

<b>Local Members' Interest</b>	
Mark Sutton	South Staffordshire - Brewood

**Countryside and Rights of Way Panel -**

**Wildlife and Countryside Act 1981**

**Application for Alleged Public Footpath from Stretton to the Highway east of Bickford Grange Farm**

**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 the alleged Public Footpath which is not shown on the Definitive Map and Statement is reasonably alleged to subsist along the route marked A-B-C on the plan attached at Appendix B.
2. That an Order be made to add the alleged right of way shown on the plan to the Definitive Map and Statement of Public Rights of Way for the District of South Staffordshire.

**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 South Staffordshire. The effect of such an Order, should the application be successful, would:
  - (i) Add an alleged Public Footpath from Stretton to the Highway east of Bickford Grange Farm 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-C 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 a Quarter Session Order dated 1828, this is attached at Appendix C.
2. The Applicant has also submitted evidence from the 1910 Finance Act, this is attached at Appendix D.
3. Finally, the Applicant submitted Ordnance Maps and a 1950's Penkridge Parish Survey to further support his claim. These documents are attached at Appendix E.

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

4. The present land owner is Mr Piers Alastair Carlos Monckton. The land was previously owned by Mr A. S. Monckton, the father of the current owner.
5. Mr A. S. Monckton completed an owner/occupier evidence form along with a cover letter dated 17<sup>th</sup> July 1997 detailing reasons why he believes the alleged footpath does not exist and objecting to the application. A copy is attached at Appendix F.
6. Mr P. A. C. Monckton sent a fax to Officers dated 25<sup>th</sup> July 1997 summarising principal reasons as to why the footpath does not exist. A copy is attached at Appendix G.
7. Mr Brewster of Bickford Grange Farm completed an owner/occupier evidence form dated 6<sup>th</sup> August 1997, a copy of this is attached at Appendix H.
8. Mr P. A. C Monckton also completed an owner/occupier evidence form and cover letter dated 6<sup>th</sup> August 1997 detailing reasons why he believes the alleged footpath does not exist and objecting to the footpath, a copy of this is attached at Appendix I.
9. Mr A. S. Monckton provided a copy of an Estate plan dated 1833, this plan does not show a footpath, a copy is attached at Appendix J.
10. Mr P. A. C. Monckton instructed a Barrister who submitted a letter of objection and supporting evidence, this is attached at Appendix K.
11. Mr Giles of Ivy House Farm completed an owner/occupier evidence form dated 20<sup>th</sup> July 2018, this is attached at Appendix L.

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

12. Penkridge Parish Council has responded advising they have no special comments to make regarding the application, however they do support any additional footpaths.
13. Lapley, Stretton & Wheaton Aston Parish Council have responded confirming they support the application.
14. The Ramblers Association responded advising they have no supporting evidence for the addition of the footpath; however, they do welcome all new footpaths.

#### **Comments on Evidence**

##### **Quarter Session Order 1827 & 1828**

15. Quarter Sessions Orders are documents relating to the proceedings of the Magistrates Courts who met on a quarterly basis to hear a range of cases.
16. In addition to criminal cases, the Magistrates also heard applications of the diversion or stopping up of public highways.
17. Quarter Sessions Orders can therefore provide conclusive evidence of the existence of a route specifically created by an Order or of the stopping up of such highways if so provided for within an Order.
18. In either occurrence it was important to ensure that the full procedure was followed.

19. Quarter Sessions Orders may also provide supportive evidence of the reputation of the existence of other routes referred to within the proceedings.
20. In this instance the 1827 Quarter Session discontinued some highways in the same area and created new ones. The plan enclosed clearly shows the old and new footpaths, the alleged footpath is coloured brown on the plan enclosed with the Quarter Session and marked by letters C and K. The Order states 'subject to a right of footway from the point marked C to the point marked K'.
21. The 1827 Quarter Session covers part of the path shown at points A- B on the plan at Appendix B.

#### **1910 Finance Act Material**

22. The 1910 Finance Act involved completing a national survey of land by the Inland Revenue so that incremental value duty could be levied when ownership was transferred.
23. Land was broken into land ownership units known as hereditaments and given a number. Land could be excluded from payment of taxes on the grounds that it was a public highway and reductions in value were sometimes made if land was crossed by a public right of way.
24. Claims for deductions were investigated by 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 6 months imprisonment. Given this consideration it would have been most unlikely that a landowner would have made a claim unless it was well founded.
25. The Finance Act material submitted by the Applicant shows that tax relief was granted for footpaths that crossed the plots referred to. An examination of the maps shows that there are 3 footpaths in plot 610 and the routes are annotated on the accompanying map.
26. The field book entries were originally compiled by entering the information provided by the landowner and would include any claims for easements, rights of way etc. For plot 610 the landowner did make a claim for footpaths.
27. The valuers did note that there were public footpaths and made a note on the field book. They granted relief for the paths that crossed the land which they would not have done unless satisfied of their existence.
28. The claimed route appears to be one of the footpaths shown on the plan and the field book entries detail the footpath. It states that there are public rights of way or user or refers to public footpaths and thus provides evidence that they were public highways with a recognised status of a public footpath.
29. The 1910 Finance Act material covers part of the path shown at points B – C on the plan at Appendix B.

#### **Parish Survey**

30. Under the National Parks and Access to the Countryside Act 1949 all surveying authorities in England and Wales had to carry out a survey of their area and produce a map that showed all the public Footpaths, Bridleways and Roads Used as Public Paths (RUPPs) which were, or could reasonably be alleged to be, public rights of way.
31. The Act imposed a duty on Parish and District Councils to provide information on the public rights of way in their area to the County Council. The surveys were marked on an Ordnance Survey Map, showing the physical depiction of the route, accompanied

by a record card detailing when and by whom the survey was carried out, the date, the basis for believing it to be public and a description of the way.

32. The parish survey record cards varied in their quality and the information provided. Some gave detailed descriptions of their routes including any gates, stiles or other noteworthy features while some merely gave a start and finish point.
33. The information from the survey provided the basis for a Draft Definitive Map and Statement which was placed on public deposit and open to objections and representations.
34. In Staffordshire, a substantial number of objections were received both from users claiming routes had been omitted or requiring upgrading from a footpath to a bridleway; or from landowners denying the existence of, or disputing the status of, a route.
35. Penkridge Parish Survey Cards support the alleged route from B-C. There was an objection received regarding the omission of the alleged route. As a consequence of this the route was then added on the Parish Survey as a Footpath. Copies of the Parish Survey Cards can be found at Appendix M.

### **Comments on Evidence from the Landowner**

36. At paragraph 12-14 of the objection letter submitted by Mr Monckton, it sets out the impact the route will have on the affected land. Mr Monckton has submitted annotated photographs and maps showing the impact of the proposed footpath on the land in its current form. However, issues such as security, privacy, safety or suitability of the land are not factors that can, as a point of law, be taken into account when considering these applications.
37. At paragraph 18 it states, 'it is assumed that the Applicant is relying upon the common law test for dedication'. This is incorrect, this application is under s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 which does not require dedication by a landowner. It can be said the doctrine of lost modern grant applies here. If a right has been enjoyed for at least 20 years, the court is willing to presume that a grant was created which evidenced such an easement but that the grant was subsequently lost. And so, it can be presumed these routes previously existed, therefore dedication and acceptance would not need to be proved.
38. Paragraphs 26-38 of the objection letter sets out a detailed analysis of the Finance Act documents that have been submitted as part of the application. Plot 1268 which is raised in the objection letter refers to part A-B of the alleged route. Officers consider that this analysis is correct, it does not support this part of the route.
39. However, Officers contend previously that plot 610 does show part B-C. Officers do not require the Finance Act material to support part A-B of the route, as stated above the 1827 Quarter Session Order supports this part. And so, the objectors' comments on plot 1268 are irrelevant.
40. The objector's representative at paragraph 43 contends that the 1827 Quarter Session Order was subsequently appealed in the 1828 Epiphany Quarter Session. This is incorrect in that the Order was confirmed in relation to the stopping up of the various highways and not appealed as they state.

### **Comments from the Applicant on the Landowner Evidence**

41. The objection material was sent to the Applicant Mr Reay. He responded with two letters addressing the issues raised by the objectors, copies are attached at Appendix N.
42. In the letter dated 5 December 2018, he states the route depicted on the plan is incorrect. The commencement point of the path as shown on the plan has been positioned to the west of the junction including Lapley Road and The Avenue which is incorrect according to the Applicant. He further states the commencement point should be positioned to the east, in line with the junction of Lapley Road and The Avenue and not to the west of it, this is how it is depicted on the Highway Order Plan and all subsequent maps he has inspected which were published between 1833 and 1900.
43. The Applicant goes on to state that there is no evidence that the Highways now known as Lapley Road and The Avenue have been repositioned at any point which affects the above conclusion.
44. In the second letter from the Applicant dated 10 December 2018, he sets out his response to the objections made by the objectors. He firstly states the Quarter Session Order of 1827 does not consider anything other than public rights of way as stated by the objectors. They regard the Order as being focused on the stopping up of rights of way and not whether they were public.
45. The Applicant further comments that the stopping up of specified highways within the 1827 Highway Order was subsequently appealed. In 1828 the appeal was heard, and the 1827 Order was upheld. The highways were to remain open with reserved rights for users on foot, as shown on the 1827 Order Plan. The text of the appeal decision by the Court clarifies that the 1827 Order and appeal were dealing with public highways in the area of Stretton.
46. The Applicant then comments on the 'remodelling' of the Estate, he states that it is argued that the remodelling between 1854, 1865 and up to 1870, created obstructions to the claimed route. He further states that it could be also argued that any constructions obstructing the path were inherently unlikely to have been undertaken unless the claimed path had first been extinguished by a legal order that has been lost in time or the path had been diverted. He then gives examples of such obstructions; details can be found in the letter dated 10 December 2018 at Appendix N.
47. The Applicant next points out inconsistencies within the landowner's representation, such as they assert that "*During the Congrave ownership up to at least 1925 the Estate was copyhold in tenure*", the Applicant states that the 1910 Finance Act Field Books record that the land comprising the Estate was freehold at that time and not copyhold as asserted. Also, he claims there is no inability of a landowner to dedicate highway rights over copyhold land, however the consent of both landowner and copyholder would be required.
48. Further inconsistencies the Applicant points out are "*Since its construction [in the 1870's] the bridge has been secured by a locked padlock*", the Applicant states this assertion is made with no supporting evidence that has or could be provided that the gate has been secured, by a padlock for at least the last 130 years. He also claims when the application was made in 1997, the pedestrian gate was not locked as being claimed by the landowners. This gate provides access to the claimed route, a photograph of the gate have been provided by the Applicant and is attached with the letter dated 10 December 2018 at Appendix N.

49. The Applicant continues with the landowners argue that; *“The Order extinguishes all and any public rights of way between points C, B and F”*, he states this is incorrect. The 1827 Order did extinguish user rights between points C, B and F, but not all and any as the landowner’s state. He further notes that the express qualification of extinguishing some user rights, within the Order and recorded on the Order Plan by way of a brown tint was, quoted *“but subject to a right of footway from the point marked C to the point marked K on the said plan”*. So, the reserved right of way on foot between C and K was emphatically confirmed by the Order.
50. The Applicant lastly comments on the landowner’s assertions regarding the Finance Act evidence. He states they have said he has misinterpreted the Finance Act material. He then makes the following comments regarding this assertion; the claimed public route up to the northern boundary shown on the 1827 and 1828 order plans and tinted brown requires no further comment. Its depiction and definition on the 1827 and 1828 order plans, and the express reserved of footpath rights over it, are sufficient to conclude that acceptance and retention of the right of way now being claimed is evidenced by the recorded legal events which took place in 1827 and 1828.
51. He further asserts that it is notable that the owner of the hereditament 1268 acknowledged that a public path crossing the hereditament as shown on the Finance Act field book. The claim states public path as an ordnance. There's only one route crossing the hereditament depicted on the Ordnance Survey map in a manner indicating it is public in nature which could be attributed to this admission. This is the section of the application route corresponding to the 1827 and 1828 order plan and is the only path shown on the OS map crossing hereditaments 1268 noted FP.
52. He then comments that in the 1827 and 1828 the justices were only considering the highways within the boundaries depicted on the order plan. However, the brown tinted path shown on the 1827 and 1828 order plan over which footpath rights were reserved by legal order continues beyond the planned boundary. At the point identified as K on the order plan its continuation to the north is noted *“to Bickford and Whiston”*.
53. From the first large scale Ordnance Survey Maps produced the extension of the path north from point K on the 1827 and 1828 order plans follows the claimed route [ towards Bickford and Whiston]. The route is noted FP on the survey and is the only route to Bickford and Whiston that could comprise the continuation of the path north.
54. The Applicant lastly asserts that the northern section of the application route crosses Finance Act hereditament 610. The Finance Act records confirm that the landowner of a hereditament 610 claimed a reduction in duty value for roads on a public path over the land. It is asserted that the public path claimed is now more likely to be that shown on the definitive to Whiston Hall than the application route. I disagree. Firstly, there are two footpaths now entered on the definitive map that leads to Whiston Hall that are noted as footpaths on the base map used to create the 1910 Finance Act plan. These are now recorded as footpaths 0138 and 0140 on the definitive map. However, the definitive map modification application route is the only one connecting with the 1827 and 1828 old plan route and heading North to bickford Ann Weston, that is shown as footpath on the base Finance Act plan. It is therefore much more likely than the application route comprises the path being claimed for within the Finance Act records.

## **Circulation of the draft report**

- 55.** On 25 October 2019 the draft report was circulated to all the relevant parties with all the available evidence appended.
- 56.** The Monckton's Legal Representative responded on 21 November 2019, firstly requesting copies of the Applicants letters dated 5 December 2018 and 10 December 2018. These letters were supplied to them as they were appended to the draft report. The letter dated 21 November 2019 can be found at Appendix O.
- 57.** They further comment on having previously provided a detailed analysis of the Finance Act documents, however the report does not deal with these submissions only by simply stating that the officers consider this analysis to be incorrect. In response to this officer's state that Plot 1268 which is raised in the objection letter by the Monckton's Legal Representative, refers to part A-B of the alleged route, officers now consider that this analysis is correct, it does not support this part of the route, it supports B-C in its place as it shows this part.
- 58.** The Legal Representatives for the Monckton's then asserts that the 1827 Order was not only concerned with stopping up, it included the reservation of a footpath as a limitation to the effect of stopping up. They further state if the reservation was not explicitly confirmed in the 1828 Order, that would indicate that the stopping up was confirmed without the reservation. There does not appear to be any other reason for the omission.
- 59.** Officers disagree with this comment. The 1827 Order states 'But subject to a right of footway from the point marked C to the point marked K on the said plan'. If an action or an event is subject to 'something', it needs 'something' to happen before it can take effect, this 'something' could be the stopping up of the stated highways.
- 60.** They further stated that even were the reservation of the footpath confirmed (which they are not accepting), on the basis that the Orders were primarily concerned with stopping up, it is clear that any footpath so reserved would only be along the road to be stopped up.
- 61.** In response Officers state that the Orders were concerned with the 'amendment and preservation of the public highways'. Preservation is the act of keeping 'something as it is'. Therefore, Officers claim footpath marked C to K was to remain as a public footpath, there is no evidence to show that this part was stopped up.
- 62.** They also state at its very highest, the 1827 Order only evidences that the Quarter Sessions thought it needed to reserve a public footpath up to the southernmost point marked K where the road turns to the East and not to the northernmost point K adjacent to the text stating 'To Bigford & Milton' as appears to be suggested by the Applicant and the report.
- 63.** Officers also disagree with this comment, attached at Appendix N is a comparison of the 1827 Order plan and the claimed route. Points marked C to K on the Order plan mirrors points A to B on the map of the claimed route. Officers contend that the Quarter Session does not support the whole of the route, only A to B. The Applicant relies on the 1910 Finance Act material and Parish Surveys to support part B to C of the claimed route.
- 64.** The Legal Representatives state that such a right of way would not subsist unless created by express dedication, by presumed dedication either at common law or by statute. They claim no evidence of how the claimed route might have come to be a footpath has provided and where the landowners can demonstrate a lack of capacity to dedicate, this is strongly indicative that no footpath subsists along the claimed route.

65. Officers contend that at some point the claimed route came into being, we cannot evidence its origins however being that it was amongst routes named in the 1827 Order as a footpath then it would have been previously created or dedicated. In this circumstance we rely on the doctrine of lost modern grant. This doctrine was devised to overcome the difficulty of common law prescription that use or enjoyment from 1189 had to be shown. Where use or enjoyment as of right for 20 years could be shown, the mere fact that use or enjoyment could not have been going on in 1189 was not allowed to stop the operation of the prescription; the courts were prepared to accept that the use or enjoyment had arisen as a result of a grant post 1189 that had subsequently been lost.
66. The Monckton's Legal Representative concluded in saying their clients are concerned with issues of health and safety if members of the public are permitted to cross their active farmyard. Secondly, their clients would have to restrict their operations on the area affected and this will involve making several redundancies. Thirdly, their clients would need to re-locate some operations from the area affected to other areas and this would require the pursuit of planning consent to build on what would otherwise remain as green fields.
67. Whilst their clients appreciate that these are not considerations the Panel can consider; they nonetheless wish to make clear their reasons for continuing to rigorously oppose the application.
68. This correspondence from the Monckton's Legal Representative dated the 21 November 2019 was forwarded to the Applicant.
69. The Applicant responded via email on the 19 and 23 November 2019 which can be found at Appendix P. They stated that the Justices sitting in 1827 and 1828, to consider the stopping up of a public highway subject to the reservation of footways rights, accepted that public rights of way subsisted over the routes depicted on the Order plan. If there were any doubt whether the routes concerned were not dedicated and accepted to exist by a Court of law 192 years ago, it would not have to be proven that the public highways concerned did not exist when the Court was considering them in 1827 and 1828.
70. The Applicant further comments that it is inconsistent for the landowners to have asserted '*Up to at least 1925 the estate was copyhold in nature*' so it was not legally possible for public highway rights to have been dedicated over the land. If that were to be correct, it would not have been possible for the landowner to claim a deduction and duty value for any public highways over the land concerned under the 1910 Finance Act. However, it is clear from the 1910 Finance Act records that the landowner did claim relief from duty value for public roads and public paths over the land. The sanction for falsely doing this would be up to six months in prison so the implied and only conclusion that can be reached, if the assertions regarding implications from copyhold tenure were to be correct is that the landowner made false claims for allowances under the 1910 act for which extreme penalties existed, which would be unlikely.
71. The Applicant also does not accept that the 1828 Court decision in any way affected the reserved footway rights, resolved by the 1827 Court Order, for the reasons expressed in his communication of December 2018.
72. The Applicant concluded with the application route is concerned to the north of and outside of the boundary of 1827/1828 Order plan, he provided evidence and rationale for that part of the claim route in his December 2018 communication.

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



73. 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 map subsists; or
  - (b) Evidence that a right of way which is not shown on the map is reasonably alleged to subsist.
74. 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.
75. 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.
76. 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”.
77. If the conclusion is that either test is satisfied, then the Definitive Map and Statement should be modified.

### **Summary**

78. The application is made under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(c)(i) of the Act.
79. The documentary evidence shows that part of the route (A-B) is supported by the 1827 and 1828 Quarter Session. There is no order extinguishing this part of the route and so it exists to this day.
80. The 1910 Finance documentary evidence supports part B to C of the alleged route, passing through three fields in Plot 610.
81. Penkrige Survey Cards also support part B to C. There was an objection received regarding the omission of the alleged route. Consequently, this route was then added on the Parish Survey as a Footpath.
82. The fact that the route is not shown on any other maps after this time does not mean that it has ceased to have any public status as the rule of law is that ‘once a highway, always a highway.’ Neither that it fell into disuse and there is no further record of its existence is immaterial nor can the existence of any obstructions have any bearing.

### **Conclusion**

83. 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 a Public Footpath which is not shown on the map and statement is reasonably alleged to subsist.
84. It is the opinion of your officers that the County Council should make a Modification Order to upgrade the routes to bridleway status on the Definitive Map and Statement of Public Rights of Way

### **Recommended Option**

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

### **Other options Available**

86. To decide to reject the application to add the alleged Public Footpath to the Definitive Map and Statement.

**Legal Implications**

87. The legal implications are contained within the report.

**Resource and Financial Implications**

88. The costs of determining applications are met from existing provisions.

89. 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**

90. In the event of the Council making an Order any person may object to that order and if such objections are not withdrawn the matter is referred to the Secretary of State for Environment under Schedule 14 of the 1981 Act. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.

91. 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.

92. 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.

93. 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**

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

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J Tradewell

Director of Corporate Services

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**Background File:** LG614G

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