

OPEN



Highways and Transport Committee

23rd November 2023

Wildlife and Countryside Act 1981– Part III, Section 53 Application no. MA/5/264, for the Addition of a Restricted Byway, Mill Lane, Rainow.

Report of: Peter Skates, Director of Growth and Enterprise

Report Reference No: HTC/36/23-24

Ward(s) Affected: Sutton

Purpose of Report

- 1 The report outlines the investigation of an application made by Sarah Giller, Clerk and Responsible Financial Officer (RFO) for Rainow Parish Council, to amend the Definitive Map and Statement by adding a restricted byway. This 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 a restricted byway 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 in relation to the application to add a restricted byway along Mill Lane in the parish

of Rainow. The evidence consists of historical documents and use on foot, bicycles and horseback by individual witnesses . The report determines whether on the balance of probabilities the status of restricted byway has been shown to subsist.

The depiction of the route as a historical physical feature in full or in part, is demonstrated through various maps such as County Maps and Ordnance Survey maps, Finance Act plans and Tithe Map and apportionment. The historical evidence investigated has clearly shown the existence of the route over a significant time period.

The user evidence amounts to 18 separate witnesses spanning a total of approximately 87 years. There is a reasonable amount of user evidence indicating use of the route on foot, with a number of witnesses having used the route for over 20 years with some dating back to the 1930s and 1940s.

The witness evidence indicates that a public footpath can be reasonably alleged to subsist along Mill Lane. The historical evidence is indicative of higher rights of access, and it can be reasonably alleged that restricted byway rights can, on the balance of probabilities, be shown to subsist along Mill Lane.

RECOMMENDATIONS

The Highways and Transport Committee is recommended to:

1. Decide that a Definitive Map Modification Order be made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 adding a restricted byway along Mill Lane as show on Plan No. WCA/032.
2. Decide that public notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Act.
3. Note that in the event of objections being received, Cheshire East Borough Council be responsible for the conduct of any hearing or Public Inquiry.

Background

4. *Introduction*

- 4.1 This application was submitted on the 20th May 2021 by Sarah Giller, Clerk and RFO for Rainow Parish Council to amend the Definitive Map and Statement by adding a restricted byway. The application consisted of user evidence from 18 individuals claiming use on foot, bicycle and horseback.

5. *Description of the Application Route.*

- 5.1 Mill Lane runs from OS grid reference SJ 9425 7785 at Ingersley Road (C406) for a distance of approximately 397 metres to OS grid reference SJ 9410 7751 at its junction with Rainow Footpath No. 39 at Ingersley Vale (see Plan No. WCA/032 in **Appendix 1**).

Travelling north to south and using Plan No. WCA/032 in **Appendix 1** as a reference, the Lane commences from Ingersley Road, at the Poachers Inn pub at point A and heads in a south easterly direction along a well-defined bounded track of an unbound gravel/stone surface and is of a variable width ranging between 3 and 4.5 metres. At point B there is a stone squeeze stile and an official signpost where Bollington Footpath No. 33 joins from the west. Between point B and point C there are bungalows on the eastern side of the lane; Mill Lane provides vehicular access to these properties. The lane is approximately 3 metres wide between point B and C and remains bounded on each side. From point C the lane heads in a southerly direction and is generally around 1.5 metres in width and of a natural earth finish that is characterised by an uneven surface with loose stones from the dilapidated adjoining stone walls, roots in places and occasional wet/damp areas that have become a little poached by traffic. The route is bounded on both sides by remnants of the stone walls and hedgerow trees. The route continues to Rainow Mill Cottages passing in between a shed and the cottages before widening to a splay where it meets Footpath No. 39 at Point D.

5.2 *Investigation of the Claim*

An investigation of the available evidence has been undertaken. The evidence that has been examined is referred to below and a list of all

the documentary evidence taken into consideration can be found in **Appendix 3.**

5.3 *Documentary Evidence*

County Maps 18th/19th Century

5.3.1 These are small scale maps made 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 topographic maps portraying what the surveyors saw on the ground. They included features of interest, including roads and tracks. It is doubtful whether mapmakers checked the status of routes or had the same sense of status of routes that exist today. The maps do not provide conclusive evidence of public status, although they may provide supporting evidence of the existence of a route.

5.3.2 *Bryants 1831:* This is a map of the County palatine of Chester from an actual survey made in the years 1829, 1830 and 1831. The map shows the route throughout and is identified under 'Lanes and Bridleways' on the key.

5.3.3 *Swire & Hutchings 1829:* A map of the County palatine of Chester, divided into hundreds and parishes, from an accurate survey, made in the years 1828 and 1829. The map shows the route at its northern end extending down so far as a building on the western side as you travel north to south. Beyond this point there is no indication of a lane or path of any type.

5.3.4 *Stuart, James Burdett, Peter Perry 1777:* The County palatine of Chester: reduced from the large survey in four sheets 1794. The map is somewhat difficult to decipher; some features are consistent with the later maps and modern road layout however it is not possible to say with any degree of certainty that a route is shown to exist.

Tithe Records

5.4 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. A map was produced by the Tithe

Commissioners which showed parcels of land with unique reference numbers, and these were referred to in the apportionment document, which contained details of the land including its ownership, occupation and use. 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. The 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.

The Tithe Map for Bollington is a second class map dated 1842. First class maps had the Commissioners' seal attached, showing them to be reliable as a true record of matters relating to the purposes for which the map was designed. However, second class maps, which failed in some, often minor, way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view. Both first and second class maps have been accepted by the courts as evidence.

Tithe maps are generally good evidence of the topography of the roads they portray, especially those which form boundaries of tithable land. They may not necessarily be strong evidence either of public rights or the nature of any public right that may exist.

As statutory documents, where they do provide evidence, it should be given the appropriate weight bearing in mind the original purpose of the documents concerned and the issues identified above.

The southern end where it reaches Rainow Mill Cottages joins what would be the current day Rainow Footpath No. 39 in what appears to be a more northerly position. It appears that Footpath No. 39 also followed a slightly different alignment than its present day route.

Mill Lane is recorded in the same way as other routes in the Parish, some are now roads, some are footpaths and others are bridleways.

The Tithe Map shows the route throughout its length with solid continuous lines either side separating it from neighbouring land. It has no plot name nor number and appears to be excluded from tithes throughout its length. This is consistent with it being considered a public highway; albeit other possibilities exist.

Whilst there may be a variety of reasons for a route to be exempt from tithe payments it adds support to the evidence in favour of Mill Lane being a public highway.

Highway Board Map

- 5.5 The Highways Act 1862 compelled parishes to join together to become Highway Districts and Boards. This established Highway Districts as the norm for areas where parishes had not become Urban Sanitary Districts.

A copy of the Prestbury Highway Board Map 1865, believed to have been produced pursuant to the Highways Act 1862 has been obtained from Cheshire Archives.

The key for the map shows turnpike roads, district highways and all other roads. The map shows Mill Lane in its entirety, depicted as one of the uncoloured "other roads". No evidence has been provided to indicate that the route has been stopped up.

The Prestbury Highway Board Map provides further evidence of Mill Lane having carriageway rights; this is a map prepared under statutory authority specifically to identify public highways. Within the Authority this document is considered good evidence of the route being a publicly maintainable carriageway.

Ordnance Survey Records

- 5.6 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. Survey 1 inch to 1 mile 1842

The route is shown throughout bounded on both sides by solid lines indicating that it is separate from adjoining land. It is obscured somewhat by the name "Bollington".

O.S. 1st Edition 1:25 inch c.1870

The map shows the route throughout. Solid lines alongside both sides of the route for its entire length. The parish boundary runs visibly along the western boundary for most of its length save for the southern end. Bollington Footpath No. 33 is shown joining from the west. Near point C (on Plan No. WCA/032, **Appendix 1**) the map is annotated with the letters "Tr" indicating the location of a trough; this could be an indication that the route was used to drive animals or for riding.

O.S. 2nd Edition 1:25 inch c.1890

The route is shown throughout in the same way as on the 1st edition with the exception that Mill Lane is now written on the map. At the southern end near Rainow Mill Cottages a pecked line runs across the route near its modern day junction with Rainow Footpath No. 39. This indicates that the route was open at the junction. It could also indicate a change of surface.

O.S. 3rd Edition 1:25 inch c.1910

The route is shown throughout in the same way as on the 1st and 2nd editions. As with the 2nd edition, the title Mill Lane is again identified on the map. At the southern end near Rainow Mill Cottages a faint pecked line runs across the route near its modern day junction with Rainow Footpath No. 39.

Object Name book for Cheshire sheet XXIX SW (6 inch) 1908

The object name book was obtained from The National Archives, but it did not contain any reference to Mill Lane.

Boundary Remark Books for Cheshire sheet XXIX SW (6 inch) 1908

It was not possible to identify the specific items in these books without direct research at The National Archives.

In summation all four editions of the Ordnance Survey maps show the route throughout, with solid lines alongside both sides of the route for its entire length. This indicates that it was separate from land on either side. Bollington Footpath No. 33 is shown joining from the west. Bollington Footpath No. 33 is depicted as “FP” on the 2nd and 3rd edition maps.

Of relevance with regards to Ordnance Survey Maps is that the annotation, Mill Lane, is included in the maps in both the second and third editions. The Ordnance Survey were keen to ensure the accuracy of detail included in maps and this not only related to alignment of physical features but also to names included on maps.

Bartholomew’s Half Inch to a Mile

- 5.7 These maps were produced for the benefit of tourists and cyclists with help from the Cyclists’ Touring Club (CTC). Local CTC members would generally have cycled every available route in their area, and it is subsequently assumed that any route that appeared on these maps had initially at least, been used without hindrance. These maps were well used by cyclists for their outings so the depiction here is likely to have led to it being used.

The earlier edition maps (1902 and 1904) for both Cheshire and Liverpool and Manchester depict both Mill Lane and adjoining Rainow Footpath No. 39 as routes that are either secondary class roads in good condition (1902) or indifferent/passable (1904). The exception is the Sheffield edition which only shows Rainow Footpath No. 39.

The later edition maps of 1920, 1923, 1941 and 1943 depict neither Mill Lane nor Rainow Footpath No. 39 other than to show it as a physical 'lane' feature.

The Planning Inspectorate's Wildlife and Countryside Definitive Map Modification Orders Consistency guidelines indicate the commercial maps (such as Bartholomew's) are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with evidence from other sources, they can tip the balance of probability in favour of such status.

Finance Act 1910

- 5.8 The Finance Act of 1910 involved a national survey of land by the Inland Revenue so that an incremental value duty could be levied when ownership was transferred. Land was valued for each owner/occupier and this land was given a hereditament number. Landowners could claim tax relief where a highway crossed their land. Although the existence of a public right of way may be admitted it is not usually described or a route shown on the plan. This Act was repealed in 1920.

Two sets of plans were produced: the working plans for the original valuation and the record plans once the valuation was complete. Two sets of books were produced to accompany the maps; the field books, which record what the surveyor found at each property and the so-called 'Domesday Book', which was the complete register of properties and valuations.

The exclusion of vehicular roads stems from s.35 of the Finance Act 1910 which provided that no duty under this part of the act shall be charged in respect any land or interest in land held by or on behalf of a Rating Authority. A Highway Authority was considered to be a Rating Authority.

The Planning Inspectorate's Wildlife and Countryside Act Definitive Map Orders Consistency Guidelines indicate that:

"..if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway,

normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books.”

In the case of *Fortune v Wiltshire CC* [2012] Lewison J gave consideration to the interpretation of routes excluded from adjacent hereditaments. In essence he concluded that the Finance Act records are not definitive; they are “simply one part of the jigsaw puzzle” to be considered along with other relevant material particular to each case.

Reinforcing the view of Lewison J, the Consistency Guidelines concluding comment states:

It should not be assumed that the existence of public carriageway rights is the only explanation for the exclusion of a route from adjacent hereditaments although this may be a strong possibility, depending on the circumstances.

5.8.1 Working Plans

Three sets of plans were available at Cheshire Archives; these are considered to be the working plans. All three maps are drawn on an O.S base map 3rd edition and Mill Lane is consequently shown in the same way.

Map A – the hereditaments that are shown are all shown outlined in red ink. The southern end of the route is shown as a separate entity from abutting land holdings and no hereditament number is included. There are no details on the map in terms of hereditaments abutting the northern part of the lane. The Lane itself has no hereditament number.

Map B - the hereditaments that are shown are all outlined in red ink. There are no hereditaments shown in the vicinity of Mill Lane on this map. The lane has no hereditament number.

Map C – the hereditaments that are shown are all outlined in different colours. For most part the route is shown as a separate entity from abutting land which are shown with hereditament numbers. The lane has no hereditament number. The land abutting

to the south of the lane along the north eastern section has no hereditament number.

5.8.2 *Record Plans*

The Record Plans were not available in The National Archives.

5.8.3 *Field Book*

Mill Lane is shown as separate from the abutting hereditaments and as such no reference is included in the field book.

5.8.4 *Bollington Index*

The “Bollington Index” which purports to list roads and streets, and accompanied the map makes reference to Mill Lane. The index refers to page 52 in the assessment book which indicates that there were some properties along Mill Lane that were subject to duty.

Evidence of the possible existence of a public right of way in Finance Act documentation usually arises in one of two ways:

Reference to it in one or more of the various documents forming part of the valuation process, or

Exclusion of a route from the assessable parcels of land shown on the map record.

The Finance Act documents inspected shows that Mill Lane is excluded from assessable parcels of land. Routes that are uncolored are sometimes referred to as “white roads” as they are separate from abutting hereditaments.

Much debate surrounds the value of Finance Act maps and documents in the determination of cases for Definitive Map Modification Order applications. In this case we must also be alive to the fact that the maps available are considered working copies rather than record copies.

The general position in terms of Finance Act maps and documents is that they are considered good evidence of public rights (normally of vehicular status) particularly in the absence of any contemporary evidence to indicate otherwise.

Definitive Map Records

- 5.9 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 Definitive Map.

An extract from Bollington Town Council Survey Map and notes (undated) from survey information shows Footpath No. 33 in Bollington linking into Mill Lane. Mill Lane itself is coloured blue; the notes state “*The FP Pres. Soc. shows the following paths in addition to those shown by the UDC (coloured blue on U.D map)*”. UDC refers to Bollington Urban District Council. It then includes a reference to Mill Lane with “Inspect” followed by “Omit”. This is believed to be a contemporaneous annotation made by an officer from Cheshire County Council.

An extract from the Footpath Society Survey Map (undated) shows the route in part coloured red which would indicate a public footpath. The letter “S” denoting a stile is shown where Bollington Footpath No. 33 joins.

The date of the Draft Maps for the Borough of Macclesfield is 7th December 1954 and the route is not shown. The Provisional Map for the Borough of Macclesfield is dated the 17th May 1968 and the route is not shown. The Definitive Map for the Borough of Macclesfield is dated the 15th January 1971 and the route is not shown.

Aerial photographs

- 5.10 All aerial photos are sourced from the Historic England website. Aerial imagery is useful for showing the physical existence of routes and changes over time.

Flight: AFL192704. Aerial Photo - EPW017791. Date flown: 1 Apr 1927

This oblique photo looking north shows the southern end of the route by Rainow Mill Cottages. Rainow Footpath No. 39 towards Ingersley Vale is a wide open track. The hedge line on the eastern side of the track appears less pronounced.

Flight: AFL192704. Aerial Photo - EPW017792. Date flown: 1 Apr 1927

This oblique photo looking south shows the most of the route bar the very northern section. It appears as a wide bounded track throughout. Mirroring the previous photos, the hedge line on the eastern side of the track as it approaches Rainow Mill Cottages appears less pronounced. Bollington Footpath No. 33 appears to be a well-established surfaced path bounded on one side.

Sortie: RAF/106G/UK/645. Date flown: August 11, 1945

Mill Lane is shown throughout on this photo and bounded on both sides for most part, albeit obscured by trees for the northern section. Bollington Footpath No. 33 appears to be shown on ground as possibly being surfaced or at least distinguishable on the ground with a hedge line on one side.

Witness Evidence

5.11 There were 18 user evidence forms submitted with the application. Telephone interviews were held with 12 of the witnesses during a two week period in mid-August 2023. All 18 witnesses stated in their forms that they had used the route on foot; 14 of which indicating that they had used it for periods exceeding 20 years. The use as a whole spans a period of over 80 years with the earliest use dating back to the late 1930s.

Five of the witnesses have indicated they have used the route on horseback or on a bicycle. Use on horseback and bicycle is far less frequent and of much shorter duration than that on foot. One person used it on horseback between 1990 and 1994 but only infrequently

or occasionally. Another who used on bicycle used it between 1985 and 2000 to visit his son and grandson who lived at Rainow Mill cottages; that use was said to be frequent. Given the date of use and the submission of the application this use is likely to be outside the relevant period. Two others used it on bicycle up to the date of application with one using it monthly from 2010 onwards and the other using it occasionally from 2014 onwards. Finally, one person stated to have used it on bicycle and on horseback on occasion from the late 1950s onwards; however, they ceased to use the route in around 2005. It does not appear that any one witness has used the route on horseback nor on bicycle for a period of twenty years, with the longest amounting to 11 years' use. On face value this level of use would not be sufficient to suggest a level capable of claiming restricted byway or bridleway rights under S.31(1) of the Highways Act 1980.

All the witnesses claim also to have seen others using the route, again mainly on foot but also on bicycle and on horseback. Many referred to use in vehicles which amounted to those accessing properties along the northern end of the route. One witness indicated that they had heard the route was once used by the milkman who took his milk float along the route but that would have been some time ago given that southern of the route has become narrow, overgrown and rougher under foot. Another witness makes reference to having seen the route used by horse and cart many years ago.

It is clear from the interviews that most if not all have always considered the route to be publicly accessible and the characteristics of the route are similar to other recognised and registered public rights of way in the area. None have ever considered asking for permission with many not being aware that there was an owner or someone who would be able to grant permission.

Many of the witnesses make reference to the erection of a fence on the land adjoining the lane at the site of the old Bowling Green (located to the east of Mill Lane between points C and D on Plan No. WCA/032) and how this had been placed onto/or over the adjoining stone wall. This had caused some upset locally but did not impede access along the route; the fence was subsequently

removed/relocated. One witness referred to the developer at the Bowling Green attempting to turn people back, but this seemed to be short-lived and unsuccessful as people continued to use it. Other than this instance it appears that none of the witnesses have ever been challenged while trying the route nor told that it was not public.

None of the witnesses ever recall there ever being any gates, stiles or other obstruction on the route nor any signs or notices that might indicate its status. The only sign that is referred to is the “no through road, re-set sat navs” sign in between Mill Lane and Savio Drive at the northern end. A number of witnesses also refer to the sign “Mill Lane” on the wall of the Poachers Inn pub.

Analysis of the user evidence is included in the charts in **Appendix 2**.

5.11.1 Relevant period

To meet the tests under the Highways Act 1980 there must be 20 years’ continuous use by the public; this 20 years period is termed the “relevant period”. The relevant period for considering the 20 year use is to be taken from the point when the right was called into question and calculating retrospectively. In cases where no act of calling into question has occurred, Highways Act 1980, s31(7a) and s31(7b) are relevant in that the matter bringing the right of the public to use a way into question is an application under section 53 of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the Definitive Map and Statement.

One witness referred to the developer at the Bowling Green attempting to turn people back, but this seemed to be an isolated, short lived incident. Other than this instance it appears that none of the witnesses have ever been challenged while using the route nor told that it was not public.

A number of witnesses mentioned the erection of a fence which encroached onto the path boundary however it didn’t have the effect of restricting access as such there has been no overt action that has resulted in the right to use the lane being into question. The relevant

period will therefore be calculated using the application date and is considered to be 2001-2021.

5.11.2 Intention to dedicate by the landowner

Consideration must be given to whether during the period in question there was sufficient evidence that there was no intention during that period to dedicate it (see 7.2 below). The route is not registered with the Land Registry and whilst notices were placed on site during the informal consultation, no owner came forward. There is no indication that the landowner has undertaken any acts that would indicate to the public that they were not using a public right of way and as such there appears to have been no rebuttal of the rights.

6. Consultation and Engagement

Consultation letters/emails and a plan of the claimed route were sent out to the Ward Member; Parish Council; User Groups/Organisations; statutory undertakers and abutting landowners on 10th August 2023.

A response from Rainow Parish Council was received confirming that they supported the application. This is unsurprising given that they were the applicants. A response from Bollington Town Council also indicated their support for the application.

Responses were submitted from a number of residents living along Mill Lane. These representations all focused on private rights of access to properties and the impact that the recording of a public restricted byway would have. Responses were sent to those residents with concerns outlining that the current process was solely focussed on the recording of public rights and would not affect any private right of access that exist or are likely to exist.

There were no representations that questioned the validity of the application in terms of public rights nor submitted in rebuttal of the evidence being put forward by the applicants and the witnesses.

7. Main Issues

7.1 Wildlife and Countryside Act 1981

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:-

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

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 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.

7.2 *Highways Act 1980*

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”.

In cases where no act of calling into question has occurred, Highways Act 1980, s31(7a) & s31(7b) are relevant in that the

matter bringing the right of the public to use a way into question is an application under section 53 of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the Definitive Map and Statement.

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.

Where the evidence in support of the application is documentary evidence, section 32 of the Highways Act 1980 applies. This states;

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or

compiled, and the custody in which it has been kept and from which it is produced.

7.3 Common law dedication

The establishment of highway rights under the common law is not bound by the “20 year rule”, with the courts having ruled that rights can be established in a very short period of time.

Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence, any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”. Halsbury’s Laws of England (Volume 55 ‘Highways’)

7.4 Countryside and Rights of Way (CROW) Act 2000

The Countryside and Rights of Way Act 2000 redesigned all routes formerly classified as Roads Used as Public Paths as Restricted Byways. The rights on a restricted byway are as follows — a right of way on foot, a right of way on horseback or leading a horse, and a right of way for vehicles other than mechanically propelled vehicles.

7.5 Natural Environment and Rural Communities Act (NERC) 2006

Where evidence points toward a route with Restricted Byway rights it is necessary to give consideration to section 67 (a-e) of the NERC Act 2006 and any exemptions that might apply.

Section 67(1) of the NERC Act 2006 extinguished, on commencement, public motor vehicular rights over every highway that is not already shown on the Definitive Map and Statement, or is there shown as a footpath, bridleway, or restricted byway.

Subsection 67(2) introduced a series of exceptions to protect certain highways from such extinguishment under subsection 67(1). The five exceptions may be summarised as follows:

- 67(2)(a) excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement.
- Subsection 67(2)(b) excepts ways that are both recorded on the “list of streets” as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way.
- Subsection 67(2)(c) excepts ways that have been expressly created or constructed for motor vehicles.
- Subsection 67(2)(d) excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
- Subsection 67(2)(e) excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive ‘off-road

8. *Conclusion*

There is no standard bar or prescribed detail on sufficiency of evidence with regards the making of Definitive Map Modification Orders. The Deregulation Act 2015 proposes a “Basic Evidential Test” as a pre-assessment for Surveying Authorities to consider when deciding whether to investigate an application. There appears to be no regulatory guidance prepared on the matter and as such sufficiency is still largely a subjective matter.

The approach to considering evidence was considered in the criminal case *R v Exall and Others* (1866) 4 F & F 922: *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then if any one link broke the chain would fall. It is more like the case of a rope composed of several cords. One strand of a cord might be insufficient to sustain the weight, but three stranded together maybe of quite sufficient strength"*.

User Evidence

The tests outlined under s31 of the Highways Act 1980 (see 7.2 above) have been met with regards to use of the route on foot. All 18 witnesses stated that they had used the route on foot; 14 of whom indicated that they had used it for periods exceeding 20 years. The use as a whole spans a period of over 80 years with the earliest use dating back to the late 1930s. None of the witnesses have sought or been given permission to use the route and there has been no rebuttal of such rights from any known landowner.

The claim is to register a restricted byway; however, there is insufficient evidence to show that public rights of a higher status have reasonably alleged to subsist under statute. Only 5 witnesses have indicated use on bike or horseback and none of these have spanned 20 years or are entirely within the relevant period.

As the statutory tests have been met with regards to footpath status, there is no requirement to assess the common law test. However, the statutory tests have not been met in regards to higher rights of access, so it is necessary to consider the common law position with regards to higher rights of access. The evidence of use by the public is not considered sufficient to show that higher rights have become established at common law.

Documentary Evidence

Whilst the user evidence points towards a public right of way on foot it is also necessary to consider the documentary evidence to determine whether a public right of way of a higher status exists, whereupon the common law maxim of “once a highway always a highway” would be relevant.

It is clear from the mapping evidence that Mill Lane has existed physically for some time, the 1 inch to 1 mile OS map indicates it was present in 1842, with the Byrant Map indicating its presence to c. 1829-1831. The Tithe Map also indicates that it was present from the 1840's. The aerial imagery shows what appears to be a wide well-constructed route adjoining other similar looking routes in the area which are now vehicular highways.

The documentary evidence considered as part of the application is indicative of there being public carriageway rights on Mill Lane. There are rarely cases where once single piece of evidence provides the conclusive status of a route, and this case is no different. The evidence taken as a whole is sufficient to make an order on the ground that a public right of way of carriageway status is reasonably alleged to subsist.

Of particular relevance in coming to this conclusion is the Finance Act documents that appear to indicate that Mill Lane is excluded from surrounding hereditaments; whilst not in itself conclusive it is regarded as a “strong indicator”. Despite not being record copies which weren’t available at The National Archives, they are still viewed as good evidence, particularly in the absence of any contradictory evidence and when viewed as part of the evidence as a whole.

The index accompanying the Finance Act map, indicates that Mill Lane was regarded as a road or street at the time the documents were being produced.

The Prestbury Highway Board Map provides further evidence of Mill Lane having carriageway rights; this is a map prepared under statutory authority specifically to identify public highways.

The Tithe maps show Mill Lane as a through route with no plot number; similarly other routes are depicted in the same way, and these are now public rights of way depicted on the Definitive Map and Statement. Whilst the tithe map evidence is certainly not conclusive it does provide further indication that the route was public. It does not provide conclusive evidence of status; however, it is supportive of a public highway of a higher status than a public footpath.

The early edition Bartholomew maps show both Mill Lane and adjoining Rainow Footpath No. 39 as secondary class roads in good condition with later editions as indifferent/passable. These maps were well used by cyclists so the depiction here is likely to have led to it being used. Whilst again this evidence cannot be considered conclusive, it does add some weight to Mill Lane being a public carriageway.

Ordnance Survey Maps (second and third editions) show the route as Mill Lane. Whilst no information was available from the object name book this adds to the evidence of carriageway status as OS surveyors were careful to use names based on established local knowledge in order to ensure accuracy. Many old roads would have names, providing evidence of the reputation of the named route.

Bollington Footpath No. 33 is shown on the OS maps and it is consistently shown terminating at Mill Lane and travels no further; this route is included in the current Definitive Map and Statement and whilst the statement for the route identifies it terminating at the parish boundary (i.e. Mill Lane) it is unlikely that this would have been registered as a dead end or “cul de sac” route and the assumption is the Mill Lane was a highway at the time of the preparation of the Definitive Map, albeit this does not provide any indication of status.

Whilst the conclusion in this section focuses on the documentary evidence it is also noteworthy that some of the older witnesses recall the lane being used by horses and horse and cart and that one witness recalls undertaking maintenance work to the route as part of a post war effort to “re-open” public rights of way in the area. Whilst the user evidence submitted does not meet the criteria under s31 or common law for restricted byway rights, the route certainly appears to have the reputation of a route of higher public status.

In concluding that Mill Lane is a likely a carriageway it is appropriate to consider the Natural Environment and Rural Communities Act 2006 with regards to its current status regarding mechanically propelled vehicles: it does not appear that any of the exemptions in s.67 (a-e) are relevant in this instance and in summation, on the balance of probability, it is reasonable to allege that Mill Lane is a restricted byway.

Other matters

The evidence in support of Mill Lane being a restricted byway may also be supportive of a similar status for part of Rainow Footpath No. 39 in so far as the Finance Act Maps, the Highway Board Map, Bartholomew Maps and the Tithe Maps are concerned.

The courts have long recognised that, in certain circumstances, cul-de-sacs in rural areas can be highways. (e.g. *Eyre v New Forest Highways Board* 1892, *Moser v Ambleside* 1925, *A-G and Newton Abbott v Dyer* 1947 and *Roberts v Webster* 1967).

Most frequently, such a situation arises where a cul-de-sac is the only way to or from a place of public interest or where changes to the highways network have turned what was part of a through road into a cul-de-sac. It is possible that Rainow Mill could be considered a place of public interest.

In *Eyre v New Forest Highway Board* 1892 Wills J also covers the situation in which two apparent cul-de-sacs are created by reason of uncertainty over the status of a short, linking section. In that case it was held that, where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it.

Reasons for Recommendation

9. The evidence in support of this application must show, on the balance of probabilities, that restricted byway rights subsist along the claimed route. On the balance of probabilities, the historic evidence supports the case that a restricted byway can be reasonably alleged to subsist; therefore, it is considered that the requirements of Section 53(3)(c)(ii) have been met and it is recommended that this application be accepted.
10. 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

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

Implications and Comments

Monitoring Officer/Legal

12. Upon determination of this application, the authority must serve notice on the applicant to inform them of the decision. Under Schedule 14 of the Wildlife and Countryside Act 1981, 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.

Section 151 Officer/Finance

- 13.** If an appeal is successful and the subsequent Order objected to this may lead to a subsequent hearing/inquiry, for which the Council would be responsible for any costs involved in the preparation and conducting of such although as a directed Order the Council would be at liberty to take a neutral stance. The maintenance of the 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

- 14.** 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

- 15.** 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

16. There are no direct implications for Human Resources.

Risk Management

17. There are no direct implications for risk management.

Rural Communities

18. 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)

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

Public Health

20. The recommendations are anticipated to offer a positive overall impact on the health and wellbeing of Cheshire East residents.

Climate Change

21. There are no direct implications for Climate Change.

Access to Information	
Contact Officer:	Clare Hibbert clare.hibbert@cheshireeast.gov.uk
Appendices:	Appendix 1 - Map of route Appendix 2 – User chart Appendix 3 – Documentary evidence list
Background Papers:	MA/5/264