

Local Members' Interest	
Cllr Alan White	Lichfield (Rural East)

Countryside and Rights of Way Panel

Wildlife and Countryside Act 1981

Application for a Public Bridleway from Birdsley Farm to Portway Lane, Wigginton

Report of the Director for Corporate Services

Recommendation

1. That the evidence submitted by the Applicant in the Application at Appendix "A" is sufficient to show that a right of way with the status of a Public Bridleway is **reasonably alleged** to subsist between points A to B on the plan attached at Appendix "B" of this report.
2. That an Order be made to add the alleged route as a Public Bridleway to the Definitive Map and Statement of Public Rights of Way for the District of Lichfield.

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").
2. 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.
3. 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 Lichfield. The effect of such an Order, should the application be successful, would:
 - (i) Add a Public Bridleway from Birdsley Farm to Portway Lane under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981.
 - (ii) The line of the Public Bridleway which is the subject of the application is shown marked A to B on the plan attached at Appendix "B".
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. The Applicant has submitted in support of the claim a copy of the Wigginton Inclosure Award dated 1771 (Q/RDC2).
2. The Applicant has submitted in support of the claim 2 x Ordnance Survey Maps dated 1834 and 1884.
3. These are all attached at Appendix "C".

Evidence Submitted by the Landowners.

4. Two landowners were identified by the Applicant and a further four were discovered by the County Council.
5. One of the landowners responded through his solicitors.
6. These representations can be found at Appendix "D".

Comments Received from Statutory Consultees.

7. Lichfield District Council responded setting out the position relating to the land across which the claimed route passes.
8. This may be found at Appendix "E".

Comments on Evidence.

9. This application is based upon historical evidence and although limited to three specific documents one of them is potentially of significant probity.
10. Inclosure Awards have been deemed by the courts to be sufficient evidence in their own right to prove a claim, although the clarity of both the transcript and plan needs to be assessed.
11. In this case the transcript and plan are sufficiently clear and an exposition of these is given between points 12 and 25 below.
12. Turning to the plan we find that the claimed route is a comparatively short route running in an approximately east-west direction and linking the Wigginton to Harlaston road to an existing bridleway and ultimately continuing along this east-west route.
13. The plan clearly depicts the route as a continuum of the existing Public Bridleway 15, Elford and is demarcated in exactly the same way – although it is accepted that this is not necessarily suggestive of any status.
14. The plan is clear and complete and the allotted field numbers are wholly visible and referred to in the transcript.
15. Turning to the transcript we can see that the Award refers to a "*private wagon and drift road and public bridle road*".
16. It was not unusual for Inclosure Awards to refer to both public and private roads - within the same paragraph - and the courts have held that the word "public" is taken to mean the same now as it did then.

17. In this case it is clear that the route in question had both public and private rights and that the private rights related to its use by non-motor vehicles and cattle.
18. A drift road was typically used for the movement of cattle along which farmers and drovers could drive their stock between fields - and for other purposes with the landowner's agreement.
19. Significantly the route is also referred to as a "public bridle road" and so there can be no doubt about the route's status in this regard.
20. Clearly the status of the route is not in doubt, however the question has to be this - does the transcript actually refer to the claimed route? and if so, can this be demonstrated with sufficient clarity.
21. The route stated in the Inclosure Award as having *public bridle road* status is described as "*coming out of the public road from Wigginton to Harlaston*" - and the claimed route does indeed follow this line.
22. That said there is another route to the north of the claimed route that also runs from the same road, albeit from a crossroad where four points join.
23. This road is also shown on the Inclosure Award and is shown on both the OS maps and Finance Act plan.
24. Both this alternative route and the claimed route can be seen to join the Wigginton - Harlaston road - and both join connecting routes at what may be described as "corners".
25. However, there are distinguishing features between the two in that the transcript states that the route with the status of a *public bridle road* leaves the Wigginton to Harlaston road "*through the allotment of Thomas Egerton No.52 into the road at the corner of Birdsley Lodge*".
26. The *alleged* route certainly does pass through plot number 52 – although the alternative route does not. This is the first good indicator that the alleged route is indeed the one referred to in the transcript as a bridle road.
27. The transcript then describes the bridle road as going "*into the road at the corner of Birdsley Lodge*". This is important and again lends support to the alleged route being the bridle route in the transcript.
28. The property known as "Birdsley" is much closer to the alleged route than it is to the alternative route and without further annotations on the plan it is highly suggestive of that location.
29. As such it is reasonable to conclude that the road at the corner of Birdsley Lodge is indeed the same one which eventually meets the alleged route.
30. This is further supported by the fact that the transcript mentions the bridle road then passing "*over the allotment of William Eagleston no.58*" to the turnpike road".
31. As both the allotment of William Eagleston and the turnpike road are clearly marked on the plan there can be little doubt that this is the line of the claimed route.
32. Interestingly the transcript also gives us a very specific description of the width of the route stating that it should "*remain the width of thirty feet in every part thereof*".
33. Thirty feet is approximately nine metres and so exceeds the width necessary for a bridleway, although this is justified somewhat by the transcript clarifying its use as a "*private wagon and drift road*" **as well** as a "*public bridleway*".

34. As such the evidence provided in both the transcript and plan is clear, and each supports the other in this regard.
35. Inclosure Award evidence can be sufficient on its own to prove a case and although later awards after 1801 were usually more detailed and included more express powers of the commissioners, the earlier ones still carry considerable weight.
36. In the absence of other evidence, a later Inclosure Award being made after 1801 may have still been enough to meet the higher test (balance of probabilities) – as it is this earlier award of 1771 is more appropriately considered under the lower test of reasonable allegation.
37. Turning to the other evidence provided by the Applicant in the form of two ordnance survey maps, we find the route depicted as a physical feature on the ground although of course this bears no relation to its status – public or private – or its categories of use.
38. Notwithstanding, the OS maps do show that a physical route existed on the ground and so the OS record does not at least preclude the possibility that the claimed way ever existed.
39. The two OS maps also have widely different dates – one is dated 1834 and the other 1884 meaning the route was at least visible in pre-Victorian times and then again in the latter part of the 19th century.
40. On the 1 inch to 1 mile map of 1834 the route can be clearly seen, although joining the highway at both ends it does not open into either as does the wider road network in the area.
41. This detail could merely suggest a change in surface in that the claimed route was not part of the public vehicular highway and so had never been upgraded to a higher status - although we are in the realms of conjecture on this point and nothing definitive can be gleaned from it.
42. The OS map of 1834 is approximately 60 years later than the Inclosure Award plan and *does* appear to support the existence of the line shown on the earlier document.
43. Turning to the landowners submission through their solicitors, Dewes Sketchley , we find an objection based upon a lack of physical evidence of the route upon the ground.
44. This lack of “physical evidence” is not material to the claim as the matter is based upon historical evidence – and not evidence of use. As such it is frequently the case that there are no visible physical features at the time of the claim.
45. This objection therefore can only be discounted and although an OS map is also held as evidence of its nonexistence, the route has been shown to appear on two other OS plans.
46. OS evidence is merely a snapshot in time of what existed when the area was mapped and although it may be missing from the 1880 series it is clearly shown on the 1834 edition.
47. Again, OS evidence is not material to the claim and the Inclosure Award of 1771 is sufficient in its own right - in this case - to demonstrate its existence.
48. Nothing turns therefore on the landowner’s submission.
49. Although the width is stated to be 30 feet (9 metres) in the Inclosure Award the fact that it was also a private wagon and drift road is also noted and as such in the

absence of any ancillary evidence any claimed width would be limited to that of a bridleway.

50. When taking all of the evidence together – somewhat limited as it is – it is still sufficient for a *reasonable person to reasonably allege* that the route subsists.

Comments on All Available Material.

51. There is no significant evidence that we are aware of that would support any higher rights than those applied for – in this case being a Public Bridleway.
52. The material when taken together appears to be consistent.
53. The evidence is presented in a detailed and cogent way which quite clearly supports the validity of the claim.
54. When all the evidence is taken together it is sufficient to say that the claimed route is **reasonably alleged** to subsist.

Burden and Standard of Proof.

55. The Applicant made the application under Section 53(3)(c)(i) which relates to the discovery of evidence and is concerned with two separate events:
- Evidence that a right of way which is not shown on the map subsists on the balance of probabilities.
- OR
- Evidence that a right of way which is not shown on the map is reasonably alleged to subsist.
56. 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.
57. 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.
58. 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”.
59. One of the two tests must be satisfied before a Modification Order can be made to add the public right of way.
60. 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.

61. The application is made under under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(i) of the Act.

62. If the test is considered in the first part of the section, that is 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.
63. As Lord Denning in the case of Miller said; *“if the evidence is such that the tribunal can say ‘we think it is mor probable than not’ the burden is discharged, but if the probabilities are equal, it is not”*.
64. In this instance your officers consider that the evidence is *not* sufficient on the balance of probabilities, but that it does satisfy the test of reasonable allegation.

Conclusion.

65. It is open to the Panel when considering applications to come to a decision on the matter other than which is the subject of the application.
66. In this instance the claim is for the addition of a Public Bridleway.
67. When the totality of the evidence is considered, it is sufficient to say that the route can be **reasonably alleged** to subsist.
68. It is the opinion of your officers that the County Council should make a modification order to **add** the right of way which is the **subject** of this application with the status of a **public bridleway**, to the Definitive Map and Statement of public rights of way for the district of Lichfield.

Recommended Option.

69. To accept the Application based upon the reasons contained in the report and outlined above and to make an Order to add the route to the Definitive Map and Statement of Public Rights of Way.
70. It is further recommended that this should be to the minimum width of **2 metres** throughout its length.

Other options Available.

71. To decide to *reject* the application.

Legal Implications.

72. The legal implications are contained within the report.

Resource and Financial Implications.

73. The costs of determining applications are met from existing provisions.
74. 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.

- 75. In the event of the Council making an Order any person may object to that order and if such objections are not withdrawn the matter is referred to the Secretary of State for Environment, Food and Rural Affairs. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.
- 76. 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.
- 77. Should the Council decide not to make an Order the applicants may appeal that decision under Schedule 15 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.
- 78. 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.

- 79. There are no direct equality implications arising from this report.

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INDEX TO APPENDICES

Appendix A	Form 1
Appendix B	Plan
Appendix C	Inclosure Award (1771) and 2 x Ordnance Survey Plans (1834 & 1884)
Appendix D	Landowner Response

