

Highways and Transport Committee

19th September 2024

**Wildlife and Countryside act 1981 – Part
III Section 53 Application No CN-7-29
Application for the varying of
particulars of Public Footpath 17 Crewe**

Report of: Peter Skates, Acting Executive Director of Place

Report Reference No: HTC/34/24-25

Ward(s) Affected: Crewe East

Purpose of Report

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

Executive Summary

2. The report considers the evidence submitted and researched in the application to modify the Definitive Map and Statement of Public Rights of Way (“the DM”) by varying the location of a part of Public Footpath 17 Crewe. This includes a discussion of the consultations carried out in respect of this application, the historical evidence, the witness evidence and the legal tests for making a decision. The report makes a recommendation based on the evidence from the investigation for a quasi-judicial decision by Members as to whether an Order should be made.
3. The evidence supporting the application comprises six statements and a conveyance deed. The report determines whether on the balance of probabilities part of a public footpath can be shown to have been incorrectly recorded. Various historical documents have been viewed

including maps such as Ordnance Survey maps and Tithe and Finance Act documents. This report also includes a review of the process and mapping for the DM.

4. The investigation found that the statements and documents were new pieces of evidence and satisfied the tests for reviewing the DM. The evidence, however, was not significant enough on the balance of probabilities to prove the DM was incorrect.

RECOMMENDATIONS

The Highways and Transport committee is recommended to decide:

That the application for the variation of part of Public Footpath 17 Crewe be refused on the grounds that it cannot be demonstrated that the Definitive Map and Statement needs modifying

Background

5. The application was made to the Council in 2015 prompted by a dispute between the former landowner(s) and the council over the last section of the route of Public Footpath 17 Crewe, terminating at the junction with Waldron's Lane. It is understood that the former landowner(s) accept that there is a public footpath, it is the line of that public footpath that they dispute.
6. To the extent that it is material to the determination of the subsequent application for a Definitive Map Modification Order ("DMMO") what prompted the issue to be raised with the Council in 2014 was the removal of part of a hedge and the erection of a bridge and stile to enforce the legal line of the footpath. The applicant claims the alignment of the footpath identified on the ground by the council is in error and that the DM is therefore incorrect.

Description of the application route

7. Public Footpath 17 Crewe commences on Stoneley Road (UY556) at OS grid reference SJ 706 575 and runs in a generally northerly direction along the west side of a hedge line to terminate on Waldron's Lane (UY580) at OS grid reference SJ 706 579. The allegation is that the footpath crossed a ditch at OS grid reference SJ 706 578 (Point B on the plan) and ran in a northerly direction on the east side of a ditch and between hedges to Waldron's Lane (Point C on the plan).

8. The application for a DMMO would be for an Order to delete the line shown as A-B on the plan WCA/41 and add the line shown B-C on the plan.

Legal Issues

9. Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the “81 Act”) requires that the Council shall keep the DM under continuous review and make such modifications to the Map and Statement as appear requisite in consequence of the occurrence of certain events:-
10. One such event, section 53(3)(c) is where “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:-
11. (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. AND
12. iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification
13. The Definitive Map and Statement is the legal record of public rights of way in England and Wales. Section 56(1) of the 81 Act states the depiction of a path on the DM is conclusive evidence that at the relevant date a public right of way existed over that path. Inclusion of a route in the DM is legally conclusive evidence of the public’s right, at the relevant date without prejudice to the existence of other public rights.
14. The evidence can consist of 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 claim could be proven. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.
15. The evidence considered in this report is listed in the appendix, together with other documents and case law.
16. It will be noted that there is no provision for an Order to simply amend the line of a right of way shown on the DM. In order to make a ‘positional correction’ it is necessary to conclude that there is no public right of way on the alleged incorrect line and that instead there is a

public right of way, not currently shown on the DM on the alleged correct line.

17. The case of R (on the application of) Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin) provides the Council with guidance on how it should approach the matter of an application that seeks a 'positional correction'. Particularly relevant to this case are paragraphs 27-29 of the judgment which is explained in paragraph 16 above.
18. It should also be noted for an application to be successful it is necessary for there to be 'discovery' of evidence which when considered with all other available relevant evidence shows that an Order or Orders should be made. It is this 'discovery' of evidence rather than the fact that there has been an application that is the trigger for any Order making process.

Definitive Map Process

19. The DM was a requirement of the National Parks and Countryside Act 1949 and 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 Map and for the Nantwich district, the date of the survey is 1955 which is referred to as the "relevant date".
20. The parish survey for Crewe was undertaken in 1951 on a 1:6" OS base map. Footpath 17 is described as commencing on Stoneley Road "runs in a northerly direction" and terminates at Waldron's Lane. It was noted that the path and stiles were in good condition. The detailed description of the path commences; "access to the path is at the northern side of Greig House, Stoneley Road. From this point the path follows a northerly course via a stile No 1 and 2 to a gap in the fence at the junction with Waldrons Lane." The parish map shows a purple line drawn over the pecked line of a footpath on the base OS map. Where the northern section runs, the base map graphic is dense and a colour line is drawn on top so that the exact location cannot be seen.
21. The Draft Map is hand drawn on to a 1:6" OS base map. There is no schedule with this map, but the notations on the map describe "gap 1" at the commencement of FP17. The path runs in a northerly direction, noting "S.2"(stile 2) at the junction with FP16. "S.3" (stile 3) is noted at the southern point of the "roadway" and "Gap.4" at the junction with Waldron's Lane. The footpath at the northern section is coloured between single weight lines (which seems to be the "roadway" discussed later in this report at paragraphs 47-48). Although there were

objections to other routes shown on the Draft Map in the parish of Crewe, no record of an objection was found for Footpath 17.

22. The Provisional Map, which was the Draft Map following any determined appeals modifying the map, is on a 1968 OS base map at 1:10560 scale. Notice of its preparation was published in 1969 in the London Gazette and the local press at which point owners, lessees and occupiers were allowed to apply to the Crown Court for a change. The footpath is denoted by a purple line running from Stoneley Road in a northerly direction, the line is drawn to the west of the n-s field boundary through to Waldrons Lane. A double line is visible to the east of this line, which indicates the footpath is west of the "roadway". This map would have to be shown to be incorrect to prove the case that the DM needs a correction. No appeals regarding the footpath have been found, although it does appear that the line of the footpath has changed between the Draft Map and Provisional Map.
23. The DM was published in 1973. It comprises the public rights of way shown on the Provisional Map with any successful appeal modifying the map. The line for the footpath is purple and is drawn to the west of the n-s field boundary lines. The Provisional and Definitive Maps are consistent in showing the location of the footpath.

Historic Documents prior to the DM

Tithe Awards

24. 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. The 1836 Act relieved the Tithe Commissioners of the need to certify all maps. The Church Coppenhall Award is however, certified by the commissioners and so is viewed as a first-class map.
25. It was not the purpose of the Awards to record public highways. Although depiction of both private occupation and public roads may provide good supporting evidence of the existence of a route, especially since they were implemented as part of a statutory process. 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.
26. The Church Coppenhall Tithe Map field configuration is similar to the current field layout. From Waldron's Lane, running south a field boundary separates two fields on the west side and one field on the

east. There is a short section of enclosed “track”, number 170 described as occupation road [the “roadway”] linking Waldron’s Lane to the second field on the west side, number 200 and in the same ownership of the track; Charles Pooley. George Pooley was the owner of farm numbered 193 and now known as “Race Farm”. The public roads are separated on this Tithe Award under number 170 and so the “occupation road” can be considered to be a private access.

Finance Act

27. 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. It is thought that exclusion of highways on the maps came under S35(1) of the Act not to charge on land or an interest in land held by a rating authority. 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.
28. The map available did not include the hereditaments for the area relevant to this enquiry which is Church Coppenhall. The schedule is available, and it is notable that only one property in the township applied for a public right of way reduction. That property was Moss Villa, not relevant to the area under consideration. The document provides no evidence in this case.

Ordnance Survey (“OS”) Mapping

29. OS 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 its maps to the effect that the depiction of a road is not evidence of the existence of a right of way. It is argued that this disclaimer was solely to avoid potential litigation. Dr Yolande Hodson has written widely on the interpretation of the OS map. Dr Hodson was formerly employed by the Military Survey and then by the Map Room of the British Museum. In publication, she has described the tension in the twentieth century within the OS to agree on what would be shown on the maps, at which scale and for which audience and what symbols should be used to depict the condition and status of roads and ways. She has indicated that the OS is good evidence of the existence of a way or path and can

support any other evidence claiming public rights of way, but they are limited in proof for public status

30. OS 6" 1882; A single broken line indicative of a footpath running from the southern direction (ie Stoneyford Lane) on the west side of a solid line indicative of a field boundary. The broken line continues in a northerly direction and crosses to the east side of a solid line field boundary at the last field before Waldrons Lane.
31. OS 6" 1899; A Single broken line indicative of a footpath, running on the west side of a north-south field boundary which then switches to the east side.
32. OS 6" 1910 and 1946 Sheet XLIX SE shows a single broken line running from the south on the west side of a north-south solid line indicative of a field boundary. From a cross over point south of Waldron's Lane, running north there is a double solid line indicative of an enclosed track and field boundaries either side. This is labelled as "F.P." indicative of a public footpath.
33. OS 6" 1968 sheet SJ 75NW shows a broken line labelled "path" running from Broughton Road (west) towards the n-s field boundary then turning north running on the west side. The path ends at the fields adjacent to Waldron's Lane. There is a solid line labelled drain, parallel to a double line track. The map does not show the location of a path at the relevant location.
34. The OS maps are evidence of a footpath with an indication that a footpath was located east of the hedge line. As the OS maps are not conclusive of public rights of way, this evidence is not significant, on its own, to change the DM.

Aerial photographs

35. The Council holds a series of aerial surveys taken from 1940 to 2021. The surveys were undertaken by a number of commercial companies and are sometimes very good indicators of the layout at ground level. Normally the quality of the image is not good enough to look in more detail. For the location of FP17 the tree line usually obscures the detail on the ground. A 1940 aerial photograph shows no field boundaries on the west side of the n-s field boundary (northern length) suggesting a path on that line would be without limitations. A double hedge line can be seen on this image but not enough detail to identify a stile crossing.
36. A 1985 aerial image shows the north-south field boundary is very thick, and there are no substantive indications of routes being walked on either route. The images do not show where the connection would

be at the Waldron's Lane end of the footpath. The vegetation from this period onwards is generally too thick to identify a route within the hedge line east of the DM line. A final aerial image of 2005 date shows the fields to the west are being cropped, the verge adjacent to the crop is in shadow and there are no trodden lines to compare.

37. The applicant relies on the statements from witness evidence. They have also supplied documents relating to the title of the landownership which it is alleged, demonstrates where the correct route runs.

Witness evidence.

38. There are 6 witness statements in support of the claim. All witnesses were contacted, and the applicant and 4 witnesses made themselves available to speak with. All had used the route at an early period, referring to the 1940's through to the 1970's. There is consistent description from these witnesses that the footpath crossed from the southern field and then ran to the east side of the main ditch and north-south hedge line. The witnesses said the footpath was regularly used by people. The witnesses were unable to say how the main ditch was crossed, two people thought there was a stile another person referred to a bridge. The surface is described as having been cindered and narrow and then deteriorated so that in winter it was described as a quagmire. Comments were made by the witnesses that the ditches and hedges had used to be maintained by the "council". And that at some point this maintenance stopped and the footpath and hedges became overgrown.
39. The document submitted with the application is a conveyance of the land and buildings of Holly Tree Farm and is dated 13 January 1930. The document includes a reference to a right of way over a section of land (a track) running between Waldron's Lane and the fields to the rear of Holly Tree Farm. This is shown on a plan and described as "roadway". The document indicates the ownership of the land incorporating the roadway was the same as the field to the east. The document type is illustrative of private rights only. The roadway appears to be the same as shown on the tithe map which described the roadway as an occupation road. The presence of a roadway is a good indication that at the time of use of the roadway, it is possible that it was used by walkers in preference, if it was a surface and width suitable for vehicles.
40. The witness evidence indicates that some people, if not all, were using the track created as a farm access which runs on the east side of the legal line of the footpath possibly in preference to the legal line. The witnesses were unclear about the furniture on the path and how the path crossed the ditch to the field side east. All indicated the route they considered to be the footpath, running over the track was overgrown

and impassable at some point in the mid to late 1970s. The witness evidence however, is not conclusive that the claim line is the legal line. The evidence does confirm that the route claimed, over a roadway, was very overgrown in approximately the 1970s.

Consultation and Engagement

41. Crewe Town Council have no comments to make on the application. Ward Councillor Faddes sent in comments that she had personal experience of using the footpath and recalled a bridge between fields and the overgrowth from brambles. It was noted a few years ago the ground towards Waldron's Lane was flooded.
42. Notice of the application was advertised on the unregistered land from 19 April 2024 to 18 May 2024. There was no response.
43. Landowner 1 of land to the east has been in contact and made an initial objection. They have not submitted any further comments or evidence to support an objection.
44. Landowner 2 of land on the west side and formerly owned by the applicants have obtained the land for development. They have not objected to the application. They have submitted a representation of documents relating to the planning permissions on the land. The planning permission incorporates the DM line of the public footpaths. If the current claim were successful, it would have no impact on the land as the planning permission would create a footpath as shown on the permitted site layout and the owners have indicated no intention to change the permissions.

Reasons for Recommendations

45. New information was brought forward claiming that part of the line of Public Footpath 17 Crewe was incorrectly shown on the DM and should be shown on a different alignment. There was no dispute that a public footpath existed, only the location was in dispute.
46. The length of path in dispute was at the northern end, a section that terminated at a junction with Waldron's Lane. Aerial photographs and Tithe and OS maps have also been consulted as well as a conveyance document provided by the applicant together with witness statements.
47. A review of the DM documents shows that the Provisional Map, which was a publicly consulted document and the DM were consistent in showing the footpath on the west side of a hedge line. Witness evidence suggests that the claim route, over a private roadway east of

the same hedge line, was used but mainly impassable at a date in the 1970s.

48. The applicant had evidence to show walkers had used a track, which was shown on a conveyance document as a private easement. The use was said to be regular up to a date sometime in the 1970s. This was at a time when the DM was going through the consultation process and the Provisional Map was published. The possibility is that the public were using a line to the west of the hedge line. The witnesses state the route they had walked was overgrown and not available in this period. The DM shows the line of the footpath as it was drawn on the Provisional Map.
49. Landowner 1 made representations but did not object to the claim, although they were clear in stating the intention to provide a footpath on the same line as the DM on the development layout. The second landowner indicated they would object but have not submitted any evidence.
50. The evidence submitted with the claim, it is considered, is not strong enough to show the DM is incorrect. There was a track referred to as “roadway” which was early on described as an occupation road and which was used by walkers in a period prior to publication of the Provisional Map. The Provisional Map was publicly consulted and showed a footpath to the west of the hedge line and attracted; it seems no objection or appeal of being incorrect. The DM replicates the location of the footpath and until recently has not attracted an objection to the depiction of the footpath. The evidence submitted is not conclusive that the DM is incorrect and the recommendation is to refuse to make the Order that is requested.
51. 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

52. If the authority was to do nothing it would not comply with Section 53 of the Wildlife and Countryside Act 1981, which requires the Council to keep the Definitive Map and Statement under continuous review and make such modifications to the Map and Statement as required.

Implications and Comments

Monitoring Officer/Legal

53. The legal implications in relation to highways law are set out in the Legal matters section of this report (paragraphs 9-18).
54. The Human Rights Act is also of relevance. Whilst article 1 to the first protocol (peaceful enjoyment of property) and article 8 (right to respect for family, private life and home) are engaged, it is important to note that these rights are qualified, not absolute, which means that they can be interfered with in so far as such interference is in accordance with domestic law and is necessary in a democratic society for the protection of the rights and freedoms of others. It is considered that any interference occasioned by the making of a Modification Order is both in accordance with domestic law (the Wildlife and Countryside Act 1981) and is in the public interest as it is necessary in a democratic society for the protection of the rights and freedoms of others, namely the public who wish to use the way. Should Members resolve that a Modification Order be made in accordance with highways legislation, this is merely the start of the legal process. Once a Modification Order is made, it must be publicised, and any person will have an opportunity to formally object to it. Should objections be received, the Modification Order would have to be referred to the Secretary of State who may hold a Public Inquiry before deciding upon whether or not to confirm the Modification Order.
55. Please note that the Council will not disclose the user evidence forms that form part of the background documentation at this stage in the process. The Council considers that the information provided within the user evidence documentation is exempt information under s1&2 Schedule 12A Local Government Act 1972, as amended.
56. Under the Wildlife and Countryside Act 1981 there is not statutory right prior to an Order having been made – persons affected are entitled to the information in the event that an Order is made following the Committee decision.

Section 151 Officer/Finance

57. 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 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

58. The work of the Public Rights of Way team contributes to the Vision of the Corporate Plan of a greener Cheshire East, with the aim of

a “thriving and sustainable place” and the policies and objectives of the Council’s statutory Rights of Way Improvement Plan.

Vision – AN open, fairer, greener Cheshire East

AIM - 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 2027

Equality, Diversity and Inclusion

59. 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.

Human Resources

- a. There are no direct implications for Human Resources.

Risk Management

- b. There are no direct implications for risk management.

Rural Communities

- c. 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)

- d. There are no direct implications for Children and Young People

Public Health

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

Climate Change

- f. The recommendations will help the Council to reduce its carbon footprint and achieve environmental sustainability by reducing energy consumption and promoting healthy lifestyles.

Access to Information

Contact Officer:	Adele Mayer adele.mayer@cheshireeast.gov.uk
Appendices:	Appendix 1 document list Appendix 2 Plan Appendix 3 Photographs
Background Papers:	File CN-7-29

Appendix 1 – Document List

Primary Sources	Date	Reference Number/Source
Tithe Records		
Tithe Map	1840 Church Coppenhall	Cheshire Record Office ("CRO") EDT 108/2
Ordnance Survey Maps		
O.S. 6"	1882, 1899, 1910	Scottish Map Library ("SML")
OS 6"	1968	SML
OS 25"	1898,	SML PROW
OS 25"	1909	SML
Finance Act		
Map and Book of Reference	1910	CRO NVA XLIX.15 and NVB
Local Authority Records		
PRE-DM	1930s	PROW
Parish Survey Schedules and Maps	1955	PROW
Draft Map	1950's	PROW
Provisional Map	1952	PROW

Definitive Map & Statement	1953	PROW
Additional records		
Photos	2024	PROW– see photo sheet
Conveyance	1930, 1949	Private document
Witness statements x 6	2015	Application
Case Law	2003	R (on the application of) Leicestershire County Council v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171