

<b>Local Members' Interest</b>	
Mike Worthington	Staffordshire Moorlands-Churnet Valley

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

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

#### **Application for an alleged Public Footpath between Hollow Lane and Public Footpath No IR/2248, Cheddleton Parish**

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

### **Recommendation**

1. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement for the District of Staffordshire Moorlands 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 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 Staffordshire Moorlands 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 Cheddleton Parish Council made under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981 for an Order to modify the Definitive Map and Statement for the District of Staffordshire Moorlands. The line of the alleged Public Footpath as claimed by Cheddleton Parish Council is 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.

#### **Evidence submitted by the applicant**

1. The application is supported by statements from 10 members of the public who claim to have used the alleged footpath over varying periods of time. Copies of the statements are attached as Appendix C to this report.
2. For the application to be successful, it will have to be shown that the public have used the alleged route, as of right and without interruption, for a period of at least 20 years prior to the status of the route being brought into question, or that it can be inferred by the landowner's conduct that he had actually dedicated the route as a public right of way, and the right of way had been accepted by the public.
3. In order for the right of the public to have been brought into question, the right must be challenged by some means sufficient to bring it home to the public that their right to use the way is being challenged.
4. In this instance there does not appear to be any challenge to the actual usage of the route by any person nor have there been any physical impediments.
5. Where there is no identifiable event which has brought into question the use of a way, Section 31(7B) of the Highways Act 1980 (as amended by Section 69 of the Natural Environment and Rural Communities Act 2006) provides that the date of an application for a modification order under Section 53 can be used as the date at which the public's use was brought into question.
6. In the absence of any other major or identifiable challenge to the public's use of the claimed route the date of the application, 14 November 1995, will be used as the challenge date. Accordingly, the requisite 20 year period of use should be calculated retrospectively from this date. The years 1975 to 1995 are the 20 year period whereby the majority of users provide evidence of use.
7. A summary of the salient points from the user information sheets has been compiled in a table. This is attached at Appendix D.
8. An examination of the forms will show that of the 10 submitted 6 users have over 20 years uninterrupted usage of the route, which have all recorded usage that covers the relevant 20 year period, from 1975 to 1995.
9. Of the remaining 4 users Barbara Hine claims to have known the route for 50 years, which would be during the period 1945 to 1995. She claims to have mainly used the route for the first 25 years, which would be during the years 1945 to 1970, which falls outside the 20 year period of 1975 to 1995.
10. Barbara Hine when asked the question "Have you ever known of any stiles, handgates or notices", responds saying: "out of churchyard into Lymers Field". She does not specify what is there and therefore her evidence is unclear as to whether there has been an obstruction along the alleged route.
11. The usage of Rachel Murfin is unclear as she claims to have known the alleged way for 36 years and states that she has used the alleged way for most of her life, on and off. A date of birth has not been provided on the evidence form. It could be assumed that Rachel Murfin is 36 years old as that is how long she has claimed to have known the route but without a specific number of years being given for usage of the route it cannot be said with certainty that she meets the requisite 20 year period. This evidence can at least be considered evidence of reputation of the alleged route.
12. The remaining two users have not provided a number of years for usage of the route.
13. Michael Bowen claims to have used the alleged route once a month from 1974 to the present day of completing the information sheet. In a similar manner as Barbara Hine, when asked the question, "Have you ever known of any stiles, handgates or notices", he has responded with: "one out of the church" but he does not specify what.

14. None of the 10 users claim they were an owner, tenant or related to anyone owning or tenancing the land crossed by the alleged route.
15. 5 of the 10 users claim that there is a stile along the alleged route. One of the users, Mr Michael Askey indicates that the stile is to Lymer's field. No maps have been provided with the information sheets so it is unclear as to where the stile is situated along the alleged route, although it is likely to be at the northern end of the route, where it connects with Public Footpath IR/2248, as shown on the current mapping this leads to a field.
16. Although a number of the users have made reference to a stile, this would not necessarily be considered an obstruction or challenge to members of the public using the route as stiles when viewed objectively are generally regarded as an aid to public use of a route, as they can aid access from one part of a route to another part. None of the users have indicated that the presence of a stile has interrupted their use of the route. Therefore, this cannot be considered a challenge to use of the route.
17. All the users have claimed that they have used the route for pleasure. 6 of the 10 users claim their usage of the route being once a month, 1 user being once a week, 1 user being twice a month and 2 users being twice a year.
18. There is nothing on the information sheets to indicate whether any of the users sought or were given permission to use the route.

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

19. When the application was submitted, the applicant revealed two landowners for the whole of the land over which the application route runs.
20. One owner has not responded to date.
21. The Revd. Preb. Derek Tinsley, Vicar of Cheddleton at St Edwards Church in Cheddleton responded with a letter and owner evidence form dated 5 February 1996. Copies can be found at Appendix E.
22. Revd. Tinsley advised that on discussing the application with the Parochial Church Council they recognised that people were in the habit of using the churchyard as a through way on foot without any intention of visiting the church or the churchyard. He advises that there are footpaths to and from the church and they have been in existence for many hundreds of years. The Parochial Church Council have no desire to block these access points but they recognise that there might arise a need in the future to make a variation to the actual positions on the ground of these paths and they would not wish to jeopardise the possibility of such variation in the long term future by the establishment of a formal footpath or right of way drawn on a map at this time.
23. Revd. Tinsley further states in the owner evidence form that he does consider the route to be public and no steps have ever been taken to prevent the presumed dedication of the path as a public right of way. There is no map attached with the owner evidence form.

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

24. The Peak and Northern Footpaths Society has indicated that it has no evidence to submit either in support or against the application.

25. The Staffordshire Moorlands branch of the Ramblers Association confirmed that the alleged path is used by local people going to church. They are of the opinion that the alleged route should be put on the Definitive Map.
26. Staffordshire Moorlands District Council has indicated that subject to the Authority being satisfied with the evidence found, the path should be added to the Definitive Map of Rights of Way.
27. Copies of the above correspondence are attached at Appendix F.

### **Comments on Evidence**

28. 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.
29. 6 of the 10 users can show that they have used the alleged route, as of right and without interruption, for a period of at least 20 years prior to the status of the route being brought into question.
30. None of the users used force to use the route and that usage has not been in secrecy. Although the alleged route provides access to the church and more specifically the churchyard/cemetery there is nothing in the evidence to suggest that the route is solely used for access purposes. All the users confirm that they use the route for pleasure with none of the users specifying that they use the route to access the church. Rev. Preb. Derek Tinsley also confirms in his letter dated 5 February 1996 that members of the public use the route as a “through way on foot without any intention of visiting the church or the churchyard”. Therefore, the route can be regarded as being public and not solely for people using the church.
31. The information sheets do not support any contention that the users are drawn from a particular section of society or that use is limited to members of a particular area, although from the evidence provided it is clear that the route is predominantly used by people living in the local area. This is not unusual and there is nothing to suggest that this is a prerequisite for use in this instance.
32. Neither the legislation nor the applicable case law sets 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, i.e. “as of right”.
33. It could be argued that evidence from 10 users is not a significantly high number to show that the alleged route is widely used but it certainly indicates that there is a reputation particularly among local people of the route’s existence.
34. In addition, 6 of the users use the route once a month, with 1 user using it twice a month and another using it on a weekly basis. It could be argued that the use of the path is relatively trivial but as a rural path, it would be expected to attract less usage than one in an urban location. Revd. Tinsley, as landowner makes it clear in his correspondence that he was aware of members of the public using the churchyard as a through way. Whilst he does not make specific reference to the alleged route it highlights that any use through the church’s land was brought to his attention. Therefore, it could be argued that the route was being used as of right.
35. The remaining part of the s31 test considers whether the landowner has undertaken any action to rebut the statutory presumption of dedication. Often this is evidenced by way of notices or obstructions to prevent people accessing or using the path. For a presumption of dedication to be raised against a landowner the Court in R v Redcar

and Cleveland [2010] 2 All ER 613 said that it must be brought home to a landowner that a right is being asserted across his land.

36. If the use was such that it would go unnoticed by a reasonable landowner, that is it was used by so few and so sporadic that it would not be apparent the way was being used, then it could be the case that no presumption of dedication would arise.
37. Once a presumption of dedication is raised then the burden lies with the owner to demonstrate by his actions that there was no intention to dedicate. Here there is no evidence of any acts by a landowner to rebut the presumption of dedication in the 1980 Act. In fact the landowner, in his letter and owner evidence form confirms that he is aware of members of the public using the route, that he “has no desire to block these access points” and no steps have been taken to prevent the presumed dedication of the path as a public right of way. Although, the route may not be used extensively, the landowner was aware of the use and has not take any action to rebut dedication.
38. The fact that the landowner was aware that members of the public were using the route and he did not take any overt action to prevent dedication of the route does not automatically imply that he was giving permission for members of the public to use the route, as confirmed in the case of *R v City of Sunderland ex parte Beresford* [2003] UKHL 60.
39. In considering whether a public highway of any description exists the evidence also needs to be considered under the common law. Under common law, the burden of proof is reversed, in that it is for the user to prove the owner dedicated the route and the use does not have to be for 20 years. The former can be inferred from the use but as the judge in *Nicholson v Secretary of State* (1996) said, “*the more notorious it is the more readily will dedication be inferred*”.
40. In the evidence before the Panel one could say that the use was such that it was obvious to the owner. As has already been stated the owner, Revd. Tinsley has confirmed that he was aware that the route was being used and no steps were taken to prevent usage. Therefore, it can be argued that the owner acquiesced and so there was inferred dedication.

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

41. An application for a modification order based upon evidence of use can be made under either s53(3)(b) or (c). It is usual that s53(3)(b) is used where use has ceased either as a consequence of a challenge or physical prevention. In this case there has been no physical challenge to use of the alleged route.
42. Officers consider that the application should be more properly considered under s53(3)(c)(i) and that this should be considered the relevant section for determination purposes.
43. There is a two stage test, one of which must be satisfied before a Modification Order can be made. All the evidence must be evaluated and weighed and a conclusion reached whether on the balance of probabilities either:
  - (a) the alleged right subsists or;
  - (b) is reasonably alleged to subsist.
44. Thus there are two separate tests. For the first test to be satisfied, it will be necessary to show that on the balance of probabilities the right of way does exist.

45. For the second test to be satisfied, the question is 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.

## **Summary**

47. The application is made under Section 53(2) of the 1981 Act, relying on the user evidence specified in 53(3)(c)(i) 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.
49. This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
50. Before a presumption of dedication can be raised under statute, Section 31 of the 1980 Act requires that a way must be shown to have been actually used by the public, as of right and without interruption, and for this use to have continued for a full period of twenty years. As there has been no specific challenge to use of the alleged route, the period of years of usage is from the date of the application, November 1995. Therefore, the relevant twenty year period is from 1975 to 1995.
51. The user evidence shows that 6 of the 10 users meet the requisite twenty year period of usage. The Secretary of State in determining appeals on Section 53 matters has accepted as few as six users where the evidence has been of a high quality in its accuracy, credibility and consistency. Although the quantity of the user evidence is not high, it does show that the alleged route has been used by a reasonable number of the public without interruption for the relevant twenty year period.
52. In addition, there has been no evidence to indicate a clear intention not to dedicate by the owner. On the contrary, the owner’s evidence is that they knew the alleged route was being used by members of the public and no steps were taken to prevent the presumed dedication of the path as a public right of way.

## **Conclusion**

53. In light of the evidence, as set out above, it is your officers’ opinion that the evidence shows that a public right of way, with the status of footpath, which is not shown on the map and statement subsists.
54. In this instance your officers consider that the use is sufficient to satisfy the test set out in s31 when considered on the balance of probabilities.
55. It is evident that there has been over twenty years usage of the route and the evidence from the landowner is that he was aware the route was being used by members of the public and no overt actions were taken to rebut any presumed dedication of the route. The evidence also shows that the footpath was not being used as a route to solely access the church or churchyard, as confirmed by the landowner and the user evidence states that the route was used for pleasure, none of the users make reference to using the route for access to the church.

56. With regard to the second part of the relevant section, whether the route can be said to be reasonably alleged to exist, your officers consider that the test would be satisfied.
57. It is the opinion of your officers that the County Council ought to make a Modification Order to add the public footpath which is the subject of this application to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands.

### **Recommended Option**

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

### **Other options Available**

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

### **Legal Implications**

60. The legal implications are contained within the report.

### **Resource and Financial Implications**

61. The costs of determining applications are met from existing provisions.
62. 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**

63. In the event of the Council making an Order any person may object to that order and if such objections are not withdrawn the matter is referred to the Secretary of State for Environment under Schedule 15 of the 1981 Act. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.
64. 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.
65. Should the Council decide not to make an Order the applicants 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.
66. 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**

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

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J Tradewell

Director of Corporate Services

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## INDEX TO APPENDICES

Appendix A	Copy of application and associated submitted letters and documents
Appendix B	Plan of claimed route
Appendix C	User Information Sheets
Appendix D	Table of Usage
Appendix E	Letter and owner evidence form from Revd. Preb. Derek Tinsley dated 5.2.1996
Appendix F	Copies of the comments of the User Groups/Councils