In support of the application the applicant, Mr B Smith on behalf of the Staffordshire Moorlands Bridleways Group submitted a Transcript of the Inclosure Award of Bradnop and Onecote dated 1769. A copy of the Transcript can be found at Appendix C.
7. The applicant has also submitted a copy of Smith's Map dated 1801. A copy of this is attached at Appendix D

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

8. Staffordshire County Council obtained a copy of the original Inclosure Map and Transcript from the County Records Office. This is the originating document for the Transcript supplied by the applicant and is attached at Appendix E.
9. Staffordshire County Council also extracted the Parish Survey Card for the route in question. This can be seen at Appendix F.

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

10. Two landowners were identified by the applicant being Mr M Barlow and Mr E.C. Hine.
11. A Mr E.W. Hine returned the landowner response form and identified how the alleged route was being used, along with the status he believed the route to be.
12. A Mrs Barlow returned the landowner response form and identified how the alleged route was being used, along with the status she believed the route to be.
13. These landowner evidence forms can be found at Appendix G.

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

14. No evidence was received from any consultee to either support or refute the application.

### **Comments on Evidence**

15. In this case it is not the existence of a public right of way that is brought into question as it already has the status as a Public Bridleway. The claim is that the route has higher rights and that these rights are consistent with those of a Restricted Byway.
16. The evidence depends heavily upon the Inclosure Transcript and so the probity of this evidence needs to be significant and sufficient for the claim to be successful. The Transcript forms part of the Inclosure Award, that came about through the Inclosure Act.
17. The Inclosure Act was designed to enclose the old commons, manorial waste, and smaller holdings in order to increase agricultural productivity. They were often promoted on behalf of the bigger landowners to enable them to increase the profitability of their land.
18. The local Inclosure Act empowered an Inclosure Commissioner to survey and divide up the land, allotting it to named individuals, including the setting out of

highways. After all the procedures had been completed the Commissioner would issue the final Award and accompanying Map.

19. The Inclosure Commissioners had to follow laid down procedures to ensure their actions were legal. If they had not then the Award itself, and its provisions, would not be valid. They also had to be granted the appropriate authority.
20. The Inclosure Act is dated 1769. This means that it pre-dated the Inclosure Consolidation Act 1801 and it therefore falls under the category of a Private Inclosure Act. However, this does not automatically detract from its legal weight or probity.
21. In *Meldale Ltd v Ludgershall Parish Council* (2007) the Adjudicator to the Land Registry found that prior to 1801 Inclosure Commissioners were given the necessary powers for setting out, dividing and allotting areas
22. The often-lengthy pre-amble setting out the Commissioners authority – their empowerment – is an important part of the Inclosure Award. In this case the details are somewhat limited and in parts the Transcript is illegible.
23. It would however appear that they were empowered to act in this respect. The most relevant excerpt in the Transcript being just discernible “*allotting the said commissioners... to preparing and enforcing... this one award*”
24. The Transcript describes the route, alleged to be the claimed route, and this is reproduced in full as it is the primary evidence submitted for the claim. The route in the Award is described as such:
25. A “*Publick Horse Carriage and Drift Road Number 182 called Ashenhurst Road leading out of the before mentioned Turnpike Road between an ancient inclosure belonging to the said Lawrence Stanley called Jailors Meadow on the South East and the allotment Number 181 hereinafter allotted to the said Thomas Mills on the North West from whence the said Road leads into and along the ancient Lane called Pinfold Lane to the allotment Number 180 hereinafter allotted to the said James Finney and by the East side of the allotment to the South corner thereof where the said Lane branches out into two Roads, one branch whereof lying between the last mentioned allotment Number 180 and an ancient inclosure belonging to the said Elizabeth Higginbotham called the Fair Hayes from whence the said branch leads to a place in the Parish of Leek aforesaid called Middle Cliff and the other branch said allotment number 180 between ancient inclosures to Ashenhurst aforesaid.*”
26. For clarity the terms Public and Private when used in Inclosure Awards may refer to the maintenance of the route although not necessarily the rights over it. As such the word “Public” in the Transcript is not necessarily indicative of any given status.
27. The use of the term’s ‘carriage’ and ‘drift road’ within the Transcript could suggest that the route had a higher status than that of a footpath or a bridleway. Clearly if a horse and carriage were using the route then the status would more likely than not, be higher than a bridleway, and this is further strengthened by the use of the term “road” within the Transcript.
28. The facts set out in an Inclosure Award carry significant evidential weight and it has been determined by the courts to be conclusive evidence in respect of public highways in the absence of later legal events such as Quarter Session Orders.
29. However, it has to be reiterated that in this case the Inclosure Plan was not submitted as evidence with the Transcript of the Inclosure Award and on its discovery by the County Council it did not show the route in question.

30. Indeed, the whole section relating to the claimed route had either never been drawn up or had faded to the point that it was no longer visible. Even when the relevant section of the Inclosure Plan was enlarged and enhanced it was still not possible to see even a faded line of the route or any reference points that might relate to it.
31. A very short section of what may have been the northern most end of the route was visible on the Inclosure Plan although this itself was open to some conjecture as it did not align comfortably with the claimed route.
32. Turning then to the Inclosure Plan discovered by the Council and viewing it alongside the written Transcript in the Inclosure Award it can be seen, that by using the points of reference, that the route referred to is numbered 182 on the Plan.
33. The route is described as the "*Publick Horse, Carriage and Drift Road number 182 called Ashenhurst Road leading out of the before mentioned Turnpike Road*".
34. The route is referred to as a "road" in its own right as well as leading out of a "turnpike road". Clearly this would suggest that route 182 probably had higher rights than that of a bridleway although not conclusively so. The difficulty arises in identifying where exactly this route ran and if it is the same route as is the subject of the claim.
35. The Transcript refers to the allotment numbered 180, land holders called James Finney and Elizabeth Higginbotham and a plot named the Fair Hayes. These are all reference points intended to describe the line of the route although none of them are visible on the Inclosure Plan.
36. The reference point referred to as or at "Pinfold" is recorded in the Transcript and on the Plan and the branching of the road to Middle Cliff in one direction and Ashenhurst in the other is also shown in both records.
37. Taking the Ashnehurst branch to be the claimed route it is curious as to why, if it did have higher rights, it is not continued further on the Plan. Nothing below this point is shown. Of course, this may be due merely to the quality of the Plan in this particular section, or it could suggest that from this point on – that is the point of the "branch" - the route was of a lesser status, namely that of a bridleway or footpath.
38. Without any further reference points from the Transcript being visible on the Plan the question has to be as to whether there is any doubt as to the line of the route or indeed its status. The Plan cannot confirm the details in the Transcript due to the paucity of information contained thereon. Therefore a reasonable element of doubt is introduced to the application.
39. Furthermore, the Award offers no further exposition of the route it references relating to its measurements, width or bounds. It is accepted that it is an early Award predating 1801 although this aside a more detailed account would have been helpful to the claim.
40. Inclosure Award evidence is significant and when viewed in conjunction with the Plan can add considerable weight to any claim. The problematic factor in this case is that the actual line of the claimed route is not shown on the Inclosure Plan and so everything rests with the Transcript.
41. It is unfortunate that this evidence has not survived. If it had survived, then it may have been possible to say with some certainty that this was indeed the route in question and more could have been gleaned about its probable status. Without the accompanying Plan the remaining evidence needs to be exceptional for the application to succeed.

42. The applicant also submitted a copy of Smiths Map dated 1801. The map covers a large area of the Staffordshire Moorlands which shares borders with Cheshire and Derbyshire. The map, however, is on such a small scale that it is problematic to say with full certainty whether it depicts the route or not.
43. That said a route is indeed depicted in the locality of the claim and this appears to follow the line of Ashenhurst Lane to the south of the Turnpike Road forming a discernible crossroads with School Lane to the north. In all probability this is the route in question however given the small scale and lack of accuracy it has limited evidential value.
44. However, if a map predates 1835 it may provide supporting evidence for the existence of an “ancient highway”. (Ridley v Secretary of State Environment, Food & Rural Affairs (2009). Smith’s Map is dated 1801 which adds somewhat to its limited legal weight. Again, it depends on the clarity of the map and how the route is shown. In this case it is not possible to say with full certainty that the route shown on the Map is the same as that which is subject of this claim.
45. In Kent County Council v Loughlin 1975 Denning LG stated that the maps submitted by the County Council (1769 – 1819) were on such a small scale that they only showed public highways. Some have interpreted this to mean that all highways on any maps predating 1820 are public highways. On the other hand, this is quite a broad interpretation and maps must be considered alongside all other evidence submitted.
46. The evidence provided by Smiths Map is therefore tentative and evidentially limited. At best it suggests there may have been a route with higher rights in the vicinity of the claimed route but on its own without an Inclosure Plan or other weighted evidence to back it up its probity is limited.
47. Turning to the landowner user evidence forms in respect of the application it can be said that neither provided anything of evidential value pertinent to the claim. However, it is interesting to note that one of them considered the route to be a Bridleway – its current status - and the other a Byway Open to All Traffic (BOAT). The latter clarifying this further by stating it was believed to be a “public vehicular road”.
48. Turning to the Parish Survey Card dated 1951, it can be seen that it recorded the route with the acronym CRF. The acronyms CRF and CRB were used historically during the evolution of the Definitive Map and in each case did suggest some kind of vehicular right.
49. The Commons, Open Spaces and Footpaths Preservation Society produced the informative pamphlet entitled “Survey of Rights of Way” which very effectively explained these acronyms. The definition of CRF was stated as “a public carriage or cart road or green unmetalled lane mainly used as a footpath or bridleway”. This was further clarified as being “highways which the public are entitled to use with vehicles, but which, in practice, are mainly used by them as footpaths or bridleways.”
50. However, the acronyms CRF and CRB could not be used on the Definitive Map and as a result the majority of them were recorded as Roads Used as Public Paths or RUPPs. This route was never accorded the status of a RUPP.
51. There are no additional annotations on the survey card to indicate the route had any status higher than a bridleway, although it does state that it had been used for over a hundred years.

52. Although the acronym CRF could be suggestive of higher rights the Parish Survey Card alone is not enough to provide conclusive evidence that the route had vehicular rights along it. It is suggestive of these rights rather than conclusive.
53. The evidence therefore depends more heavily on the Inclosure Award and Plan. As the route is not shown on the Plan everything rests on the Award itself. This does describe a public horse, carriage and drift road and places it in the vicinity of the claimed route. Although even if we accept that this is the route in question the Transcript is open to interpretation.
54. The term “public horse” gives a probable indication that the route was consistent with a “public bridleway” while a “drift road” was more likely used locally by neighbouring farmers to drive or water cattle.
55. The overall detail in the Inclosure Award is also limited. There are no additional details regarding the widths or boundaries of the route as were often recorded in those of higher status. This would have been helpful to the claim.
56. In summation we only have one half of what is normally taken to be a good piece evidence and that half is open to interpretation. This is supported by two further pieces of evidence of limited legal weight. The application is based upon the balance of probabilities, the higher test, requiring a greater level of probity to succeed.

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

57. With regard to the status of the routes, the burden is on the applicant to show, on the balance of probabilities, that it is more likely than not, that the Definitive Map and Statement are wrong. The existing classification of the route, as a bridleway, must remain unless and until the Panel is of the view that the Definitive Map and Statement are wrong. If the evidence is evenly balanced, then the existing classification of the route on the Definitive Map and Statement prevails.
58. If a conclusion is reached that the test is satisfied, then the Definitive Map and Statement should be modified.

### **Summary**

59. The application is made under Section 53 (2) of the 1981 Act, relying on the occurrence of the event specified in 53 (c) (ii) of the Act. Therefore, the Panel need to be satisfied that on the balance of probabilities, the evidence that has been discovered shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
60. The Inclosure Award of Bradnop with Onecote 1769 refers to a public horse, carriage and drift road in the vicinity of the claimed route but does **not** show the route on its accompanying Plan.
61. The accompanying Inclosure Plan is somewhat degraded, and the relevant section is not visible, if indeed it was ever drawn up at all. It is impossible to discern even the faintest lines even when this section is enlarged and enhanced.
62. Taking this into account the evidence rests heavily on the Transcript within the Inclosure award itself.
63. This appears to have been compiled by Commissioners empowered to act although the details concerning the location of the route are open to conjecture. This is problematic to the claim.

64. The applicant also submitted a copy of Smith's Map 1801. This small-scale map lacks the necessary detail although does show a route that could be consistent with the route in question.
65. However, it must be reiterated that these maps can at best only be taken as supporting evidence, they are too small scale to be conclusive and rarely convey any legal weight.
66. The Parish Survey Card is of greater interest as the CRF description of the route is suggestive of higher rights, including vehicular rights. However, there are no further annotations on the card and without anything else to support it the existing status of bridleway is more convincing.
67. In summation the application rests on the interpretation of the details in the Inclosure Award to prove the claim. There are open to conjecture as regards both the location and the status of the route and introduce a plausible element of doubt.
68. As such the evidence we have is not weighted enough to prove the claim.

### **Conclusion**

69. In light of the evidence, as set out above, it is your officers' opinion that the evidence does **not** show that a public right of way subsists, with the status of a Restricted Byway.
70. It is the opinion of your officers that the County Council should **not** make a Modification Order to upgrade the route which is the subject of this application to a Restricted Byway on the Definitive Map and Statement of Public Rights of Way.

### **Recommended Option**

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

### **Other options Available**

72. To decide to accept the application to upgrade the bridleway to a restricted byway.

### **Legal Implications**

73. The legal implications are contained within the report.

### **Resource and Financial Implications**

74. The costs of determining applications are met from existing provisions.
75. 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**

- 76.** 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.
- 77.** 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.
- 78.** 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.
- 79.** 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.
- 80.** There are no additional risk implications.

### **Equal Opportunity Implications**

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

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J Tradewell

Director for Corporate Services

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**Background File: LW602G**



## INDEX TO APPENDICES

Appendix A	Application
Appendix B	Plan
Appendix C	Inclosure Award Transcript - 1769
Appendix D	Smith's Map 1801
Appendix E	Copy of Inclosure Award and Map – 1769
Appendix F	Parish Survey Card – Public Bridleway 29 Bradnop
Appendix G	Landowner Response Forms