

Highways and Transport Committee

23rd November 2023

**Wildlife & Countryside Act 1981 – Part III, Section 53.
Application No.MA/5/227: Application to add a Public Footpath
between Alderley Road and Grove Street, Wilmslow**

Report of: Peter Skates, Director of Growth and Enterprise

Report Reference No: HTC/33/23-24

Ward Affected: Wilmslow East

Purpose of Report

- 1 This report outlines the investigation into an application made by Mr Davenport to amend the Definitive Map and Statement to add a public footpath between Alderley Road and Grove Street, in the town of Wilmslow. The report includes a discussion of the consultations carried out in respect of the claim, the historical evidence, user evidence and 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 a Public Footpath to the Definitive Map and Statement.
2. The work of the Public Rights of Way team contributes to the Green aim of the Corporate Plan, the “thriving and sustainable place” priority and the policies and objectives of the Council’s statutory Rights of Way Improvement Plan.

Executive Summary

- 3 The report considers the evidence submitted and researched into the application to add a public footpath between Alderley Road and Grove Street, Wilmslow. The evidence submitted consisted of user evidence forms and historical documents.

- 4 The report determines whether on the balance of probabilities the status of public footpath has been acquired. The documentary evidence considered in this case does not demonstrate the existence of the route. The user evidence investigated and discussed provides insufficient evidence of use by foot over the relevant 20 year period and, in conjunction with the historical evidence, leads to the assertion that footpath rights do not exist, the rationale for this being explained in the report.

RECOMMENDATIONS

The Highways and Transport Committee is recommended to:

1. Decide that a Modification Order not be made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement to add a footpath as shown between points A and B on Plan No. WCA/035 at Appendix 1.
2. The application be refused on the grounds that there is not any robust evidence to overturn the legal presumption that the Definitive Map and Statement are correct.

Background

- 5 The application was made to Cheshire East Council on 29th March 2004 by Mr David Davenport, a local resident of Wilmslow, ('the Applicant') to add a footpath between Alderley Road and Grove Street in the town of Wilmslow. The application consisted of user evidence forms, maps and photos. A total of 12 user evidence forms were submitted claiming use on foot.
- 6 Evidence was submitted in the form of a copy of an article in the Wilmslow Express newspaper, an abstract from an Ordnance Survey map and a photograph of the Lady Luncheon Club dated 1953.
- 7 The arcade, a covered area and as described by the applicant and in user evidence forms, replaced a garden and fountain understood to be presented to the people of Wilmslow by the Ladies Luncheon Club in the Coronation year 1953. The arcade was described as a short cut, a regular meeting place and resting place for the residents of Wilmslow,

until Barclays Bank Plc, the site leaseholder, fenced off the area in January 2004 due to antisocial behaviour.

- 8 Shortly after the fencing off of the area, the former Cheshire County Council received a number of letters from concerned residents and local councillors resulting in the application under section 53 Wildlife and Countryside Act 1981 being submitted. Shortly after the application was made, the fence was removed by Barclays Bank.
- 9 The County Council contacted the Applicant shortly after the removal of the fence, asking if they would like to withdraw their application. Their response was that they would like to continue with the application to its conclusion.

Description of the application route

- 10 The claimed route commences on the public highway known as Alderley Road (A538) and runs in a north westerly direction for a length of approximately 7.6 metres, to its termination at the junction with Grove Street (UW1516), a pedestrianised highway.
- 11 The route is located at the junction of Water Lane (A538) and Alderley Road (A538) and is directly at the front of and within the curtilage of a property which formerly housed Barclays Bank. The surface at this point is blocked paving, very similar to the adopted highway network.

Main issues

- 12 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 to them to be requisite in consequence of the occurrence of certain events:-

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 on 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.

13 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 rights subsist. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.

14 Where the evidence in support of the application is user evidence, section 31(1) of the Highways Act 1980 applies. These state; -

"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."

15 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.

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".

16 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.

- 17 For public rights to have come into being through long use, as stated above, a twenty-year period must be identified during which time use can be established. Where no challenge to the use has occurred, this period can be taken as the twenty years immediately prior to the date of the application. In this case the date of challenge can be identified as the date on which the fence was erected, being January 2004, the user period is therefore 1984 – 2004.

Consultation and Engagement

- 18 Consultation letters and a plan of the claimed route were sent out to the Ward Member; Town Council; user groups/organisations; statutory undertakers and registered landowners. The following responses were received:
- 19 The footpath secretary for East Cheshire Ramblers responded stating that they have no comments to make on the application. None of the other user groups responded to the consultation.
- 20 The registered leaseholder, Barclays Bank Plc. replied through their managing agent, by referring the Council to the registered freeholder/landlord, and making the following response:
- “Barclays Bank are the leaseholder for the property..... In terms of the banks view they have no objection, from a lease perspective. But any change would have to be documented in a tri party agreement/licence with Barclays landlord and Barclays”.*
- 21 The Landlord responded through their agent, requesting details of the claim, but no further responses has been received from the landlord’s agent at the time of writing this report.
- 22 Cadent formally objected to the proposed application pending further consultations due to Cadent gas apparatus in the immediate vicinity.

Reasons for Recommendation

- 23 An investigation of the available evidence has been undertaken. 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 2.

Documentary Evidence

County Maps 18th/19th Century

- 24 These are small scale maps by commercial mapmakers, 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 topographical maps portraying what the surveyors saw on the ground. They include features of interest, including roads and tracks. It is doubtful whether mapmakers checked the status of the routes or had the same sense of status of routes that exist today. There are known errors on many mapmakers work and private estate roads and cul-de-sac paths are sometimes depicted as cross-roads. The maps do not provide conclusive evidence of the existence of a route.
- 25 The claimed route was not shown on any of the early commercial maps.

Tithe Records

- 26 Tithe Awards were prepared under the Tithe Commutation Act 1836, which commuted the payment of 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 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.
- 27 The Bollin Fee Township Tithe Map and Apportionment 1841 in the parish of Wilmslow shows the area where the claim is, but not the claimed route.

Ordnance Survey Records

- 28 Ordnance Survey (O.S.) 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 is not evidence of the existence of a right of way. It can be presumed that this caveat applied to earlier maps.

O.S. One inch 1872 – 1914, England & Wales

The map shows the junction of roads where the claim is located but does not show the claimed route.

O.S. Cheshire Sheet XXVIII.NW. Six-inch, 1899,

The map shows the junction of roads where the claim is located but does not show the claimed route.

O.S. Sheet 11. Quarter inch to the mile of England 1st Edition 1901

The map shows the junction of roads where the claim is located but does not show the claimed route.

Definitive Map Process – National Park and Access to the Countryside Act 1949.

- 29 The Definitive Map and Statement is based on surveys and plans produced 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.
- 30 The walking survey map and provisional map did not identify the claimed route, but clearly show the area. Whilst the surveys of the early 1950s do not show the claimed route, they do show the junction of roads where the route is claimed.

Deposit plan

- 31 These relate to turnpike, railways and canals, each of which required an Act of Parliament to authorise construction. Detailed plans were submitted showing the effect on the land, highways, and private accesses

crossed by the proposed route. The Acts, plans and accompanying books of reference should be considered together.

- 32 Railway and Canal developments from 1794 onwards it was a requirement for detailed plans of the proposed development to be drawn up and placed on deposit for public consultation. Plans were accompanied by a book of reference which itemised fields, houses, roads etc. on the line of the utility and identified owners and occupiers. These documents are generally regarded as strong evidence however, many proposed lines were never constructed, some proposals could have failed or been rejected because of poor and inaccurate plans.
- 33 The Railway plan of Birmingham and Manchester, county palatine of Chester 1845, shows the junction where the claim is but shows no details of any footpaths in that area.

Photographs and other evidence

- 34 During the investigation into this claim photographs were taken in 2023. The photographs of the route demonstrate that there is no significant use by the public by the evidence of any clear defined route on the ground.
- 35 Aerial photographs from 1971 to 2015 show the claimed area but provide no evidence of usage.

Witness Evidence

- 36 The application, when made on 29th March 2004, was accompanied by 12 user evidence forms, of which 2 forms were incomplete. Since the time of the submission, 1 of the users has deceased (the Applicant) and another 1 no longer lives at the address stated on their form. Out of the 12 users only 9 claim to have used the route for a full 20 year period. The use is plotted on the chart at Appendix 3.
- 37 The witnesses were all written to on 2nd August 2023 inviting them to a follow up interview to establish their use of the route. None of the witnesses responded.
- 38 In their initial user evidence forms 7 witnesses describe their use of the claimed route as being to sit and rest on the bench (which is no longer there), and to shelter from the rain. 4 witnesses refer to the area as a

meeting place, meeting up with friends, with 1 witness referring to it as a 'special feature'. None of the witnesses provide a clear description and only 5 witnesses provided a diagram of the area, but not details of the exact route they had taken. Out of the 5 diagrams, 4 were copies of each other.

39 The gifting of the area in 1953 by the Ladies Luncheon Club to the people of Wilmslow was mentioned by 6 witnesses.

40 It appears likely that the arcade has been a well-known and used area, but without any further evidence having been able to be examined by the undertaking of detailed interviews, there is insufficient evidence to suggest a single particular route was used to pass and re-pass. Therefore, there is insufficient evidence of use to satisfy the statutory test,

Conclusion

41 The balance of user evidence combined with documentary evidence does not support the case that a public footpath subsists along the route between points A-B as shown on Plan No. WCA/035 at Appendix 1.

42 It is therefore considered that the requirements of Section 53(3)(c)(i) have not been met and it is recommended that the application is refused on the grounds that there insufficient evidence to make a Definitive Map Modification Order to record a Public Footpath between Alderley Road and Grove Street, Wilmslow.

43 The work of the Public Rights of Way team contributes to the Green aim of the Corporate Plan, the "thriving and sustainable place" priority and the policies and objectives of the Council's statutory Rights of Way Improvement Plan.

Other Options Considered

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

Implications and Comments

Monitoring Officer/Legal

45 Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the Local Authority to

confirm the Order itself and may lead to a hearing or Public Inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources.

Section 151 Officer/Finance

- 46 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. The maintenance of a Public Right of Way, if added to the Definitive Map and Statement, would fall to the landowner and Council in line with legislation. The associated costs would be borne within existing Public Rights of Way revenue and capital budgets.

Policy

- 47 The work of the Public Rights of Way team contributes to the Green aim of the Corporate Plan, the “thriving and sustainable place” priority, and the policies and objectives of the Council’s statutory Rights of Way Improvement Plan.

A thriving and sustainable place

- A great place for people to live, work and visit
- Welcoming, safe and clean neighbourhoods
- Reduce impact on the environment
- A transport network that is safe and promotes active travel
- Thriving urban and rural economies with opportunities for all
- Be a carbon neutral council by 2025

Equality, Diversity and Inclusion

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

Human Resources

- 49 There are no direct implications for Human Resources.

Risk Management

- 50 There are no direct implications for risk management.

Rural Communities

51 There are no direct implications for Rural Communities.

Children and Young People including Cared for Children, care leavers and Children with special educational needs and disabilities (SEND)

52 There are no direct implications for Children and Young People.

Public Health

53 There are no direct implications for Public Health.

Climate Change

54 There are no direct implications for Climate Change.

| Access to Information | |
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| Contact Officer: | John Lindsay John.lindsay@cheshireeast.gov.uk |
| Appendices: | Appendix 1 Application Plan No. WCA/035 Appendix 2 Historical document list Appendix 3 User Chart |
| Background Papers: | The background papers are available by contacting the report author |