

Highway and Transport Committee

[19th September 2024]

**Wildlife & Countryside Act 1981 –Part III,
Section 53, Application No: CO/8/35:
Application for the Addition of a Public
Footpath from Footpath No.9 Hassall to
the Junction with Footpath No.8 Hassall,
Hassall.**

Report of: Peter Skates, Acting Executive Director of Places

Report Reference No: HTC/30/24-25

Ward(s) Affected: Hassall.

Purpose of Report

1. This report outlines the investigation into the application that was made by Mr Meewezen on the 24 August 2015 to amend the Definitive Map and Statement to add a Public Footpath between Footpath No.9 Hassall (junction with Hassall Moss, UY1177) to junction with Footpath No.8 Hassall from A-B-C Plan ref: WCA/042 (**Appendix 1**).
2. This report includes a discussion of the consultations carried out in respect of the claim, historical documentary 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 Public Footpath to the Definitive Map and Statement.
3. 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

4. The report considers the evidence submitted and researched in the application to add a Public Footpath in the Parish of Hassall. The evidence consists of use on foot by individual witnesses over a period of over twenty years and historical documents that demonstrate the existence of a physical track feature for the part of the claimed route for well more than 30 years. The report determines whether on the balance of probabilities the status of Public Footpath has been acquired.

RECOMMENDATIONS

The Highways & Transport Committee is recommended to:

1. Decide that the application for the addition of the footpath as shown between points A-B-C on Plan No. WCA/042 at **Appendix 1**, 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 that was initially made by Hassall Parish Council 26 May 2007. On 4 July 2011 the Parish Council wrote to CEC withdrawing their application as a result of a parish meeting. The application was later resubmitted by Mr Meewezen (former Hassall Parish Council Clerk and then Footpath Secretary, The Ramblers, Congleton Group) on the 24 August 2015 to amend the Definitive Map and Statement to add a Public Footpath between Footpath No.9 Hassall (junction with Hassall Moss, UY1177) to junction with Footpath No.8 Hassall from A-B-C (**Appendix 1**). The application consisted of 4 user evidence forms and some photographs (2007 application). The 2015 application consisted of a number of ordinance survey maps.
6. The claimed route commences at Point A (Grid Ref: SJ 76362,58255) Footpath No.9 Hassall (junction with Hassall Moss, UY1177) and then proceeds along track in a north easterly direction to Point B (Grid Ref: SJ 76511,58160). It continues in a north easterly direction along a field boundary to Point C, junction with Footpath No.8 Hassall, (Grid Ref: SJ 76589,58133)
7. The width of the route from Points A-B is approximately 3 metres wide between boundaries and is a physical track like feature for its length. It is bounded by stone wall and boundary hedge and is a clear bounded feature. From Points B-C the route continues along a field boundary and is approximately 2 metres wide (RoW policy & DEFRA guidance).

8. There is only two registered landowners on the claimed route from point B-C and section A-B of the claimed route is un-registered.

Legal matters

9. 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:-

10. Section 53(3)(c)(i) is relevant were

“(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.

11. 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.

12. 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.”

13. 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”.

14. 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.
15. 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 was the date of the application being 16 May 2007.

Consultation and Engagement

16. Only a few responses were received during consultation, these were from two of the landowners and three user groups. There are two further handwritten letters of objection from other landowners dated 4 June 2007 and dated 30 June 2007.
17. Hassall Parish Council was contacted on two occasions and at the time of writing this report failed to respond.
18. Sandbach Footpath Group responded stating *‘that they have consulted with members of the group and we all strongly support the DMMO application to add this footpath’.*
19. The Open Spaces Society “the applicant”, responded by *‘I made the application before being appointed to represent the society in Cheshire East. In addition to the historical evidence to support the claim, users have walked the path for many years, unchallenged. I for example have walked the route unchallenged since the summer of 1994, until it was obstructed. The society considers that this application is well founded and support unreservedly’.*
20. The Peak and Northern Footpath Society responded stating *‘that it will be a valuable addition to the network’.*

21. Landowner 1 responded in January 2024 by stating *'that historically prior to occupying one of the cottages there was a gated access used by No.1 & No.2 Hassall Moss and properties off field view; (possible farm workers historically) accessing existing footpath No.8 Hassall at the side of No.1 Hassall Moss'. 'Residents have also confirmed that they have used the gate prior to it becoming obstructed/hedge being allowed to become overgrown'.*

'It's understood that the overgrowth has been deliberate by the landowner'.

'They would like to point out that the cart lane is utilised by tractors/horses etc. so, in effect it would be a bridleway rather than a footpath for that section, but would be a cul-de-sac'. 'If the claim is successful would the Council replace the gate?'. 'With the increase in traffic and deterioration along the Cart Lane would the Council provide material to repair the Cart Lane on an annual basis.

22. Landowner 2, in January 2024 states, *'The farm has been in the family for the duration of the claim. His brother still lives at the farm and jointly owns the fields which the route is claimed to run and was aware that there was a gap in the field boundary but is not aware that the public have been using the lane to walk down'.*

'The gap was there for the farm workers to access the fields from the farm cottages at the end of the lane as a short cut'. 'This hasn't been used for a long time and from all accounts the access is overgrown and fallen into disrepair'.

23. The handwritten objection letter dated 5 June 2007, from the landowners – state, *'we are objecting to the varying/adding of the footpath and the opening of the private stile at the corner of Hassall Moss by No's 1 & 2 Hassall Moss Cottages'. 'This opening was never a Council stile; it was a homemade stile with just two pieces of wood for the farm workers to use to get to the farm'. 'The above-mentioned cottages belong to the farm and were used to house farmworkers.*

'My husband has lived at the farm since 1957 and I myself since 1971 and the stile has never been maintained'. 'Approximately ten years ago there was sheep grazing in the field and some kept popping out of the gap in the hedge, so we placed a small pallet in the gap to stop the sheep escaping'.

'Eight years ago, horses grazed that part of the field and a pallet was placed there and is still in place, there has never been any maintenance'.

24. The handwritten objection letter dated 30 June 2007, from a landowner, states, *'we would like to formally object to this application, I have lived*

here for 67 years and my wife for 45 years and my son for 41 years, for the last eight years we have farmed the farm next to ours’.

‘The stile in question as always been for farm workers and has been blocked off for at least twelve years or more’. ‘The hedge has been cut back every year and that part of the hedge has never been disturbed, this in itself tells you that nobody has ever used that entrance in the last twelve years or so’.

‘The road down Hassall Moss is a private gravelly road and certainly unsuitable for a footpath, the road is narrow – a single car width only with no passing place’. ‘Where will walkers go when they meet a car or delivery van, let’s hope common sense prevails in this decision’.

Historical Evidence

Ordnance Survey (O.S.) Records

25. 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.
26. **Ordnance Survey 1 inch to a mile, 1842.** The map shows Hassall Moss but doesn’t show the full extent of the claimed route.
27. **Ordnance Survey 1st Edition 1:25 inch, c1875.** The map shows the full length of the claimed route. Along Hassall Moss it’s shown as a clear physical feature bounded by solid double lines – indicating a other road (poor or unmetalled). Then leaving annotated as a single dashed line – indicating a footpath along the field boundary.
28. **Ordnance Survey 1:25 inch c1898.** The map shows the full length of the claimed route. Along Hassall Moss it’s shown as a clear physical feature bounded by solid double lines – indicating another road (poor or unmetalled). Then leaving annotated as a single dashed line – indicating a footpath along the field boundary.
29. **Ordnance Survey 1:25 inch c1910.** The map shows the full length of the claimed route. Along Hassall Moss it’s shown as a clear physical feature bounded by solid double lines – indicating another road (poor or unmetalled). Then leaving annotated as a single dashed line – indicating a footpath along the field boundary.

Old County Commercial maps

30. 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. 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 public status, although they may provide supporting evidence of the existence of a route.
31. Burdett map of 1794 and the Swire and Hutching map 1830 are of very limited use as it doesn't show the claimed route only surrounding major roads and routes. By the 1831 Bryant map shows part of the claimed route (Hassall Moss) as two solid lines.

Tithe Map 1841

32. Tithe Awards were prepared under the Tithe Commutation Act 1836, which commuted the payment of a tax (tithe) in kind, to a monetary payment. The purpose of the award was to record productive land on which a tax could be levied. The Tithe Map and Award were independently produced by parishes and the quality of the maps is variable. It was not the purpose of the awards to record public highways. Although depiction of both private occupation and public roads, which often formed boundaries, is incidental, they may provide good supporting evidence of the existence of a route, especially since they were implemented as part of a statutory process. Non-depiction of a route is not evidence that it did not exist; merely that it did not affect the tithe charge. Colouring of a track may or may not be significant in determining status. In the absence of a key, explanation, or other corroborative evidence the colouring cannot be deemed to be conclusive of anything.
33. The Tithe Map, Township: Hassall dated 1841, reference EDT 190/2, shows part of the claimed route (Hassall Moss, A-B) bounded by solid double line & dashed line.
34. The owners in 1841 for plot No. 42a on the Tithe Map was Thomas Sumner, plot named Hassall Moss. The owners in 1841 for plot no.49 (named Rye Stubble) was Messieurs Timmis and occupied Samuel Oakes.

Finance Act Map 1910

35. 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.

36. The valuation book from Cheshire East Archives, reference NVA 2/9, for the Sandbach, Wheelock was reviewed and there was no entry for the claim route.

Deposit Plans

37. 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.
38. 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.
39. Plan of the Proposed Turnpike Road from Wheelock Wharf in Sandbach and Book of Reference, 1834, ref QDP 115, the claimed route is outside of the area shown on the plan and there is no entry within the Book of Reference for the plan.
40. Section of intended Railway plan from Warrington and Newton, county palatine of Chester 1829, and Book of Reference, ref QDP 88. The claimed route is outside of the area shown on the plan and there is no entry within the book of reference for the plan. The railway was never built.
41. The North Staffordshire Railway, Trent & Mersey Navigation: plans and sections, and book of reference, 1890, ref QDP 667. The claimed route is outside of the area shown on the plan and there is no entry within the book of reference for the plan. The railway was never built.
42. Congleton and Crewe Railway: Book of Reference to plans of lands in Hassall and Wheelock, 1845, ref QDP 217. The plan shows part of the claim route, parcel numbered "42a" and where the route is not shown the parcel of land is numbered "37". The railway was never built.

43. The Book of Reference entry for number “37” describes this parcel of land as “**Field, Footpath and Occupation Road**” this I believe is reference to an annotated footpath running along the adjacent field boundary and not where the claimed route is alleged to go. The track is described as an occupation road. Entry for number “42a” describes this parcel of land as “**Occupation Road and Footpath**”. These I believe is reference to an annotated footpath running along the adjacent fields and not where the claimed route is alleged to go. The track is described as an occupation road.

44. The Railway Clearing House plan dated 1913, does not show the claimed route.

The Definitive Map records

45. 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.

46. The Definitive Map, Provisional and Draft Map do not show any of the claimed route marked and only existing nearby Public Footpaths.

Aerial Imagery

47. Aerial Imagery from 1971 to 2015 was consulted with to see if there are indicators that the route has been used, reviewing the five aerial photographs Hassall Moss can be clearly seen. Although once the claimed route goes onto the adjacent fields B-C there is not shown.

User evidence

48. There are 4 user evidence forms supporting the claim. The User Evidence Forms (UEFs) were completed by local people living in the area (including the applicant), with two giving evidences of at least 20 years + use of the claimed route, with one user mention use going back to the 1930’s and one user evidence form covering four family member. Since 2007 when the user evidence forms where submitted, one user is deceased, one has moved away, and the four family members didn’t respond to being contacted. Only one user had a follow up interview. Detailed user evidence charts showing year of use can be seen at **Appendix 3**.

49. The route claimed is clearly identified by all user’s map sketches at the back of the UEF’s. But the information given to the questions in the forms was limited and needed exploring more by follow up interviews.

50. The date when the first challenge to public use wasn't made clear in the UEF's, but the initial claim was submitted 19 May 2007 (date on the application) so it can take this as the relevant date for the application. All users refer to a wooden pallet/barrier being put up off Hassall Moss, and before that there was a wooden stile that allowed access to the field, no dates where provided.
51. Within the period 1987-2007, only two of the users have used the path throughout the 20-year period, with the other claiming use over 10 years of use during that period. All users have considered the route being a public footpath, and none ever asked permission and the use was always by foot.
52. The frequency of use is low with three users using the route occasionally, and one only weekly. The use was majority for recreational and leisure, with the user with the longest use, used the route to go to and from school when a child.
53. The evidence given by the users in their UEFs show that no actions appear to have been taken by the landowner, to challenge the public's belief that the route enjoys public rights.
54. Interview took place during April 2024 with the applicant. Unfortunately, the other two have been difficult to contact. The user interviewed remembers a clear through route.

Conclusion on Evidence

55. Documentary evidence from old Ordnance Survey (OS) maps show all of the claimed route has been a physically defined feature back to the 18th century. OS map evidence is good in support of other documents, but reviewed in isolation are very weak as they tend to show all routes that are not necessarily public routes. Other documents reviewed do not show the entire claimed route and does not provide evidence that support what the OS maps show that a public footpath subsists along the claimed route.
56. The user evidence submitted with the application was lacking in detail and numbers to establish use over 20-year period.
57. While the user groups all support adding the claimed route to the Definitive Map and Statement, the landowner's evidence since 2007 to 2024 has been consistent stating that the gap in the hedge was there for farm workers to access the fields and has been modified throughout the years due to the change in land use. The deposit plan ref QDP 217 Book of Reference describes the claimed route as a "footpath, occupation road" which would support the use by farmworkers.

58. The balance of user evidence combined with documentary evidence does not support the case that a public footpath exists along the route between points A-B-C as shown on plan No. WCA/042 at **Appendix 1**.

Recommendation

59. It is therefore considered that the requirements of Section 53(3)(c)(i) have not been met and it's recommended that the application is refused on the grounds that there is insufficient evidence to make a Definitive Map Modification Order to record a public footpath between footpath No.9 & footpath No.8 Hassall. For the reasons explained in this report (sufficient use of the route for 20 years has not been satisfied to meet the legal tests to make an Order).

Council Policies

60. 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.

Other Options Considered

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

Implications and Comments

Monitoring Officer/Legal

62. The legal implications in relation to highways law are set out in the Legal matters section of this report (paragraph 9-15).

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 would usually hold a Public Inquiry before deciding upon whether or not to confirm the Modification Order.

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.

Under the Wildlife and Countryside Act 1981, there is no such 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

63. 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.

There are no financial implications.

Policy

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

Vision – An open, fairer and sustainable place

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

65. 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

66. There are no direct implications for Human Resources.

Risk Management

67. There are no direct implications for risk management.

Rural Communities

68. 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)

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

Public Health

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

Climate Change

71. 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:	John Lindsay john.lindsay@cheshireeast.gov.uk
Appendices:	Appendix 1 – Plan no: WCA/042 Appendix 2 – Archive List Appendix 3 – User Evidence Chart
Background Papers:	File no: CO/8/35