

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 12 March 2012
Report of: Greenspaces Manager
Subject/Title: Wildlife and Countryside Act 1981 – Part III Section 53
Investigation into Claimed Footpath at Malkins Bank Golf Course, Parish of Hassall, from Mill Lane to Bridleway No.15, Hassall

1.0 Report Summary

- 1.1 The report outlines the investigation of a claimed footpath in the Parish of Hassall the details of which were presented to the Borough Council by Mr C Meewezen. This includes a discussion of the consultations carried out in respect of the claim, the historical 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 the footpath to the Definitive Map and Statement.
- 1.2 Members are invited to make a decision based on the evidence as set out in the report in light of the application of the legal tests required by Section 53 of the Wildlife and Countryside Act 1981 as set out in the report (particularly at paragraphs 10.3.1 and 10.3.2).

2.0 Recommendation

- 2.1 An Order be made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by adding a Public Footpath on the route shown between points A-B on drawing number WCA/003.
- 2.2 Public notice of the making of the Order be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.
- 2.3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

3.0 Reasons for Recommendations

- 3.1 The evidence in support of this claim must show, on the balance of probabilities that a reasonable allegation has been made that public footpath rights subsist along the claimed route. It is considered that there is sufficient historical evidence to support the existence of public footpath rights along the

route A-B on drawing no. WCA/003. On the balance of probabilities, the requirements of Section 53 (3)(c)(i) have been met and it is recommended that the Definitive Map and Statement should be modified to add the route as a Public Footpath.

4.0 Wards Affected

4.1 Brereton Rural

5.0 Local Ward Members

5.1 Councillor John Wray

6.0 Policy Implications including – Carbon Reduction – Health

6.1 Not Applicable

7.0 Financial Implications

7.1 Not Applicable

8.0 Legal Implications (Authorised by the Borough Solicitor)

8.1 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.

8.2 The legal implications are contained within the report.

9.0 Risk Management

9.1 None

10.0 Background and Options

10.1 Introduction

10.1.1 This claim originally came to the attention of Cheshire County Council in approximately 2005 when an inquiry was made regarding whether a right of way existed at this location and consequently an application pack to make a claim to record a footpath was sent out to Mr Meewezen. The existence of the footpath was being concurrently pursued by Mr Meewezen with the landowner, Congleton Borough Council.

- 10.1.2 In order to address this situation Congleton Council instigated a Footpath Task Group who contributed to a report put by the Health Scrutiny Committee before the Council's Executive in April 2006. The report looked into whether a footpath ever existed at this location and received input from a County Council Public Rights of Way Officer as well as other Officers.
- 10.1.3 They examined the evidence considered by this report, including the Hassall Tithe Map of 1841; A Plan of a Proposed Railway 1845 and Ordnance Survey maps from 1872 and 1898. The most pertinent item was a statutory declaration made by the landowners, ICI, in 1941 under the Rights of Way Act 1932 which states the footpath in question has been dedicated as public. It was accepted that there was no evidence to suggest that this right of way had been stopped up or diverted since 1941 but they were silent on whether or not the evidence indicated the continued existence of the footpath.
- 10.1.4 The report considered that there was no evidence to suggest the route was currently being used and that the 'used route' was some distance away. The report considered that the public attempting to use this route would be at considerable risk as it ran through the 6th and 7th fairways of the Golf Course.
- 10.1.5 The report concluded that it was felt that the needs of the public had been addressed by the previous dedication of a bridleway running north to south across the course (now Bridleway No. 15) and that the correct procedure to have a footpath recognised was to submit any relevant evidence with an application for a Definitive Map Modification Order to the Public Rights of Way Office at the County Council.

10.2 Description of the Claimed Footpath

- 10.2.1 The claimed route commences on Mill Lane at Point A on Plan no. WCA/003 and runs in a northerly then north westerly direction crossing the stream and then running generally westerly to the north of the stream and continuing to its junction with bridleway no. 15. The surface is grassed. Where the path leaves Mill Lane there is post and rail fencing preventing access and further along the road to the south east there is a gap in the fencing/hedge. There is no bridge where the path crosses the stream although the remnant of a sleeper bridge can be seen.

10.3 The Main Issues

- 10.3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Cheshire East Borough 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
- 10.3.2 One such event (section 53(3)(c)(i)) requiring modification of the map by the upgrading of a right of way, is the discovery of evidence by the Council which, when considered with all other relevant evidence available, shows:-

‘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’

10.3.3 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, either 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.

10.3.4 The relevant evidence in this case is the ICI (Alkali Ltd) Statutory Declaration dated 1941 with a map, dated 1935, indicating their areas of land ownership in Wheelock and Hassall. This document was deposited under the provisions of the Rights of Way Act 1932 which allowed a land owner to declare those rights of way that they accepted affected their land at the date of deposit with a statement that they did not intend to dedicate any further rights of way. The statement that should accompany the 1935 plan is not available however the 1941 statement indicates that since that declaration no further rights of way have been dedicated than those shown on the plan of 1935. It was a requirement of the Act that a statement must be renewed within six years, hence the time difference between the two documents.

10.3.5 There is a well known maxim in Rights of Way law:

‘Once a highway, always a highway’

In the case law *Harvey v Truro Rural District Council 1903* it was said that ‘Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used would preclude the public from resuming the exercise of the right to use it if and when they think proper’

Therefore the only means by which a public right of way can be extinguished is by use of a statutory provision such as under sections 116 and 119 of the Highways Act.

10.4 Consultations

10.4.1 Consultation letters were sent to the Ward Member; Hassall Parish Council; User Groups/Organisations and the landowner and current lessee of the golf course.

10.4.2 There has been no response from the local member. Hassall Parish Council have written in to say that the matter was discussed at their parish meeting and that they have no knowledge or documentation relating to the existence or otherwise of this footpath and that they have no objection to raise to the proposal.

10.4.3 Congleton Rambler’s Association have e-mailed to say that they support the proposal to see the footpath formally recognised. They comment that the

footpath forms a key link in the network for access from the west to the canal towpath and easterly and also for residents on Mill Lane gaining access to services such as transport and the post office at Malkins Bank.

10.4.4 The current lessees of the Golf Course, which is owned by Cheshire East Council, have responded to say that they support the findings of Congleton Borough Council's Scrutiny Committee Report of 2006, outlined at point 10.1 in this report. They believe that the report fully set out and explained the history and background to the suggested route. They also refer to an earlier Ombudsman's decision in 1999 which considered the footpath claim and concluded that it was not a public right of way. It is suggested that the route is not used as a right of way and that there is no bridge crossing the brook and no evidence of such having been in place since the golf course was created in 1986. It is felt that pedestrians attempting to use this route would be at considerable risk as it crosses the 6th and 7th fairways and that there is a bridleway running north to south across the course in existence that addresses the needs of the public. They conclude by asserting that the claim be rejected.

10.4.5 No comments have been received from Cheshire East Council Property Services.

10.5 Investigation of the Claim

10.5.1 In addition to the Statutory Declaration document, additional research has been undertaken to see if available historical documentation supports the existence of the footpath or shows that the route has been formally closed by statutory procedure.

10.5.2 The standard reference documents have been consulted. Details of the evidence taken into consideration can be found in Appendix 1.

10.6 Documentary Evidence

County Maps 18th-19th Century

10.6.1 These are small scale maps made by commercial map-makers, some of which are known to have been produced from original surveys and others are believed to be copies of earlier maps. All were essentially topographic maps portraying what the surveyors saw on the ground. They included features of interest, including roads and tracks. It is doubtful whether map-makers checked the status of routes, or had the same sense of status of routes that exist today. There are known errors on many map-makers' work and private estate roads and cul de sac paths are sometimes depicted as 'cross-roads'. The maps do not provide conclusive evidence of public status, although they may provide supporting evidence of the existence of a route.

10.6.2 On Bryant's Map (1831) part of the route is shown by a double pecked line indicated on the key as 'Lanes and Bridleways'.

10.6.3 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.

10.6.4 The Tithe Map and Award of Hassall dated 1841 shows most of the route in question as a double pecked line. A small part of the route has an apportionment number 14a which is described as Road and Waste, whilst the greater part falls under apportionment number 16 and is described as Meadow. The entire route appears to be faintly shaded.

Ordnance Survey Maps

10.6.5 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.

10.6.6 Ordnance Survey Map 1" to 1 mile 1842 'Old Series'

This shows most of the route and is similarly depicted as on the Tithe Map.

10.6.7 North Staffordshire Railway – Liverpool Extension 1845

Railway Plans had to be produced and deposited prior to a railway company obtaining an Act of Parliament authorising the construction of their intended railway. The maps covered a corridor of land defining the limits of deviation either side of the line of the intended railway, with plot numbers for the land and public and private routes, which are referred to in a book of reference. They showed the status of routes bisected by the proposed line, the accuracy of which would have been in the interest of those affected. The plans were drawn to comply with parliamentary requirements. The Bill and plans were open to consultation and debate and as such, they carry strong evidential weight. The Book of Reference for a railway which was in due course built provides good evidence for the existence of public rights over a way as it was in everyone's interests that the information given was correct. Also these applications were open for public scrutiny and objection. In this case an Act of Parliament will

have followed giving additional weight as the information therein had passed through a statutory procedure.

- 10.6.8 The extension to the North Staffordshire Railway depicts an intended railway which was subsequently built. The part of the route shown within the limits of deviation is within plot number 172 which is recorded as 'Grass field and footpath'. There is a second route contained within this plot.

Ordnance Survey 6" and 25" Maps, 1872 First Edition, 1899 Second Edition and 1909 Third Edition

- 10.6.9 The route is shown on the First edition maps in the same way as on the Tithe and Old Series Maps. The route continues to be shown on the 2nd and 3rd edition maps in a like manner although on the 3rd edition the route is annotated with 'F.P'.

The Finance Act 1910

- 10.6.10 Unfortunately the information pertaining to this area is not available in the Chester Record Office. It may be available in the National Archives in Kew.

ICI Statutory Declaration 1935 and 1941

- 10.6.11 The Map produced to accompany the original statutory declaration dated 13th February 1935 is based on the O.S. 3rd Edition 6 inch map. It depicts the route in question in red within a green shaded area of land. The plan is stamped and signed by the secretary representing ICI and by the Clerk to the County Council. The declaration dated 6th February 1941 declares that ICI are still the estate owners of the land coloured green on the plan of 1935 and that the ways shown thereon and coloured red have been dedicated by them (or their predecessors in title) as public footpaths. This declaration is signed as having been witnessed by a Commissioner for Oaths.

Internal Pre Definitive Map Records

- 10.6.12 Prior to the National Parks and Access to the Countryside Act 1949, which placed a duty on all surveying authorities to record public rights of way; records within Cheshire County Council were kept in the form of a 'Green Book' and paper files. The Green Book is a book of O.S.map bases with additional information annotated on. In this book the claimed route is indicated on the plan with a reference to 'Rights of Way Act 1932 deposited Plan. There is also a reference to a file number within which there is a memorandum from the County Surveyor to Congleton Rural District Council referring to this footpath. It states that it is shown on the map deposited by ICI and that

'it will be necessary at some future date to make arrangements to have it included as a public footpath. It is well defined by stiles at either end and is a grass footpath in a good and clean condition.'

This memorandum is dated 3rd November 1955.

10.7 Conclusion

- 10.7.1 The existence of the Statutory Declaration by ICI in 1935 and 1941 is effectively an acknowledgement that a footpath has been dedicated by the then landowner. The documentary evidence from 1831(Bryant's Map) up to the date of the declaration consistently depicts a route in this location although the western end has changed from sometime between 1872 (O.S. 1st edition) and 1899 (2nd Edition) when some houses appear. This area is often referred to as 'The Hollows' and this may be a reference to these properties. The Tithe Map adds to the presumption of the existence of a route at this point and the Railway Plan indicates that this route could be the footpath referenced.
- 10.7.2 As stated previously it would be necessary for there to be a formal closure order to extinguish a route that had been legally dedicated and therefore become a highway. The Quarter Sessions Highway Index has been viewed at the Record Office and a wide search of the online records of the London Gazette has been undertaken. It was necessary up until the late 1980's for all public path orders to be advertised in the London Gazette and therefore it can prove a useful source of information. Nothing relating to a path closure on this route has been discovered.
- 10.7.3 The evidence to support this claim must show, on the balance of probabilities that a reasonable allegation has been made that a public footpath rights subsist along the claimed route. It is considered that there is sufficient evidence to prove the existence of a public footpath along the route A-B on drawing no. WCA/003. Therefore in line with the requirements of Section 53 (3)(c)(i), it is recommended that the Definitive Map and Statement should be modified to add the route as depicted on the 1935 statutory declaration map as a public footpath.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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