

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

## Countryside and Rights of Way Panel

### Wildlife and Countryside Act 1981

#### Application to Upgrade Public Footpath 30 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 A to B along Public Footpath 30, 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 to a Restricted Byway shown marked A to B on the plan attached at Appendix B to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands.
3. That the evidence submitted by the applicant at Appendix A **is** sufficient to show that a Public Bridleway subsists along the route marked A to B along Public Footpath 30, Bradnop and Cawdry and shown on the attached Plan at Appendix B.
4. That an Order **should** be made to upgrade the right of way to a Public Bridleway shown marked A to B 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 Footpath 30 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 A to 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. This application (referenced LW604G) was submitted at approximately the same time and by the same applicant as another application (referenced LW602G). 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 same status, that of a Restricted Byway.
5. The lines of the two application routes are shown on the plan attached at Appendix B. The subject of this application being marked A to B and the subject of the other application being marked B to C. 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. It should be noted that the accompanying plan was not supplied. A copy of the transcript can be found at Appendix C.
7. The applicant has also submitted a copy of Smith's Map dated 1817 and a copy of Greenwoods Map dated 1818-19. A copy of these is attached at Appendix D
8. The applicant has also submitted a copy of the map of maintainable roads from the County Highways Department. A copy of this is attached at Appendix E.

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

9. Staffordshire County Council also examined the Parish Survey Card for the route in question. A copy is attached at Appendix F.
10. Staffordshire County Council secured a copy of the originating document – the Inclosure Award – from which the Transcript was taken. This can be seen at Appendix G.

### **Evidence submitted by the Landowners**

11. Four landowners were identified by the applicant being Mr M Barlow, Mr J Needham, Mr M Needham and Mr H Clulow. Three of them returned landowner responses as outlined below:
12. Mr H Clulow returned the landowner response form and identified how the alleged route was being used, along with the status he believed the route to be.
13. A Mrs S C 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.
14. Mr M T Needham returned the landowner response form and identified how the alleged route was being used, along with the status he believed the route to be.

15. These landowner evidence forms can be found at Appendix H.

### Comments received from statutory consultees

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

### Comments on Evidence

17. 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 Footpath. The claim is that the route has higher rights and that these rights are consistent with a Restricted Byway.
18. The evidence depends heavily upon the Inclosure Transcript and so the probity of this evidence needs to be significant and sufficient in order for the claim to be successful.
19. 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.
20. 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.
21. 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.
22. 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.
23. In *Meldale Ltd v Ludgershall Parish Council (2007)* the Adjudicator to the Land Registry found that in the pre-1801 Consolidation Act Inclosure Commissioners were given the necessary powers for setting out, dividing and allotting areas.
24. 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.
25. 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”*.
26. 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 reward is described as such:
27. *“One other publick horse, carriage and drift road number 93 called Revedge Road leading out of the Apesford Road, last described towards Ashenhurst in the parish of Leek aforesaid and lying between the allotment number 88, hereinafter allotted to the said Samuel Moss, ancient inclosures severally belonging to the said Samuel Moss and Elizabeth Higginbotham on the East and the allotment number 90*

*hereinafter allotted to the said Lawrence Stanley and the allotment number 91 hereinafter allotted to the said Elizabeth Higginbotham on the west from whence this said Road enters into and along an ancient lane leading to Ashenhurst aforesaid."*

28. 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.
29. The use of the term's 'carriage' and 'drift road' within the Transcript would 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 that of a bridleway, and this is further strengthened by the use of the term "road" within the Transcript.
30. 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 Sessions Orders.
31. 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.
32. 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.
33. 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 93 on the Plan.
34. The route is described as a "*Publick Horse , Carriage and Drift Road number 93 called Revedge Road leading out of Apesford Road*".
35. The route is referred to as a "road" in its own right as well as leading out of *another* road. Clearly this would suggest that route 93 probably had higher rights than that of a footpath or bridleway, although not conclusively so. The difficulty arises in identifying where exactly this route ran and if it is the same route as that which is the subject of the claim.
36. The Transcript does however give us some indication of the line of the route at the time of Inclosure, more particularly giving Apesford Road as a key point of reference.
37. It describes the route as leading from Apesford Road to Ashenhurst and this would seem to be consistent with the route of the present Public Footpath 30.
38. It is further ratified by the fact that the road is called Revedge Road in the Award - *Revedge* being a property accessed off the same stretch of road that leads from Apesford Road to Ashenhurst aforesaid.
39. As the lower part of the route is referred to specifically as a "road" –namely Revedge Road, then it again supports the application in that the way may have had rights higher than that of a footpath.
40. Revedge Road is then described in the Award as entering an ancient lane leading towards Ashenhurst. Again, this would be consistent with the route of the

present PF30 and describes the route as a “lane”. Again, tentatively suggestive of rights higher than those of footpath.

41. In this case, however we have mention of three good reference points which although not shown on the Inclosure Plan itself provide good indicators of the line of the route as described in the Award.
42. We have a starting point, being a main road (Apesford Road), we have an end point, Ashenhurst and we have a middle section running along Revedge Road. Together these three indicators strongly suggest the route in the Inclosure Award is consistent with PF30.
43. Taking the detailed Transcript from the Inclosure Award therefore, and subjecting it to some scrutiny, it is possible to say with relative certainty that the route described is consistent with the route of PF30. Although without sight of the accompanying Inclosure Plan it is impossible to say anything with complete certainty, this is mitigated however by the detailed descriptive of the Award in this respect.
44. Inclosure Award evidence is significant evidence and although in this case the accompanying Plan has not survived there is sufficient detail to contend that the route of the present PF30 is contemporary with the “public horse carriage and drift road” heretofore mentioned and as a consequence had higher rights prior to its designation as a footpath.
45. The applicant in addition submitted a copy of Smiths Map dated 1817. 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.
46. The applicant also submitted a copy of Greenwoods Map dated 1818. However again this is on too small a scale for anything conclusive to be derived from it. There are similarities with Smiths Map but it is impossible to ascertain whether or not one was taken from the other in ages past.
47. Even if both the Smiths and Greenwoods Maps could be shown beyond reasonable doubt to follow the same route as the claimed route their evidential value would still be limited. They would offer little beyond confirming the physical existence of the route.
48. Notwithstanding the courts have considered the evidence of old maps and found that while the weight of evidence attached to these was small, they were suggestive of higher rights than a footpath. (*Ridley v Secretary of State Environment, Food & Rural Affairs* (2009))
49. 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.
50. Turning to the landowner response forms in respect of the application it can be said that none provided anything of evidential value pertinent to the claim. However, it is interesting to note that one of them stated that the route was shown on the parish map as a “Public Road”. This came from a respondent who at the time of the response stated he was a Parish Councillor. The same respondent also believed the route was a Byway Open to All Traffic (BOAT).

51. A BOAT of course is a route that permits its use by “all traffic” including motor propelled vehicles. The claim in this instance is that the existing public footpath has the status of a Restricted Byway which allows vehicular use, excepting motor propelled vehicles. The difference in status between a footpath and a BOAT is significant and a case for a BOAT has not been made out.
52. A second landowner who returned the response form stated that the alleged route (PF30) joined a “private access road”. The latter was clarified to mean Public Bridleway 29 which the respondent confirmed was contemporary with Ashenhurst Lane. They believed the route in question PF30 to be a bridleway.
53. A third landowner who returned the response form believed the route to be “a *right of way for the convenience of local farmers only*” and its status to be that of bridleway.
54. Nothing really turns on this, although it is interesting to note that there appears to be some contention that the route is in fact a Public Bridleway, rather than its actual status as a Public Footpath.
55. Turning to the Parish Survey Card dated 1951, it can be seen that it recorded the route with the acronym CRF. This is significant as it indicates that the route had in all probability higher rights than that of a public footpath. The acronyms CRF and CRB were used historically during the evolution of the Definitive Map and in each case suggested vehicular rights.
56. 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.”
57. However, the acronyms CRF and CRB used in the Parish Survey Cards 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.
58. This was not the case with the route in question and it was eventually recorded as a Public Footpath. This was not uncommon and despite the apparent limitation of status it did not prejudice the existence of any higher rights where these could subsequently be shown to exist.
59. The Parish Survey Card for Public Footpath 30 not only records the route with the acronym CRF it states that it had been used for a significant amount of time - 100 years. The designation on the 1951 card is highly suggestive of the route having had some higher rights along it – and almost certainly bridleway rights.
60. Although not conclusive evidence on its own the Parish Survey Card tips the balance somewhat in favour of the claim. Especially when taken together with the Inclosure Transcript which given its good description shows it is consistent with the line of PF30.
61. Lastly the applicant submitted a copy of a Map of Maintainable Roads from the County’s Highways Department, although nothing turns on this.
62. It shows what appears to be the route joining Public Bridleway 29 at its northernmost end, however it is not depicted with a reference number and has no accompanying notes to indicate its status.

63. As the maintainable roads would typically have a reference number and associated notes its inclusion on the map is curious, again all other routes depicted on the plan are annotated with a reference number.
64. Notwithstanding a part section of the aforesaid PB29 which joins the route is indeed recorded as a publicly maintainable road, namely Ashenhurst Lane. The additional notes reveal that its status is “unclassified”.
65. Again, the evidence of the Map of Maintainable Roads is not of sufficient probity to indicate the route has any rights higher than a footpath. Had it been annotated with a classification then this may have carried greater weight. Although this would need to have been expressly stated in the notes. Being on the list of publicly maintainable roads has no bearing on its status.
66. In summation the evidence from the Inclosure Award Transcript appears to suggest the route numbered 93, Revedge Road is the same as that of Public Footpath 30 – the subject of the claim. There can be little doubt in this respect.
67. The application is supported by the designation CRF on the Parish Survey Card which suggests the route of Public Footpath 30 originally had higher rights along it.
68. Again, given the lack of any further exposition in the Inclosure Award itself it is problematic to say with any certainty whether the route had vehicular rights along it. There are no measurements, widths or bounds to indicate it was anything more than a footpath or a bridleway.
69. That said its description as a “public horse” road would strongly suggest it did indeed have bridleway rights and this is reflected in the later Parish Survey Card. One piece of evidence supports the other.
70. While the term “drift road” more likely than not referred to a route that was used locally by neighbouring farmers to drive or water cattle.
71. Had there been more detail in the Transcript defining the route in a way more akin to that of a *road* then there may have been a case for a Restricted Byway status.
72. In summation we only have one half (an Award without a Plan) of what is normally taken to be good evidence and that half is open to interpretation.
73. However, that interpretation is mitigated somewhat by the descriptive which quite clearly shows the Inclosure route to be consistent with the claimed route.
74. This is supported by further pieces of evidence of limited legal weight, although nothing turns on these.
75. The application is based upon the balance of probabilities, the higher test, requiring a greater level of probity to succeed.
76. When taken together the Inclosure Award and the Parish Survey Card, do not provide sufficient evidence to show that a Restricted Byway subsists along the claimed route.
77. However, when taken together the Inclosure Award and the Parish Survey Card **do** provide sufficient evidence to show that a bridleway subsists along the claimed route.

## Burden and Standard of Proof

**78.** 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 footpath, 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.

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

### **Summary**

**80.** The documentary evidence when taken together is suggestive of the route having a higher status than that of footpath. However, the Panel must assess the available evidence on the balance of probabilities.

**81.** The Inclosure Award of Bradnop with Onecote does indeed lend support to the existence of a way which supported more than persons on foot. It describes the way as a "*public horse, carriage and drift road*".

**82.** However, the accompanying Inclosure Plan is somewhat degraded, and the relevant section is no longer visible. This absence of evidence is not of course evidence of absence and should not be taken to mean that no higher rights existed.

**83.** Taking this into account the evidence rests heavily on the Transcript within the Inclosure Award and the existence of the route based on the description of both its status and location.

**84.** The description of its status is clear, as the route is identified with the word's "public" "carriage" and "road". Taking these individually and together supports the status of the route as probably having higher rights.

**85.** The description of its location is also relatively clear as this can be ascertained from three separate reference point locations, Apesford Road, Revedge Road and Ashenhurst.

**86.** From the details we have it would appear more likely than not that the route is consistent with that of the existing Public Footpath 30, Bradnop.

**87.** The applicant also submitted a copy of Smith's Map 1817 and Greenwoods Map of 1818. These small-scale maps lack the necessary detail although do show a crossroads route that could be consistent with the Turnpike Road bisecting Ashenhurst Lane and School Lane.

**88.** If it is accepted that the Smiths' and Greenwoods' Maps do show the route, then it is more likely than not that it had rights higher than a footpath. This would be the most likely explanation for it to feature on such a small-scale map. However, it must be reiterated that these maps can only be taken as supporting evidence at best.

**89.** The Parish Survey Card carries greater evidential weight as the CRF description of the route is suggestive of higher rights.

**90.** In summation the application benefits from the written Transcript from the Inclosure Award and the designation on the Parish Survey Card to support the claim. Taken together these two pieces of evidence have some probity and cannot be discounted. They are supported, albeit weakly by Smith's Map of 1817 and Greenwoods Map of 1818.

**91.** Although the evidence is not sufficient to claim a Restricted Byway status, it is sufficient to show that a Public Bridleway subsists along the claimed route.



## Conclusion

92. 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.
93. 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.
94. The totality of the evidence, however, **is** sufficient to show that a Public Bridleway subsists along the claimed route.
95. It is the opinion of your officers that the County Council **should** make a modification Order to upgrade the route which is the subject of this application to a Public Bridleway on the Definitive Map and Statement of Public Rights of Way.

## Recommended Option

96. To reject the application to upgrade the route to a Restricted Byway based upon the reasons contained in the report and outlined above.

And

97. To **instead** upgrade the Footpath to a Bridleway.

## Other options Available

98. To decide to accept the application and to upgrade the Footpath to a Restricted Byway.
99. To reject both the application to upgrade the route to a Restricted Byway and the alternative recommendation to upgrade the route to a Bridleway.

## Legal Implications

100. The legal implications are contained within the report.

## Resource and Financial Implications

101. The costs of determining applications are met from existing provisions.
102. 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

103. 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.

104. 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.
105. 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.
106. 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.
107. There are no additional risk implications.

### **Equal Opportunity Implications**

108. 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: LW604G**

## INDEX TO APPENDICES

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