

<b>Local Members' Interest</b>	
Cllr G Heath	Staffordshire Moorlands-Leek Rural

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

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

#### **Application for the upgrading of Public Footpath 34 Grindon to a Restricted Byway Report of the Director of Corporate Services**

#### **Recommendation**

1. That the evidence submitted by the applicant and that discovered by the County Council is sufficient to show that, on a balance of probabilities, a Restricted Byway exists along the line of Public Footpath No 34 Grindon.
2. That Public Footpath No 34 Grindon which is subject to the claim is upgraded to a Restricted Byway on 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 for an Order to modify the Definitive Map and Statement for the District of Staffordshire Moorlands. The effect of such an Order, should the application be successful, would:
  - (i) Upgrade Public Footpath No 34 Grindon to a Restricted Byway on the Definitive Map and Statement of Public Rights of Way under the provisions of Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981. The line of the Public Footpath which is the subject of the application is shown highlighted and marked A – B 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 of various old maps showing the route.

2. Ms Turner, a member of the Staffordshire Moorlands Bridleways Group, submitted in 2020 further historical records namely, Grindon Tithe Map dated 1839, Waterfall Tithe Map dated 1846, Bartholomew's maps dated 1902 and 1924, Grindon Parish Record Card for FP34 dated 1952 and a copy of the Survey of Rights of Way Statement accompanying the Draft Map.
3. Mr Smith submitted a number of old maps, including a copy of a Cary map dated 1787. This was the only map that was clearly identified. A copy is attached at Appendix C. The Cary map shows the alleged route as two single lines running parallel to each other and it appears to be a carriageway. There is no key with the map and there is no indication as to the status of the route or the nature of any rights over the route.
4. One of the maps appears to be an Ordnance Survey Map and it shows the alleged route as a single dotted line, connecting to what appears to be two carriageways. There is no key with the map, therefore there is nothing to indicate the status of the route or the nature of any rights over the alleged route. A copy is attached at Appendix D.
5. The remaining 3 maps are not clearly identified but all appear to be relatively old. Copies are attached at Appendix E. Two of the maps show the route as two single lines running parallel to each other and connecting to two other carriageways. The other map shows two dotted lines running parallel to each other. There are no keys with the maps so nothing to indicate the status of the route or the nature of any rights over the alleged route.
6. The Grindon Tithe Map dated 1839 comprises the map and the Award Index. A copy is attached at Appendix F. The map shows the alleged route as a carriageway separate to adjacent landholdings. The route connects to carriageway 273 in the north, which is recorded as a road. The route continues in a southerly direction to Old Field, which then becomes the alleged route and forms part of plot 318, which is a house with road. The route becomes narrower and continues down to Waterfall and it appears to become two dotted lines running parallel to each other.
7. The Tithe Awards Index shows that plot 273 is in the parish of Grindon. The plot name is recorded as a road and the owner Thomas Brandon. Plot 318 is recorded as a "Homestead with Road and House".
8. The Waterfall Tithe Map dated 1846 comprises the Award Index only. A copy is attached at Appendix G. The Index refers to a Plot 145, which is recorded as being a Public Road. The owner of the plot is recorded as the Surveyors of Highways and Matthew Redfern.
9. The Bartholomew map of 1902 shows the alleged route. A copy is attached at Appendix H. There is a key with the map, which shows that as the route has red dots along the route, it is classified as an "Indifferent Road, which is passable". The map notes the representation of a road or a footpath is no evidence of the existence of a right of way.
10. The Bartholomew map of 1924 is very similar to the 1902 map in that it depicts the alleged route with red dots running along it. The map has a key, which shows that the route is classified as an "Indifferent Road, which is passable by cyclists". A copy is attached at Appendix I.
11. The National Parks and Access to the Countryside 1949 extract from the Statement accompanying the Draft Map records Path No 34 in the Parish of Grindon as a "RP", which is known as Slade Lane. "RP" is recorded as a Road Used as a Public Path. A copy is attached at Appendix J.

12. The Grindon Parish Record Card for FP 34 states: "Path symbol- CRF. Used by public without dispute for 30 years. Cart Road and footpath- is used as a cart road or footpath". A copy is attached at Appendix K.

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

13. Mr Alan John Simpson of Old Field Farm completed an owner/occupier evidence form dated 15 November 2014. Mr Simpson considers the route to be public as a bridleway and he has seen people using the way on foot and horse. He has never given anyone permission to use the route.
14. Mr Simpson also states that he has stopped off road 4 x 4 vehicles and motorcycles as there is no through road for such vehicles, it was also too wet and would damage the path. He is obliged to maintain the fields under his environmental agreement. It has always been known in his family that the field is a concessionary footpath. A copy of the evidence form is attached at Appendix L.

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

15. Grindon Parish Council responded via e-mail dated 11 December 2014 advising that they agree with the landowner who does not wish the footpath to be upgraded to a Restricted Byway. The footpath goes through a working farm and so the presence of horses or vehicles could constitute a safety issue.
16. The Byways and Bridleways Trust have responded confirming that they support the application, although they would prefer that the route is given full Byway status.
17. The Border Bridleways Association responded advising that they can offer no help with evidence for the application.
18. The Commons, Open Spaces and Footpaths Preservation Society responded stating that they do not have any evidence to support the claim, however they do not object to the upgrading of footpath 34.

### **Comments on Evidence**

19. What is not in dispute is the fact that the route is a public highway, the question relates to the status and nature of the public rights over it.
20. In relation to the tithe documentation, the sole purpose was to identify land subject to paying the tithe. Commissioners would often use highways to orientate the map and locate the plots shown. A highway crossing land would reduce its productivity and thus its value although this would be true whether the route had public or private status. A bridleway or footpath would be likely to have less impact on the cultivation of the land compared to a vehicular route, i.e. use with carriages or carts.
21. Where a route was shown separate from adjacent landholdings it would be more likely to have higher rights over it. The map accompanying the Grindon Tithe Award dated 1839 shows the alleged route as a carriageway separate to adjacent landholdings. The route appears to be a road as it connects from 273 and 318 which are both recorded as roads in the Tithe Awards Index. It could be argued that the route is more likely to be private as it connects with route 318 which is recorded as a "Homestead with Road and House" and the owner is Henniker Esq, which suggests that the route is likely to be private but also it is supportive of the route's status being higher than a footpath and bridleway.

22. Tithe maps have been held to be admissible by the courts as proof of the existence of a road but similar to Ordnance Survey Maps they are not evidence as to the status of the road recorded. The important point from the perspective of the tithe commissioner was that the land would be titheable and not the status of the way.
23. In relation to The Waterfall Tithe Award of 1846 only the Index has been provided. It refers to Plot 145, which is recorded as a public road, with the owner being the Surveyor of Highways. It is assumed that Plot 145 is the alleged route but with no map to cross reference with the index this is an assumption. However, assuming that Plot 145 is the alleged route the information is supportive of the route having higher rights over it than a footpath or bridleway and that the route would have been used by vehicles and not just walkers or horse riders. It would appear that between 1839 and 1846 the route has ceased to be in private ownership and has been adopted for public use.
24. The Cary map dated 1787 shows the alleged route as two single lines running parallel to each other. There is no key with the map and therefore there is nothing to indicate the status of the route.
25. The Ordnance Survey Map again shows the alleged route but there is no key with the map and therefore nothing to indicate the status of the route, so it does not add any supporting evidence to the case.
26. In relation to the remaining old maps that have been submitted they all show the alleged route but none of them provide any indication as to the status of the route. The primary purpose for old maps was often monetary in that the mapmaker could sell copies to interested parties. All the maps support the physical existence of the route, which is not in dispute as the route is a recognised public highway on the definitive map but they do not provide any evidence to support the route being a Restricted Byway.
27. However, the Bartholomew maps dated 1902 and 1924 do provide supporting evidence of the route having higher status than a footpath or bridleway. Both maps show the route as a carriageway with red dots running along the length of the route. When reviewed in conjunction with the keys provided with the maps, the route on both maps is classified as an Indifferent Road.
28. The 1902 map specifically states: "Indifferent Road (passable)" and the 1924 map states: "Indifferent Road (but not a motoring road) which is passable by cyclists". Neither map provides any evidence as to whether the road is public or private but as already stated that issue is not the focus of this report. However, as the route can be identified as a Road on both maps, this is strong evidence that the route has higher status than a footpath or bridleway.
29. The fact that the 1902 map refers to an "Indifferent Road (but not a motoring road)" is highly suggestive that although the route may have been accessed by vehicles, these would be non-motorised vehicles and therefore is supportive of the route being classed as a Restricted Byway. At the time these maps were drawn up the classification of Restricted Byway did not exist but when the definitions on the maps are compared with the definition of a Restricted Byway there is strong evidence that the route can be considered a Restricted Byway.
30. The extract of the Statement accompanying the Definitive Map taken as part of the National Parks and Access to the Countryside Act 1949 records Path No 34 in the Parish of Grindon as "RP", which when reviewed with the key identifies the route as being a Road Used as a Public Path. This would suggest that the route was considered to have higher status than a footpath or bridleway.

31. In relation to the Parish Record Card for FP34, again completed following the National Parks and Access to the Countryside Act 1949, the path symbol for FP34 is “CRF”. The Record Card also refers to the route as “Used by public without dispute for 30 years. Cart road and footpath- is used as a cart road and footpath”.
32. The 1949 National Parks and Access to the Countryside Act (“the 1949 Act”) introduced the concept of the Definitive Map and Statement of Public Rights of Way. Those documents were intended to be conclusive legal evidence of the existence of what might be termed minor public highways.
33. There were only three types of public highway recognised in the common law and this still prevails. These were footpath (for pedestrians), bridleway (riding or leading a horse plus pedestrians) and cartway or in today’s parlance carriageway (which was for horse and cart or nowadays vehicles). Every other type of highway is a creation of statute.
34. When the 1949 Act came into force the intent was to add these ancient highways and the legislation set out the types of rights to be recorded on the map and statement along with their definitions. The definition for a “Road used as a Public Path” was a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.
35. The government issued guidelines to authorities when drawing up the Definitive Map and Statement. The Ministry of Town and Country Planning issued Circular 81 in March 1950 and referred to a pamphlet issued by the Commons, Open Spaces, and Preservation Society entitled “Survey of Rights of Way”. The pamphlet and the methods for conducting a survey that were described within it were approved by the Ministry as being suitable for that purpose. The Ministry subsequently circulated copies of that pamphlet to County Councils for distribution to parish councils carrying out surveys under the 1949 Act.
36. The idiom “CRF” and “CRB” were two of the symbols suggested for use on the parish survey cards to aid as descriptors. In Part 3(m) it stated that “*highways which the public were entitled to use with vehicles but which, in practice are mainly used by them as footpaths or bridleways, should be marked on the map CRF or CRB*”. The F and the B denoting footpath or bridleway. Even with the use of the symbols the type of rights appertaining were not easily identifiable; the notation could just as well be a descriptive term for the path’s appearance rather than a reference to any rights enjoyed. Whilst these terms were useful as descriptions neither had any legal standing nor were suitable for inclusion on the Definitive Map and Statement.
37. The idiom “CRF” is used on the Parish Record Card for FP34, the alleged route and is described as a cart road and footpath and is described as being used as such. This supports the contention that the route was seen as a highway that could be used by the public with vehicles but was predominantly used as a footpath. Whilst this is merely a description of the path it adds weight to the argument that although this route may have been predominantly used by people on foot it was also used by vehicles.
38. The expression RUPP was intended to include a public carriage or cart road or green, unmetalled lane mainly used as a footpath or bridleway. This was deemed an unsatisfactory classification and was addressed in the 1968 Countryside Act which stated that all RUPP’s should be reclassified as footpath, bridleway or a new category Byway Open to All Traffic.
39. Prior to the 1981 Act this could only be done where there was a review of the map and statement taking place. The County Council prepared its First (General) and Special Review of the Definitive Map in 1969. As part of this reclassification process it appears that Path Number 34 was reclassified to a Public Footpath. A number of

objections were received to the new Definitive Map and Statement including to reclassifications. Any RUPPs which had been reclassified as footpaths and not objected to were shown and designated as such on the Definitive Map and Statement at the completion of the First and Special Review in 1988. It was not open to the County Council to refer routes which were not objected to, and which were RUPPs which had been reclassified to footpaths, to an Inquiry. It would appear that no objections were raised at the time of the Review regarding the reclassification of the alleged route to a footpath.

40. Whilst the Statement accompanying the draft map describes the alleged route as a RUPP, this does not automatically mean that the route's status is higher than a footpath. As outlined in the case of *Trevelyan v Secretary of State for the Environment* [2002] 2 PLR 49, Latham J stated that the relevant question is posed by Section 53(3)(c): *is there evidence, which when considered with all other evidence, shows the correct classification of a way. This would involve a "careful evaluation" of all of the available evidence to determine, on the balance of probabilities, the correct status of the way.* He went on to say *"it seems to me that there is no room for any assumptions or presumptions. The Act specifically refers to evidence... the fact of the inclusion of the right of way on the Definitive Map is obviously some evidence of its existence. But the weight to be given to that evidence will depend on an assessment of the extent to which there is material to show its inclusion was the result of inquiry, consultation, or the mere ipse dixit of the person drawing up the relevant part of the map..."*
41. However, the effect of reclassification does not automatically extinguish rights. In the case of *R v Secretary of State for the Environment ex parte Riley* (1990) 59 P&CR 1 it was held that a reclassification of a RUPP to a bridleway did not have the effect of extinguishing vehicular rights. If evidence is obtained clearly showing that certain rights exist then this has to be taken into account when determining the correct status of the route.
42. As Lord Purchas commented in the case of *R v Secretary of State for the Environment ex parte Simms and Burrows* [1990] 3 All ER 490 the purpose of Section 53 is to ensure that the map is *"capable of revision of all kinds in order to ascertain the true state of affairs on the ground"*.

### **Comments on report**

43. Following circulation of the report comments were received from Grindon Parish Council, asking for the application to upgrade FP34 to be rejected and that FP34 remain as a footpath.
44. They state that the footpath follows a track across the fields and the track is a route for the landowner and his working vehicles to access adjoining fields. They also refer to a number of maps that have been mentioned in the report that do not have any keys to them and therefore they state that they cannot be relied upon to support the route having public access. A letter of response has been sent to Grindon Parish Council in relation to their comments and it has been reiterated that the report makes clear which maps show or do not show the nature of any rights over the alleged route.
45. They also state that the path is concessionary and in the gift of the landowner to permit access along it. However, the issue of whether the route is public or not is not the question of this report, as the route is already public as it is recorded as a public footpath and therefore it is not for the landowner to grant permission for use of the route, as the

route is already open to the public as a footpath. Officers' recommendation remains unchanged.

46. In response to the letter from officers regarding the parish council's objections a further e-mail was received from Grindon Parish Council. They stated that the parish council have always recognised Public Footpath 34 as a public footpath, but the footpath stops south of Oldfields Farm at the farmyard. The reference to the landowner and concessionary use of the path is referring to how members of the public proceed from Public Footpath 34 through the farmyard onto the road and does not therefore directly apply to the application route itself. The council wanted to be clear that the applicant understood where Public Footpath 34 starts and finishes. These comments were acknowledged by officers. A copy of the parish council's comments, and officer's response is attached at Appendix M.
47. To clarify Public Footpath 34 Grindon stops just south of Oldfields Farm to the north. It connects to a green lane Oldfields Farm Lane which in turn connects to a D road of the same name. It therefore does start at the end of the county road, south of Grindon Public Footpath 0.1700.
48. Following circulation of the report comments were also received from the landowners, Alan Simpson of Oldfields Farm, Sue and Alan McGilveray of Brookhouse Farm, Jacqueline Langford-Mycock of Back o the Brook Farm and Ian and Julie King of Brooklyn, who provided a joint letter outlining their objections to Public Footpath 34 being upgraded to a Restricted Byway.
49. The basis of their objections is that they are of the opinion that the upgrade would be damaging both environmentally and ecologically and it would be detrimental to the nature of the path. They raise concerns that in places the path is not wide enough for horse riders and it would be dangerous for children who use the path and area for their Duke of Edinburgh. They advise that there is evidence of animal movement up and down the banks and the trees lining the path are a habitat for birds and where the path comes out onto fields they are under environmental protection. They have provided a number of photographs showing different sections of the route.
50. Whilst it is not out intention to belittle any legitimate concerns, the courts have decided that issues such as safety, suitability, obstructions, and wildlife concerns are irrelevant considerations and therefore cannot be taken into consideration when determining section 53 applications. The only thing that can be taken into consideration is anything that relates to the existence of the way. Therefore, officer's recommendation remains unchanged. A copy of the landowner's letter and photographs and officer's response is attached at Appendix N.

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

51. With regard to the status of the route, 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 as a footpath on the Definitive Map and Statement prevails.

### **Summary**

52. The Panel need to be satisfied that, on the balance of probabilities, the evidence that has been discovered shows that a highway shown on the map and statement as a

highway of a particular description ought to be there shown as a highway of a different description.

53. The courts have said that tithe award evidence may be supportive of the existence of a public right of way but the weight to be given to such documents is a matter for the tribunal of fact, in this case the Panel. The Grindon Tithe Award documentation of 1839 clearly identifies the alleged route as a Road. It is not clear from the documentation as to whether the Road was public or private. Although it is most likely to have been a private road, it does support that the route's status was higher than a footpath or bridleway.
54. By 1846 it would appear that the route had been adopted as a public road, as it was now under the Ownership of the Surveyors of Highways and was recorded as being public. As the route is still classified as a Road it is more than likely that the route's status was higher than a footpath or bridleway.
55. The tithe award documentation on its own is supportive of higher rights and when reviewed in conjunction with the Bartholomew maps supports the route having vehicular rights over it. Both maps record the route as an "Indifferent Road" and in particular the 1924 map states that the route is not a motoring road, but it is passable by cyclists. This strongly indicates that the road was not deemed to be a road suitable for motorised vehicles but suitable for non-motorised vehicles, which would support the contention that it is a Restricted Byway.
56. The various old maps that have been provided support the physical existence of the way but do not provide any evidence regarding the status.
57. The Parish Record Card is supportive that the route is a public highway and its status was higher than a footpath as it is also recorded as being used as a cart road. This also signifies that this was not a road used by motorised vehicles but non-motorised vehicles and therefore supports the contention that the route is a Restricted Byway.
58. When the tithe award documentation, the Parish Record Card and Bartholomew maps are considered together they support the contention that the route is a Restricted Byway.

## **Conclusion**

59. The question is not whether PF34 is a public highway but rather what is the nature of the public rights over the route.
60. The evidence to overturn the current designation on the map must satisfy the civil legal test, that of the balance of probabilities.
61. In light of the evidence, as set out above, it is the opinion of your officers that based upon the balance of probabilities the route which is the subject of the application is more likely than not a Restricted Byway.
62. It is the opinion of your officers that the County Council should make a Modification Order to upgrade the route to a Restricted Byway on the Definitive Map and Statement of Public Rights of Way.

## **Recommended Option**

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

## **Other options Available**

64. To decide to reject the application to upgrade Public Footpath 34 Grindon Parish to a Restricted Byway.

## **Legal Implications**

65. The legal implications are contained within the report.

## **Resource and Financial Implications**

66. The costs of determining applications are met from existing provisions.
67. 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**

68. 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.
69. 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.
70. 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.
71. 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**

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

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J Tradewell

Director for Corporate Services

**Report Author:** Hannah Titchener

Ext. No: 854190



## INDEX TO APPENDICES

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