

<b>Local Members' Interest</b>	
Gill Burnett	Newcastle - Kidsgrove

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

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

#### **Application for an alleged Bridleway between Oldcott Farm/Oldcott Drive to Colclough Lane/Kidsgrove Bank**

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

### **Recommendation**

1. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to conclude that a Bridleway which is not shown on the Definitive Map and Statement is reasonably alleged to subsist along the route shown marked A-B, C-F, C-D, G-H and I-J on the plan attached at Appendix A to this report and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order should be made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add to the Definitive Map and Statement as a bridleway along the route shown between points A-B, C-F, C-D, G-H and I-J on the plan attached at Appendix A.
3. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that, on a balance of probabilities, that parts B-C, F-G and H-I which are currently recorded as FP 172 and FP 173, should be added as a highway of a different description, namely a bridleway to the Definitive Map and Statement of Public Right of Way as such.
4. That an Order be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by upgrading public FP 172 and FP 173 Kidsgrove to a bridleway along the route shown between points B-C, F-G and H-I on the plan attached at Appendix A.

### **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”) and powers delegated to the Director of Strategy, Governance and Change by the County Council’s constitution (the “Director”). 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 B from Border Bridleways for an Order to modify the Definitive Map and Statement by adding parts A-B, C-F, C-D, G-H and I-J of the alleged route between Oldcott Farm/Oldcott Drive to Colclough Lane/Kidsgrove Bank and upgrading parts B-C, F-G and H-I of the alleged route under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. The line of the alleged Bridleway as claimed by Border Bridleways which is the subject of the application is shown on the plan attached at Appendix A.
3. To not consider part D-E of the claimed route, for the reason that this part falls within the boundary of Stoke on Trent and so the City Council being a unitary authority produces the Definitive Maps for the Stoke on Trent area.
4. 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. In support of the application the Border Bridleways submitted 11 user evidence forms made by members of the public who claim that the route has been used by them over varying periods of time and was still being used up to the date of the application. Copies of their statements are attached at Appendix C.
2. In order 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 in to question, or that it can be inferred by the landowners 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. For the right of the public to have been brought in to 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 June 1995 will be the used as the challenge date. Accordingly, the requisite 20-year period of use should be calculated retrospectively from the date. The years 1975 to 1995 are the 20-year period whereby most users provide evidence of use.
7. A summary of the salient points from the user evidence forms has been compiled and attached at Appendix C.
8. On examination of the user evidence forms, 8 of the 11 users used the alleged route for 20-years plus and fall within the 20-year period.
9. The user, D Casewell, states that the route she used was from Oldcott Farm to Kidsgrove Bank and Colclough lane which suggests she deviated from the alleged route. She also alleges that she used the route since she was 9 years old. Taking in

to account this user's date of birth, the use would have been from approximately 1959.

10. The user, A Moran, claims to have used the route during 1972 to 1995 on foot and horseback. She claims to have used the route from Oldcott Farm, along Birchenwood tracks to Colclough Lane.
11. The user, S Capper claims to have used the route from 1978 to 1994 and claims to have used the alleged route on a daily basis. Taking in to consideration the users date of birth, this would mean she used the route from the age of 7 years old. However, the use is for a total period of 16 years.
12. S Leese claims to have used the route from 1974 to 1995, just over 20 years. She also claims that the route has always been on the same route until the recent open cast.
13. A Locket claims to have used the route from 1971 to 1995 and also claims that the way has always been on the same route until the open cast took place, which was in Goldenhill in Stoke on Trent. That was part of the County until 1998.
14. V Neate claims to have used the route since 1937 till about 3 months before the statement, however the statement is not dated, and we can only assume it to be at the date of the application which was made in 1995. However, use of the route from 1937 is questionable given the physical layout of the land during that point and the colliery that was there.
15. James Baxter claims to have used the route from 1969 to 1994 on a fortnightly basis on horseback. But claims that the way has always been on the same route.
16. Jacqueline Hill claims to have used the route from 1970 to 1994, twice a week on horseback. She also states that the way has not always been the same and has changed and has been across the new golf course. She also states that the route has been blocked at Oldcott Farm.
17. Susan Wills claims to have used the route from 1968 to 1995 a few times a year on foot and horse. She states that the way has always been the same until the opencast mining was in progress and it was moved to the disused railway lines. She also states that way was fenced off at Oldcott Farm and that she had not heard of anyone being stopped up until recently.
18. Kathleen Capper claims to have used the route from 1965 to 1995 on a daily basis on horseback and foot for pleasure. She states that the way has not always been the same and has been across the golf course. She also states that the route is blocked off at Oldcott Farm entrance.
19. Debra Ryder claims to have used the route from 1973 to 1995, once a week during the summer but less frequently in winter, on horseback and foot.
20. The width of the alleged route varies between the users, the minimum would appear to be 3-foot-wide and the maximum would be 7-foot-wide.
21. When asked has the route always been on the same line all 11 users claimed the route is different from what they used originally. 5 of the 11 users stated it used to run where the golf course is now, which is situated south of Oldcott Farm. A further 4 users state the route changed when open cast mining took place and the route was moved to the disused railway line.

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

22. Since the application has been made Officers discovered the land in which the alleged route crosses is solely now in the ownership of Newcastle Under Lyme Borough Council. They object to the application as the route falls on a disused railway track and they were intending on developing a safe pedestrian route. A copy of the response can be found at Appendix D.

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

23. At the time the application was made the prescribed statutory consultees were contacted and invited to comment or submit evidence either in support or against the application. The responses are attached at Appendix E.
24. The Town Council of Kidsgrove objects to the application as they considered it to be a footpath and not a bridleway.
25. Newcastle-under-Lyme Borough Council at the time the application was notified as the alleged route crosses their borough. They stated the ward Councillors have been notified regarding the application.

### **Other evidence discovered by the County Council**

26. A small section of the route is a disused railway. It is understood that the railway was operational until approximately 1973.
27. Birchenwood colliery was in existence from the 1890s and closed in 1932 but coke and other by-product production continued by using coal from other collieries. However, this production also ceased in 1973. The historical information is taken from an article published on 'Staffordshire Past' website and is shown in 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. The evidence of use is from 11 members of the public who claim to have used the way on foot and horseback for a combined period of over twenty years. However, of the 11 users, 9 meet the relevant continuous 20-year period.
30. The statutory test refers to use of over 20 years and in the evidence submitted there are 9 users who claim to have used the path over that period of time. The remaining evidence suggests use was continuing prior to the application being made but is for lesser periods. However, of the 9 users only two claims to use the route solely on horseback. Whilst the remaining 7 users claim use on foot and horseback, they do not specify the frequency of use on horseback.
31. 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 supports the contention that the amount of usage should be sufficient and enough to alert a reasonable landowner that the public are using a way and that the use is "as of right", that is as if the route was already a public highway.

32. The remaining part of the s31 test considers whether the landowner has undertaken any action to rebut the statutory presumption of dedication. For a presumption of dedication under s31 of the 1980 Act 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. This is true even where the owner is absent or cannot be identified. It is how the matter would appear to a reasonable landowner who was present. Often this is evidenced by way of notices or obstructions to prevent people accessing or using the path.
33. 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. In this case there is mention of gates blocking the entrance at Oldcott Farm, however as mentioned previously Oldcott Farm does not form a part of the claimed route. And so, any evidence regarding Oldcott Farm would be discounted.
34. The above evaluation is concerned with the test as laid down in s31 of the 1980 Act, but consideration should also be given as to whether a common law dedication has taken place.
35. When considering whether a right has arisen under the common law it should be borne in mind the significant differences. 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, dependent upon circumstances it could be greatly reduced timescale. The former, the dedication, can be inferred from usage but as the court stated in *Nicholson v Secretary of State (1996)*, “..the more notorious it is the more readily will dedication be inferred..”.
36. In this instance the evidence of use is continuous for a number of years extending before the date required for satisfaction of the s31 test.

#### **Circulation of the Draft Report**

37. On the 29<sup>th</sup> September 2020 a draft report was circulated to all the relevant parties. From this Officers received comments from the applicants regarding the route is incorrect and incomplete.
38. Officers discussed this issue with the applicant and there appears to have been an administrative error with previous Officers which confused the application route. The correct route was established, and Officers proceeded to re-write the report.
39. On the 16<sup>th</sup> July 2021 the rewritten report was circulated to all the relevant parties. Further comments were received from the applicant regarding the route and evidence. A copy of the correspondences can be found at Appendix G.
40. They disagreed with the initial recommendation, they stated “*the section of the application route over what is now recorded as Kidsgrove 26 at the time. Oldcott Drive is a Staffordshire publicly maintainable highway and any obstruction of it, or access to the application route adjoining it (which was and still is recorded as a public path) would have be an unlawful obstruction that users were legally entitled to deviate around. We are advised that this is the reason for deviations from the application route, resulting from periods of unlawful obstruction of the route in this area. Attached is a Land Registry boundary plan showing the position of Oldcott Drive, the boundary of Oldcott Farm and the path position at point D of the application route*”
41. They totally disagree that the evidence of use is insufficient to create a public path.
42. Officers responded stating without evidence of the disused railway tracks being removed it would not be possible for the route to be rode with a horse.

43. The applicant returned with comments stating *“Our research reveals that the correct and accurate situation is as follows. The Loop Line was fully closed to rail traffic in 1964. In 1971 a short section was reopened for haulage of coal between a bunker at the Park Farm open cast workings (south of the Staffordshire County Council boundary in Stoke on Trent) to the coking kilns at the former Birchenwood Colliery. This was short lived and ceased in 1973. Attached is a photograph of the bunker, after it fell into disuse, which was located just south of the private bridge depicted on old OS maps that accessed Park Farm. However, these movements of coal were not wholly over the “Loop Line”. There were a multitude of shunting lines connected to the “Loop Line” around the area of the Staffordshire/Stoke on Trent boundary. The location of the kilns required trains and loads to pass off the “Loop Line” onto these separate shunting lines. There was, at the time, continuing equestrian access over the application route. As we have explained, use along the edge of the line, rather than over the track bed along this section of the “Loop Line”, is in the Stoke on Trent authority area for which a bridleway order is going to be published.*
44. The applicant claims that Jane Ridley of the North Staffordshire Bridleways Association knows the route well as she used to ride this route, also on group riding events.
45. Jane Ridley completed a user evidence form in support of the application. She stated she has known the claimed route for approximately 30 years. She claims to have ridden the route from 1990 to present. She also states she organises group horse rides over the route.
46. From the map Ms Ridley has highlighted the route in yellow, this appears that the route taken was from A-B-C-D
47. Accompanying the user evidence form and map is a statement from Ms Ridley explaining the usage and history of the claimed route. A copy of the this can be found at Appendix H.

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

48. In order 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.
49. With regard to the addition of a public right of way both sections 53(3)(b) and section 53(3)(c)(i) of the Act apply.
50. It is important to note that under s53(3)(b) the legal test is the usual civil law test on the balance of probabilities whilst s53(3)(c)(i) can be based on the fact that the route can be reasonably alleged to subsist which is a lesser legal test.
51. Section 53(3)(c)(i) 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.
52. For the first test to be satisfied it will be necessary to show that on a balance of probabilities the public right of way does subsist.
53. For the second test to be satisfied the question is whether a reasonable person could reasonably allege a public 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 is less than that which is necessary to establish the right of way “does subsist”.

54. One of the two tests must be satisfied before a Modification Order can be made to add the public right of way. Judgment must be made based upon evaluation of the evidence provided by the applicant alongside all other material and evidence. If either test is satisfied, the Definitive Map and Statement should be modified.

### **Summary**

55. In considering the use by the public in this case, it is clear from the user evidence that the amount of user does not raise concerns as to whether the evidence shows that it is sufficient to alert a landowner to the use.
56. The totality of the evidence is finely balanced as to the first part of Section 53(3)(b) i.e. whether the way subsists on the balance of probabilities, the courts have indicated that this can be satisfied by considering whether it is more probable or more likely than not. As Lord Denning in the case of Miller said, “If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not”.
57. On examination of the evidence in this application and on applying the test on the balance of probabilities, your officers consider that the use is sufficient to satisfy the test set out in s31 of the 1980 Act.
58. 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 not be satisfied.
59. When considering the question of the presumption of dedication, there is no evidence to suggest that the landowners dedicated the route to be public.
60. When this is considered in addition to the user evidence, it could be said that the test of balance of probabilities is not satisfied.
61. 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.
62. The above evaluation is concerned with the test as laid down in s31 of the 1980 Act, but consideration should also be given as to whether a common law dedication has taken place.
63. When considering whether a right has arisen under the common law test it should be borne in mind the significant differences. 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, dependent upon circumstances it could be a greatly reduced timescale. The former, the dedication, can be inferred from usage but as the court stated in *Nicholson v Secretary of State* (1996), “...the more notorious it is the more readily will dedication be inferred..”
64. In this case there is sufficient quality evidence to show the route does exist as a public bridleway.

## **Conclusion**

65. 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 Bridleway, which is not shown on the map and statement subsists.
66. It is the opinion of your officers that the County Council should make a Modification Order to add parts A-B, C-F, C-D, G-H and I-J of the route as a bridleway and upgrade parts B-C, F-G and H-I from a footpath to a bridleway on the Definitive Map and Statement of Public Rights of Way.

## **Recommended Option**

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

## **Other options Available**

68. To decide to reject the application.

## **Legal Implications**

69. The legal implications are contained within the report.

## **Resource and Financial Implications**

70. The costs of determining applications are met from existing provisions.
71. 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**

72. 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.
73. 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.
74. 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.
75. 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**

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

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J Tradewell

Director of Corporate Services

**Report Author:** Samantha Finney

Ext. No: 01785 895403

**Background File:** LE607G

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