

Public Rights of Way Committee

Date of Meeting: 03 December 2018

Report Title: Wildlife & Countryside Act 1981– Part III, Section 53
Application No. CO/8/34, for the addition of public rights
of way, Byley Lane to Carver Avenue, in the Parish of
Cranage.

Senior Officer: Frank Jordan, Executive Director Place

1. Report Summary

- 1.1 This report outlines the investigation of an application made by Cranage Parish Council to amend the Definitive Map and Statement by the adding of several public footpaths. This report includes a discussion of the consultations carried out in respect of the claim, the historical evidence, witness evidence and the legal tests for a Definitive Map Modification Order to be made. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether an Order should be made to add public footpaths.
- 1.2 The proposal contributes to the Corporate Plan Outcomes 4 “Cheshire East is a green and sustainable place” and 5 “People live well and for longer”, and the policies and objectives of the Council’s statutory Rights of Way Improvement Plan.

2. Recommendations

- 2.1 That application CO/8/34 to record public footpaths between points A-B-C-D; B-G; G-F; E-C and E-D as shown on Plan No. WCA/016 be refused on the grounds that there is insufficient evidence to show that public footpath rights exist along these routes.

3. Reasons for Recommendation/s

- 3.1 The evidence in support of this claim must show, on the balance of probabilities that public rights subsist or are reasonably alleged to subsist

along the claimed routes. It is considered there is insufficient use of the routes without, force, secrecy or permission, that is without interruption and as of right; to support the existence of footpath rights along the routes shown on Plan No. WCA/016.

- 3.2 There is also insufficient evidence under Common Law to show that the landowners have dedicated route A-B-C-D as a public footpath, as shown on Plan No. WCA/016.

4. Other Options Considered

- 4.1. Not applicable – this is a non-executive matter.

5. Background

5.1 *Introduction*

5.1.1 Cranage Parish Council had written to Cheshire County Council in July 2005 expressing concern that the paths on the attached Plan No. WCA/016 were going to be fenced off. They then wrote again in January 2006 to say that some of the paths had now been fenced and sending photographs of the situation on the ground.

5.1.2 The application was submitted in March 2007 by the then Clerk to Cranage Parish Council to modify the Definitive Map and Statement for the Parish of Cranage by adding these footpaths. The application was supported by user evidence. A total of 19 users submitted evidence, 4 of those were minors at the time the evidence was written.

5.1.3 In April 2007 a meeting was held on site between representatives of the Parish Council, landowners, a local County Councillor and an Officer from Cheshire County Council, to discuss the possibilities for securing use of the footpaths through other means. The Parish Council decided to investigate permissive path agreements with the landowners and wrote to the witnesses who gave user evidence for the application for their comments. In July 2007 the Parish Council confirmed that permissive path agreements were the best way forward. However this line of action does not appear to have been pursued since that time.

5.1.4 The Applicant, Cranage Parish Council, sought a direction from the Secretary of State for a decision to be made on the application as it was still awaiting investigation. A direction decision dated 16 March 2018 was received from an Inspector representing the Secretary of State. The decision, pursuant to paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981, directed the Council to determine the application no later than 6 months from the date of the direction.

- 5.1.5 In July 2018, following a tendering process, an external consultant was appointed to investigate this application on behalf of Cheshire East Council. They commenced the investigation by sending out introductory and consultation letters to affected and interested parties.

5.2 *Description of the Application Routes*

- 5.2.1 **Route A-B-C-D** runs from the southern end of Carver Avenue (point A on Plan No. WCA/016) south south eastward around the southern side of the boundary and garages of No. 24 Carver Avenue (point B on the Consultation Plan). The route then proceeds from the southern side of the garages south south westerly to the western side of Yew Tree Cottage (point C on the Consultation Plan), the route then continues southwards to Byley Lane (point D on the Consultation Plan).
- 5.2.2 **Route A-B-G** runs from the southern end of Carver Avenue (point A on the Consultation Plan) and proceeds to the southern side of the garages (point B on the Consultation Plan) and then runs in a generally westerly direction to join the eastern end of Crescent Road (point G on the Consultation Plan).
- 5.2.3 **Route G-F** runs from Crescent Road (point G on the Consultation Plan) in a generally southerly direction to the southeast corner of No. 36 Byley Lane (point F on the Consultation Plan).
- 5.2.4 **Route E-C** runs from the eastern end of Byley Lane (point E on the Consultation Plan) in a generally easterly direction to the west of Yew Tree Cottage (point C on the Consultation Plan).
- 5.2.5 **Route E-D** runs from the eastern end of Byley Lane (point E on the Consultation Plan) in a generally south easterly direction to the west of Cranage Cottages on Byley Lane (point D on the Consultation Plan).

5.3 *The Main Issues*

- 5.3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Council shall keep the Definitive Map and Statement under continuous review and make such modifications to the Map and Statement as appear requisite in consequence of the occurrence of certain events:-
- 5.3.2. One such event, (section 53(3)(c)(i)) is where
- “(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:-

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic

The evidence can consist of documentary/historical evidence or user evidence or a mixture of both. All the evidence must be evaluated and weighed and a conclusion reached whether, on the 'balance of probabilities' the alleged rights subsist or are reasonably alleged to subsist. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.

5.3.3 Where the evidence in support of the application is user evidence, section 31(1) of the Highways Act 1980 applies. This states;-

"Where a way.....has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

This requires that the public must have used the way without interruption and as of right; that is without force, secrecy or permission. Section 31(2) states that "the 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question".

5.3.4 In the case of, *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs (2007)*, the House of Lords considered the proviso in section 31(1) of the Highways Act 1980:

"...unless there is sufficient evidence that there was no intention during that period to dedicate it".

The proviso means that presumed dedication of a way can be rebutted if there is sufficient evidence that there was no intention to dedicate the way, during the relevant twenty year period. What is regarded as 'sufficient evidence' will vary from case to case. The Lords addressed the issue of whether the "intention" in section 31(1) had to be communicated to those using the way, at the time of use, or whether an intention held by the landowner but not revealed to anybody could constitute "sufficient evidence". The Lords also considered whether use of the phrase "during that period" in the proviso, meant during the

whole of that period. The House of Lords held that a landowner had to communicate his intention to the public in some way to satisfy the requirement of the proviso. It was also held that the lack of intention to dedicate means “at some point during that period”, it does not have to be continuously demonstrated throughout the whole twenty year period.

Common Law Dedication

5.3.5 If for some reason the statutory test fails, the issue of common law dedication can be considered; that is whether the available evidence shows that the owner of the land over which the way passes has dedicated it to the public. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.

5.3.6 Under Common Law the onus of proof is on the claimant to show that the landowners, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowners were aware of and acquiesced to public use. Use of the claimed way by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

5.4 *Investigation of the Claims*

5.4.1 An investigation of the evidence submitted with the application (CO/8/34) has been undertaken, together with some additional research. The application was made on the basis of user evidence from 19 witnesses, 4 of which were minors at the time their evidence was submitted. In addition to the evidence submitted an investigation of any other available historical documentation is also undertaken to establish whether the claimed routes are of an historical origin. The documentary evidence that has been examined is referred to below and a list of all the evidence taken into consideration can be found in **Appendix 1**.

5.5 *Documentary Evidence*

There was no documentary Evidence submitted with the application. The documents referred to are considered by collective groupings.

Tithe Maps and Apportionment

5.5.1 Tithe Awards were prepared under the Tithe Commutation Act 1836, which commuted the payment of a tax (tithe) in kind, to a monetary payment. The purpose of the award was to record productive land on which a tax could be levied. The Tithe Map and Award were independently produced by parishes and the quality of the maps is variable. It was not the purpose of the awards to record public highways. Although depiction of both private occupation and public roads, which often formed boundaries, is incidental, they may provide good supporting evidence of the existence of a route, especially since they were implemented as part of a statutory process. Non-depiction of a route is not evidence that it did not exist; merely that it did not affect the tithe charge. Colouring of a track may or may not be significant in determining status. In the absence of a key, explanation or other corroborative evidence the colouring cannot be deemed to be conclusive of anything.

5.5.2 The Tithe Map shows the area of land as apportionment numbers 242, 253, 354, 255, 257, 256. The apportionment numbers represent land and buildings. There is no evidence of the existence of public highway or rights of way across the land.

Ordnance Survey Maps

Ordnance Survey mapping was originally for military purposes to record all roads and tracks that could be used in times of war. This included both public and private routes. These maps are good evidence of the physical existence of routes, but not necessarily of status. Since 1889 the Ordnance Survey has included a disclaimer on all of its maps to the effect that the depiction of a road or way is not evidence of the existence of a right of way. It can be presumed that this caveat applies to earlier maps also. These documents must therefore be read alongside the other evidence.

5.5.3 O.S. 1st Edition County Series 25" to 1mile 1871/2

There is a physical depiction of a track across the land from Hall Farm to Byley Lane however; this track is not on the same alignment as any of the Application Routes.

5.5.4 O.S 2nd Edition County Series 1890

The track shown on the first edition O.S. Map is shown in the same way on this edition.

5.5.5 *O.S. 3rd Edition County Series 1910/11*

The track shown on the first edition O.S. Map is shown in the same way on this edition.

5.5.6 *Ordnance Survey Six-inch England and Wales, Revised 1907 to 1908, Published: 1911*

There is a track from Hall Farm shown however, no evidence of any tracks or public rights of way on the same alignment as the Application Routes

5.5.7 *Ordnance Survey Six-inch England and Wales, Revised: 1938, Published: C1946.*

There is a track from Hall Farm however, no evidence of any tracks or public rights of way on the same alignment as the Application Routes.

5.5.8 *Ordnance Survey 1:25,000 maps of Great Britain, 1937-1961, printed and published 1948 Sheet: SJ76 (includes: Middlewich; Sandbach)*

There is a track from Hall Farm shown however, no evidence of any tracks or public rights of way on the same alignment as the Application Routes.

5.5.9 *Ordnance Survey Post War circa 1950s Map*

This Ordnance Survey map shows the relevant area of land showing the development of Carver Avenue, and Byley Lane. Crescent Road is not included. The map depicts roads and tracks. The map does not however, identify the status of those roads and tracks.

5.5.10 *Ordnance Survey Map: May 1968, Boundaries October 1975*

The Map shows buildings similar to what is in existence today. Roads and tracks are also depicted. The map does not however, identify the status of those roads and tracks.

Aerial Photographs

The Aerial Photographs do not give evidence of the existence of public rights of way they contribute to the history of the area and help to identify the features in existence on the ground at the date of the photographs.

5.5.11 *Aerial Photograph 1940s*

This photograph shows a field and trees in the relevant area. There is evidence of tracks from Hall Farm southwards however these tracks are not on the same alignment as the Application Routes.

5.5.12 Aerial Photograph 1971

This photograph shows the development of houses in the area relevant to this application. There is however, no evidence of any tracks other than those known and registered as public vehicular highway, that is, Carver Avenue, Crescent Road and Byley Lane.

5.5.13 Rights of Way Act 1932

Under this Act a Landowner could submit a plan indicating those paths which were accepted to be public rights of way on their land. The Cheshire Joint Board for the Mentally Defective ('the Board') prepared such a plan which was deposited with the County Council on 14 June 1934. The plan did not depict or admit that any public rights of way existed. The Rights of Way Act was superseded by section 31 of the Highways Act 1980 which required the submission of a Statement and Plan on a six yearly basis to afford protection from additional rights being accrued across the land indicated. The Board did not submit a further statement and plan ending the protection of the land from public right of way claims.

5.5.14 National Parks and Access to the Countryside Act 1949

The Definitive Map and Statement is based on surveys and plans carried out in the early 1950s by each parish in Cheshire of all the ways they considered to be public at that time. The surveys were used as the basis for the Draft Definitive Map. Cranage Parish Council completed the survey for this area at the time and claimed a route from Byley Lane to the Hall however; this route was omitted from the published Definitive Map. This route is not, in any event, on the same alignment as any of the Application routes.

5.5.15 Estate Plans

Estate plans were produced for various reasons, and are of varying degrees of accuracy. They can however be used to as supporting evidence. A map may give an indication of highway status if for example there is a route which at either end states where the route is from or to.

Cranage Estate Plans 1920-1 & 1934. There was no evidence of public rights of way found on these plans.

5.5.16 *Highway Committee Minutes 1995 - 2009*

The information contained in Highway Committee Minutes varies, however some of the information may be good evidence as entries may indicate whether or not a way is publicly maintainable.

No evidence of public rights of way relating to the application routes was found.

5.5.17 *Summary of Documentary Evidence*

There is no documentary evidence available to suggest that public rights exist along the Application routes.

5.6. *Site Visit*

A visit to the site was made in both March 2007 and September 2018. Photographs taken on each occasion show the changes between the two dates. Outside No. 24 Carver Avenue there was an open drive/route to the garages in March 2007. Since, however, this area has been enclosed and a worn path is in evidence on the outside of the boundary wall of No. 24.

More fencing has appeared since March 2007 between the garages and the open area behind No. 4 Dean's Row. There is evidence of a worn path on the ground between the fencing.

The grass field areas are fenced and secured; there is no evidence of use across the fields in either set of site visit photographs.

5.7 *Witness Evidence*

5.7.1. A chart illustrating the user evidence is at **Appendix 2**. The evidence pre-dating 1985, i.e. outside the relevant 20 year period, is recorded in the text.

5.7.2 19 people claimed use of the route(s), 4 of these were minors at the time of the application. Of the 19, 9 completed standard user evidence forms. 6 users submitted unsigned statements in October 2017. 7 of the witnesses have been interviewed. All witnesses were written to however given that most of the forms had been completed in 2007 it is not surprising that not all of the witnesses responded.

5.7.3 The use is by foot, bicycle, horseback and one claims use by vehicle. The earliest reported use is from as early as 1934 (since birth). The routes were used for visiting, recreational purposes, to get to the post box and for deliveries. The majority of use was from Carver Avenue to Byley Lane (A-B-

C-D on Plan No. WCA/016). There is very little user evidence of use of the other routes.

5.7.4 The letters written by the children who were under 16 at the time of the application indicate that their use was predominately play and recreation. There is therefore, insufficient evidence of use along the alignment of the routes to include the children's evidence in this report.

5.7.5 Users do not report being challenged, however, there are reports of areas being fenced off which changed the alignment of the route A-B-C-D and fencing was installed preventing use of some of the other routes possibly in 2005/6 and others in 2007.

5.7.5 **Witness 1**, in an email dated 30 July 2018 in response to the consultation process, advised that they would walk the path designated or not.

5.7.6 **Witness 2**, in a telephone call on 10 August 2018 advised that route B-C-D on Plan No. WCA/016 is the same as it was in 1959. The routes B-F, E-D and E-C are no longer available as the land was fenced, possibly before 2007. Route A-B-C-D is used today but is on a different alignment between A-B. Witness 2 confirms that they used the routes from Byley Lane to Carver Avenue in early 1960s and continues to use it today.

5.7.7 **Witness 4**, completed a user evidence form but did not respond to correspondence. They claimed use from 1993; more than twice a day however, it is unclear which routes were used.

5.7.8 **Witness 6**, completed a user evidence form and also attended an interview. Witness 6 advises that they used all the routes from 1975. They used the routes on foot, daily to go to work, as a short cut to the village and to the telephone box when it was located on Carver Avenue. They stopped using the routes before 2008 (exact date not known) as they were fenced when travellers were in the area.

5.7.9 **Witness 7**, completed a user evidence form, claims that they used the paths from 2001, several times a week until they were fenced off. From the map attached to their evidence form Witness 7 appears to have used route A-B-G. Witness 7 also notes in a letter dated 2 July 2005 to the Parish Council that one piece of land was fenced preventing access through the wood.

5.7.10 **Witness 9**, completed a user evidence form and attended an interview. He advised that he used the routes from 1986 (from 4 years old) to go to school and for pleasure. They used route A-B-C-D daily and used all other routes as much as weekly. Witness 9 used the routes until they went to university in 2000. They also use route A-B-C-D now as they has their own children. They used the routes mostly on foot and occasionally by bicycle.

5.7.11 **Witness 10**, completed a user evidence form and attended an interview. They used the route A-B-C-D regularly (156 times a year) from 1978 and used the other routes but not regularly. Witness 10 used the routes on a bicycle, on horseback and on foot.

5.7.12 **Witness 11**, completed a user evidence form and attended an interview. They used the routes from 1979 either weekly or 3/5 times a week. Witness 11 used route A-B-C-D daily and route B-G every 3 weeks. The fencing stopped them using route B-G. They used the routes on foot and bicycle.

5.7.13 **Witness 12**, completed a user evidence form, submitted a statement and attended an interview. They advised that they used route A-B-C-D and Route C-E from September 1986. The routes were used on foot for dog walking. Horse riders were seen initially using route A-B-C-D. Route C-E was fully secured in the last 12 months. At points F and G there were private / keep off signs.

5.7.14 **Witness 15**, completed a user evidence form. They used the routes from 1997-2006 on horseback and 2001-2006 on foot. They used route A-B and then across the field to Byley Lane, and from October 2005 to May/June 2006 used route A-B-C-D. They advised that fencing was placed across route A-B-C-D at about point B in May/June 2006 and Witness 15 advises that the open grassland was fenced in October 2005.

5.7.15 **Witness 18**, completed a user evidence form with the help of a relative in December 2017 and they also attended an interview. Witness 18 advised that they used the routes from 1934 (year of birth) on a daily basis. They still use Route A-B-C-D but are unable to use the other routes as they were fenced in 2007. The route used was the same as the on Plan No. WCA/016 until a chicken coop was positioned over the path.

5.7.16 **Witness 19**, completed a user evidence form and attended an interview; they also telephoned on 1 August 2018 advising that they have lived there for 26 years. In interview they said that the land had been blocked off in 2006. They said that children walked every day to the school bus and also claims that people used to walk to the telephone box on the corner of Carver Avenue. Witness 19 advised in their interview that they used a route across the field from G-F-E-D to go to work and to the post box before it was relocated further along Byley Lane. They used route G-B to go to Carver Avenue.

5.7.17 A local resident, wrote in reply to the consultation letter on the 30 July 2018 to say that they do not have land in the area but have lived in the area for 20 plus years and been a member of the Parish Council for 10 years.

Route A-B-C-D has been used regularly for many years. The main use is children who walk from Carver Avenue and Hall Farm Estate to catch the school buses on Byley Lane near point D. The route is also used by people wishing to walk to the playing fields and bowling green to the south of Cranage. They have also occasionally seen cyclists and joggers use the route. The area containing the other routes has been fenced off for many years but prior to that, routes G-F, E-C and E-D were used by children from Crescent Road to reach point D. They are unable to comment on route A-B-G.

5.8 Summary of User Evidence

5.8.1 The witness evidence shows clear evidence of use of the route A-B-C-D, however, evidence of use of the other routes is fewer in number. 9 people claimed use of the route A-B-C-D and of those 6 were interviewed to verify their evidence. The alignment of route A-B-C-D was changed when fencing was installed in approximately 2006/7 and the width at that time was also reduced preventing the use by horses. In regard to the other routes; 6 witnesses, of whom 5 were interviewed, claimed use of route B-G; 4 claimed use of route G-F, all of whom were interviewed; 5 claimed use of route C-E, all of whom were interviewed and 4 claimed use of route D-E, all of whom were interviewed. Routes B-G; G-F; E-C and E-D are within the open grassland area and were also fenced preventing free access. The dates of the installation of the fencing range from 2005 to 2007.

5.8.2 For route A-B-C-D, the earliest use is from 1934 to the current time (albeit on a different alignment to the claimed route shown on Plan No. WCA/016. The alignment may have changed around 2006-2007 when fencing was erected. 9 witnesses used the route on foot, 6 of those also used the route on a bicycle, 2 used the route on horseback; 1 twice a year, the other weekly. Use of the route is regular. Two witnesses claim that 5% of their use was by bicycle. Some users have observed others using the routes on foot, bicycle and horseback.

5.8.3 The use of the routes on horseback and bicycle is limited as there are only 2 people who claim use on horseback, and it is not for the full 20 year period and for those who claim bicycle use it is also in addition to foot use. Landowners claim bicycle use is by children. It is therefore, likely that the majority of use is on foot.

6. Landowner Evidence

6.1 The land affected by the application was acquired from the Secretary of State for Health in 2001. The land had been under the ownership of Hospital and Health Authorities from at least 1934 as evidenced from the deposit mentioned in paragraph 5.5.3 above. The land was however, sold in 2001 and

then divided into smaller plots and some of the land was sold again in 2006. The land is now owned by several landowners. However, some sections are still unregistered.

6.2 *Crown Land.* The Land affected by this application, was previously owned by The Secretary of State for Health, which is a government department. Land belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, the Duchy of Cornwall, a government department or held in trust for a government department, is Crown Land.

6.3 *Landowner 1* purchased the land he owns in 2006, from a previous owner who originally bought it from the Secretary of State for Health. In a letter to the Parish Council dated 4 March 2006, Landowner 1 lists several reasons for his objections to the establishment of footpaths across their property, in particular:-

No previous owner of the land has dedicated a path for public use.

Landowner 1 does not believe a presumed right of way exists under the 20 year rule as they can remember the access from Carver Avenue being blocked, so within the last 13 years the right of way has been challenged.

The number of people using the access across the field increased dramatically since the bus stop was moved from the A50 a few years ago. Landowner 1 advises that there is a small saving in distance, surely no justification for infringement of privacy of residents of Deans Row and Yew Tree Cottage. Landowner 1 also says that it is safer to cross the field than use the A50. However, the A50 has a footpath separate from the road itself. The route via the track at the back of Deans Row and Yew Tree Cottage has no provision for pedestrians.

Landowner 1 admits in their letter that a line shown on a map they enclose is more or less the route taken by people cutting across the land, which is unacceptable to them and says "*I do not say that I am going to grant access across my land but.....there may be room for negotiation*" .

6.3.1 In a letter dated 18 March 2007 to Cheshire County Council, Landowner 1 advises that a post and wire fence which dissects route B-G has been in place since about June 2005 (*This may be the fence referred to in Witness 6's evidence form preventing use of Route A-G-B*). Several fences were erected in the summer of 2005 to keep travellers off the land. This has also prevented people riding horses or driving cars across the field to Crescent Road. Landowner 1 has lived here for nearly 14 years and they say

that the number of times they have seen people following the routes; B-G; E-D and G-F could be counted on the fingers of one hand. There certainly have never been well worn tracks.

Landowner 1 advises that route E-C is a well-worn track, they have used it themselves. The owner left gaps in the fence at both ends to allow access. It had only become difficult to use recently because of building work behind an adjacent property.

Route A-B-C-D, as explained in their letter of 4 March 2006 (above), had been diverted across the middle of their land because of the rubble dumped by a neighbour. Since the rubble was removed people have kept more to the edge of the field. Landowner 1 does not object to people occasionally crossing their land provided they keep to the boundary.

Landowner 1 then states that they object to any formal establishment of a footpath for safety, nuisance and vandalism reasons. They also object to the establishment of the part of route B-G that affects their land for litter, nuisance, vandalism reasons and that they have rarely seen anybody on route B-G.

6.3.2 In a letter dated 29 April 2007, Landowner 1 advises that the route south of point B could have only been in existence from 1994 to 2006 as in 1994 rubble and soil was moved onto the field. This forced anyone cutting across the land to take a route further westerly. In 2006 when Landowner 1 brought the land they removed the mound of rubble and soil, since then people have used the route claimed.

6.3.3 Landowner 1 wrote to Cheshire East Council in October 2014 having received a letter from the Parish Council which made reference to registering the footpath. The landowner attended a meeting with the Parish Council and was told that the permissive path was to 'preserve the status quo'. In their letter to the Borough Council they say that they would be willing to maintain a permissive path but opposes a public right of way and that they had made this clear to the Parish Council.

6.3.4 In 2015 Landowner 1 carried out an analysis of the claim, which they submitted to Cheshire East Council, and concluded that the evidence statements are inconsistent and sometimes incorrect. In addition there are exaggerations when reporting usage. They submit that the claimed path between Carver Avenue and Byley Lane fails the 20 year test. They state that there is no doubt that the path from Carver Avenue to Byley Lane is used, though not used anything like as frequently as the witness statements claim and that they would be willing to agree to a permissive footpath.

6.3.5 In a letter dated 16 October 2017 to Cheshire East Council, Landowner 1 advises that the diagram published by the Parish Council in a newsletter does not accurately show the position of the footpath. They state that nobody can claim to have walked the path because it is shown blocked by the building at the end of Carver Avenue. When the application was made to claim the paths, a meeting was held and the landowners agreed to a 'permissive path' which should have settled the matter. They state that the landowners have never suggested that the path would be closed and the path shown on the diagram differs considerably from the path claimed in 2007.

6.3.6 In a letter dated 31 July 2018 in response to the consultation letter, Landowner 1 advises that they are only concerned with Route B-C on Plan No. WCA/016. This is used mostly by school children (half a dozen at most) taking a short cut to Byley Lane to get the school bus. Out of term time usage is negligible. There are a few dog walkers who use the path occasionally. Occasionally a cyclist will use the path but this is fairly rare (usually children). Horse riders occasionally used the path though not as frequently as the witness statement would have us believe, at least not in the last 10 years as the fence is restrictive. Landowner 1 advises that they have never given anyone permission to cross their land but has not ever stopped anyone using it or suggested closing it.

6.3.7 In interview Landowner 1 advised that they had owned the land at point B as shown on the Consultation Plan, from 2006 and the other area which is currently unregistered to the east of A-B, they have occupied since 2010. They advised that No. 4 Dean's Row extended their garden in 1994 and confirms that route A-B-C-D is used by people occasionally, school children use it for the school bus and 2 people use it every day for dog walking. Horses also used to come through route E-C occasionally. Otherwise, Landowner 1 advised that use of the other routes is spurious, mostly kids wandering. The current fencing, post and wire, was installed around the field areas in 2006/7.

Landowner 1 reiterates that the route used, A-B-C-D, was not as shown on the Consultation Plan as there was rubble in the way which was moved in 1994. They claim that this route has moved several times over the years. Landowner 1 objects to the path going through the middle of their land but does not object to where the path is now.

In a follow up letter dated 12 September 2018, Landowner 1 advises that No. 4 Deans Row extended his garden to the north and to the west. It is more accurate to say that there were two regular dog walkers, but a few others use the path from time to time. Cyclists rarely use Route A-B-C-D, those who do are usually children.

6.4 *Landowner 2*: Following receipt of the consultation letter, Landowner 2 telephoned on the 2 August 2018 to advise that they own the garages at the end of Carver Avenue and that they were re-built with planning consent and agreement from the Council. They advise that they use this route and as long as it does not affect their property they are not interested in the application. They have not seen any horse riders, in any event there is nowhere for them to go.

6.4.1 In interview Landowner 2 advised that they moved into their property in 2009. They have concerns with the depiction of route A-B on the Consultation Plan and say it should be outside the boundary of their wall. They do not want people using the drive to the garages. They have seen people using the route outside their boundary wall on bikes and foot but not horses. It is not used in the winter as it gets wet and muddy. They do not want the path to be removed as they use it.

6.4.2 Landowner 2 called on 13 September 2018 to confirm that it was Cheshire East Council who had no issue with the fence on the boundary of their property not the Parish Council. He said he would write in and confirm this and also send a copy of the letter he received from the Council; this was not received.

6.5 *Landowner 3*. A previous owner of an adjacent property telephoned on the 18 July 2008, to object to the application. This was followed by an email confirming that they object as the route is directly in front of their property and runs over land that they hope to buy. This person is no longer resident in the area.

6.6 *Landowner 4*. In a letter dated 27 March 2007 to the Parish Council and copied to the Cheshire County Council, Landowner 4 confirms that they are prepared to re-establish a 'Permissive Path'.

6.6.1 Landowner 4 telephoned the Borough Council on the 12 August 2015 regarding their landownership where part of the route between B and D runs. The Parish Council had asked them if the Parish Council could put a kissing gate on the route. Landowner 4 advised that they are not averse to the idea that one path exists here (not two as claimed). They said that the land was brought from Merseyside Health Authority in 2000 with a caveat that the land was to be held as amenity land and not built on for at least 30 years.

6.6.2 In a follow up e-mail to the Parish Council and copied to Cheshire East dated 12 August 2015, Landowner 4 advises that they cannot agree to kissing gates being erected from Byley Lane cul de sac across the field (route E-C) until the issue of the other 5 proposed crossings are

resolved. They advise that they would not object to point C if the other access points are dropped from the application.

- 6.6.3 In their interview Landowner 4, advised that they purchased the field area in 2001 from the Secretary of State for Health. They then sold the northern area in 2006. The fences were put up in 2007. At that time the routes across the fields were restricted. At F there was a gap and a staggered opening at C. Landowner 4 advised that route E-C is in the incorrect position on Plan No. WCA/016 and should be further northwards. Underneath is a drainage pipe which affects the surface above it and helps the route to stay dry. People were able to use E-C after the fields were fenced in 2007 but Landowner 4 never saw anyone using it. They do not object to the use of E-C. One lady used E-D, she lived on Byley Lane. Landowner 4 did see a horse go onto the field from A-B on 2 occasions. They have no knowledge of other routes on the Plan.
- 6.7 *Landowner 5.* In a letter dated 30 March 2007 to Cheshire County Council, sent by their solicitor in response to the application being made, this landowner stated their objection to the proposal.
- 6.7.1 In a letter dated 23 August 2018 in response to the consultation letter they further advise that they still object to the designation of the proposed public footpaths on their land (route B-G). They acquired the land in 2006 and immediately erected a fence around the perimeter and set up two notices advising that it was private. They are not aware of any use by the public of the land.
- 6.8 *Landowner 6,* in a letter dated 25 August 2018 in response to the consultation, they advise that they have lived in the area since August 2003 and the path, route A-B-C-D, has been in constant use. The route is used on a daily basis during term time for school children to walk from Carver Avenue and is also used by day and night for people from the direction of Carver Avenue to use while dog walking. The route is used all year round and at all times by day and night. They did not even know that the other routes existed. They do not object to anyone using the footpaths and regularly use Route A-B-C-D in both directions whilst out walking.
- 6.9 In an email dated 10 January 2011 from the Council's Property Services, it is advised that an area of land between Carver Avenue and the A50 is owned by the Council.
- 6 10 An e-mail generated internally by Development Management dated 26 April 2011 advises that a small piece of land behind Deans Cottages

and to the side of Carver Avenue has been currently fenced off. It is causing much disruption and bad feeling with other residents as it has always been part of a footpath/woodland that school children have walked across.

7 Summary of Landowner Evidence

The Landowners are, in general, accepting and agree that route A-B-C-D is used by the public. Landowner 1 however, does not want the route to go across their land as shown on Plan No. WCA/016, they are happy for it to remain where it is now. They have stated their willingness to enter permissive path agreements on several occasions including in direct discussions with the Parish Council and other affected landowners in 2007. The current (2018) alignment of this route is shown in its approximate location in the plan at Appendix 3. A full survey of this route has not been undertaken.

It is also clear that the width of route A-B-C-D was reduced by the fencing and boundary wall put in by Landowner 2 and also the alignment was set out between fences by Landowner 1.

The other routes, Landowner 5 claims, were fenced in 2006. It is not entirely clear as to when the fences were installed as the application was made in early 2007 and the user evidence forms were completed late 2006 to early 2007. One user claims that fencing was installed in October 2005, this is however, likely to be the fence referred to in Landowner 1's letter of 18 March 2007. Landowner 6, through his solicitor, claims that the fencing was put up in 2006.

There is a general consensus that route A-B-C-D has been used although some landowners may have been in the belief that it was on a permissive basis. There is less evidence of use of the other routes which have been challenged by fencing and also private signs in a couple of locations.

8 Bringing the right to use the routes into question

8.1 In this case the date the use of the Application Routes was brought into question can be considered to be the date the application was made in March 2007, however there is evidence of some of the routes being fenced in 2006.

8.2 *Route A-B-C-D*

The alignment of this route was changed by the installation of fencing, prior to March and April 2007 and the later development of the garages at Carver Avenue; there is evidence of this from site photographs taken in March 2007.

8.3 *Route A-B-G*

Fencing was installed, across A-B-G, possibly in 2005, according to one witness, preventing use from Crescent Road to Carver Avenue

8.4 *Route G-F*

Fencing was installed again possibly in 2005, when the land was divided and sold, preventing use of Route G-F and A-B-G.

8.5 *Route E-C*

Fencing was installed in 2007 however; gaps/entrances were left at either end until closed for the grazing of sheep in the same year. A private sign is also in existence at the turning circles at points F and G and it seems that these were installed at a similar time as the fencing.

8.6 *Route E-D*

Fencing was in place around this area of land in January 2006, as evidenced by a letter and photographs dated 5 January 2006 from Cranage Parish Council.

8.7 In order to show that public rights have been acquired along the length of the claimed routes through usage, a twenty year period must be identified during which use of the route by the public has been established. This period is usually taken as the twenty years immediately prior to a challenge to that use. It is considered that the date of the application, March 2007 would have brought the right to use the route(s) into question. The relevant period would therefore, be 1987 to 2007, this would apply to route A-B-C-D. However there is also evidence that fencing prevented use of the other routes; it is possible that a fence was installed across route A-B-G and G-F in 2005 making the relevant period for those affected routes would to be 1985-2005. Routes E-C and E-D were fenced in 2007.

8.8 However, as noted previously the land in question was until 2001, Crown Land. The Highways Act 1980 (Section 327) indicates that the Act does not apply to land belonging to a government department unless there is an agreement between the highway authority and the government department that the Act shall apply. In any event, the Crown is not bound by any statute unless the statute expressly binds the Crown therefore there cannot be a presumption of dedication of a public right of way over Crown Land under Section 31. The land affected by the application was owned by the Health Authority from at least 1934 until 2001. The use of the routes was challenged from at least 2005 when the first section of fencing was installed. The use of the routes has therefore, only been available to use 'as of right' by the public

from 2001 to 2005 and in some cases to 2007, depending on when the fencing was installed and the route in question. There are therefore insufficient years of use available to satisfy the 20 year test as the period of use outside of the ownership of the Health Authority is only 4-6 years.

9. Common Law Dedication

Public rights could however, be deemed to exist under Common Law where the actions (or inaction) of a landowner are such that it can be inferred that they intended a way to be dedicated and where the public have accepted it. There needs to be evidence of use but not necessarily 20 years.

9.1 Under Common Law there can be a presumption of dedication over Crown Land however, whilst there appears to have been use of the routes in question to some degree, the existence of the deposited plan referred to in paragraph 5.5.13 demonstrated that there was no intention to dedicate the land and subsequently no action on the part of the landowner to indicate a contrary intent. Further, when the land was sold there was no indication of the existence of public rights of way. It is also unknown as to whether or not the Health Authority observed and were aware of the usage and accepted the use as being consistent with the establishment of public rights of way.

9.2 When the land was purchased in 2001 it remained open. However, since approximately 2005 the routes were fenced preventing access except for route A-B-C-D, again showing a negative intention to dedicate any of the land for use as public rights of way.

9.3 With reference to route A-B-C-D the use of the alignment and width of the route was challenged as a path was accommodated on a revised alignment by the installation of fencing in approximately 2007. Its use was also challenged by a letter stating objection to the establishment of formal footpaths in 2006 and the later development of the garages and boundary of No. 24 Carver Avenue. Use of this route, as applied for in the application, was therefore challenged from point A to the boundary of No.4 Deans Row, again therefore, showing a negative intention to dedicate.

10. Conclusions

10.1 The evidence in support of this application must show, on the balance of probabilities that public rights subsist or are reasonably alleged to subsist along the claimed routes.

10.2 There is insufficient documentary and historic evidence to show that public rights of way exist along the alignment of the Application Routes.

10.3 As the land was Crown Land prior to 2001 there is insufficient evidence of use since that time for a full 20 years to support the dedication of the routes as public rights of way. Therefore, it is considered that the requirements of section 31(1) of the Highways Act 1980 have not been met.

10.4 There is insufficient evidence to show that public rights are deemed to exist under Common Law dedication during the time of ownership by the Crown and since 2001 by subsequent landowners.

11 Implications of the Recommendations

11.1 Legal Implications

11.1.1 Under section 53 of the Wildlife & Countryside Act 1981 (WCA), the Council has a duty, as surveying authority, to keep the Definitive Map and Statement under continuous review. Section 53 (3) (c) allows for an authority to act on the discovery of evidence that suggests that the Definitive Map needs to be amended. The authority must investigate and determine that evidence and decide on the outcome whether to make a Definitive Map Modification Order or not.

11.1.2 Upon determination of this application, the authority must serve notice on the applicant to inform them of the decision. Under Schedule 14 of the WCA, if the authority decides not to make an order, the applicant may, at any time within 28 days after service of the notice, appeal against the decision to the Secretary of State. The Secretary of State will then consider the application to determine whether an order should be made and may give the authority directions in relation to the same.

11.1.3 The legal implications are contained within the report.

12.2 Finance Implications

12.2.1 If objections to an Order lead to a subsequent hearing/inquiry, the Council would be responsible for any costs involved in the preparation and conducting of such.

12.3 Policy Implications

12.3.1 There are no direct policy implications.

12.4 Equality Implications

The legal tests under section 53 of the Wildlife & Countryside Act 1981 do not include an assessment of the effects under the Equality Act 2010.

12.5 Human Resources Implications

There are no direct implications for human resources.

12.6 Risk Management Implications

There are no direct implications for risk management.

12.7 Rural Communities Implications

There are no direct implications for rural communities.

12.8 Implications for Children & Young People

There are no direct implications for children and young people.

12.9 Public Health Implications

There are no direct implications for public health.

13 Ward Members Affected

13.1 Councillor Les Gilbert and Councillor Andrew Kolker, Dane Valley Ward, have been consulted. Councillor Gilbert, sent an email dated 27 July 2018, advising that it would not be appropriate for him to comment as he sits on the Council's Public Rights of Way Committee.

14 Consultation & Engagement

14.1 The user groups, neighbouring landowners and statutory undertakers have been consulted.

14.2 Cadent, National Grid, Plant Protection, replied in a letter dated 1 August 2018 advising that they have apparatus in the area and therefore, object to activities pending further investigation.

14.3 Congleton Ramblers responded by email dated 31 August 2018, that they would welcome the addition of these footpaths as Public Rights of Way.

15 Access to Information

The background papers relating to this report can be inspected by contacting the Officer below.

Contact Information

Any questions relating to this report should be directed to the following Officer:

Name: Clare Hibbert

Job Title: Definitive Map Officer

Email: clare.hibbert@cheshireeast.gov.uk