

## **Highways and Transport Committee**

**19 September 2024**

**Wildlife and Countryside act 1981 – Part III Section 53 Two applications Nos. CO-8-37 and CO-8-38 to vary the location of Public Footpaths 34 and 36 in the Parish of Odd Rode**

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**Report of: Peter Skates, Acting Executive Director of Place**

**Report Reference No: HTC/33/24-25**

**Ward Affected: Odd Rode**

### **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 This report outlines the investigation into two applications made in 2008 by the agent for the owner of land in Odd Rode. The applications seek to delete the line of Public Footpaths 34 and 36 Odd Rode and add a public footpath on a different line to the Definitive Map and Statement of Public Rights of Way (the “DM”). There is no dispute that these are public footpaths. Public Footpath 34 Odd Rode is shown on the plan WCA/045 and Public Footpath 36 Odd Rode is shown on the plan WCA/044 both plans at Appendix 2A and 2B.
- 3 The applications allege that at the time of submission of the applications the public footpaths were running over land which was not the legal line. The application plans do not show which line it is alleged was incorrect. The plans only show the current legal line of the public footpaths.

- 4 The applications, having been properly registered, must be investigated and determined. The documentary evidence that has been examined is referred to below and a list of all the evidence taken into consideration can be found at Appendix 1.
- 5 This report includes a discussion of the consultations carried out in respect of the applications, the documents and legal tests for the modifications that are requested. There is also a detailed discussion of the records relating to the DM process.
- 6 The investigation found that the statements supporting the applications were new pieces of evidence and satisfied the tests for reviewing the DM. The applications however do not have a plan which identifies the route that was alleged to be incorrect and on the balance of probabilities or lack of evidence, the DM is not proved to require modification.

#### RECOMMENDATIONS

The Highways and Transport committee is recommended to decide:

1. **That the applications for variation of Public Footpath 34 and 36 in the parish of Odd Rode be refused on the grounds that it cannot be demonstrated that the Definitive Map and Statement needs modifying.**

#### Background

- 7 The applications were made to the former Cheshire County Council, in 2008. Internal correspondence indicates that the Land Agent disputed the location of the public footpaths which prompted him to make these applications. Internal correspondence with the Agent in 2007 suggests that there was a Council review of the DM. The routes apparently declared by the Agent differed from the DM.
- 8 The Council was conducting a revision of the digital map showing public rights of way and correcting any anomalies. This programme was to support consolidation of the DM and was initiated in 2008. This would create a DM on a modern map base with all the changes that had been made since the last publication. The project was presented to the Cheshire and Warrington Local Access Forum and Cheshire County Council Public Rights of Way committee held on 18 April 2008.
- 9 The programme was made possible by the electronic scanning of the DM sheets and subsequent checking and correction of map anomalies on the GIS system. A number of map anomalies had long been

identified on the paper maps that had been created by human error due to the hand drawn transcription process, both on the DM and the electronic working copy. A protocol was put in place so that any change was recorded and verified by the cumulative archive of the DM. The effect was that the correction of the human errors makes the DM reflective of the accuracy of the original public rights of way survey. It is possible that Footpaths 34 and 36 were corrected in this process, however there is no record of a correction.

- 10 The two applications were placed on a statutory register regulated under Schedule 14 of the 81 Act. Since the application plans do not show the change desired it has made this investigation difficult to follow, however the Authority has a duty to investigate the evidence and determine all applications that are registered. These applications have been considered on the basis that if an error can be found in the documents it will be determined that the DM needs modifying.

#### Description of the application routes

- 11 The Definitive Statement for Public Footpath 34 Odd Rode describes the commencement of the footpath from Old School Lane (UC/3/75) in a westerly direction to FP28. The name of School Lane is now replaced by Holehouse Lane (UY1167). The footpath is shown on Plan WCA/045.
- 12 Public Footpath 36 Odd Rode is described on the Definitive Statement commencing from the unclassified county road (UC/3/102) (Old Knutsford Road (UY1193)) generally in an easterly direction to FP32 [Odd Rode]. The footpath is shown on Plan WCA/044.

#### **Legal Matters**

- 13 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.
- 14 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.
- 15 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 explained at paragraph 14 above.

- 16 Events listed under Section 53(2) or the 81 Act includes section 53(3)(c) where "the discovery by the authority of evidence" which (when considered with all other relevant evidence available to them) shows:-
- 17 (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, subsection to section 54A, a byway open to all traffic. AND
- 18 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
- 19 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.
- 20 In order for an application to be successful it will have to bring forward a "discovery of evidence" (Section 53 of the 81 Act). It has to be shown that it is new evidence that is considered rather than the evidence that had been originally considered before the DM was published. The reason for this is set out by "Burrows v Secretary of State for Environment, Food and Rural Affairs (2004)."
- 21 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.
- 22 The evidence considered in this report is listed in the appendix, together with other documents, case law and guidance. The new evidence is landowner statements.

### The Definitive Map Process

- 23 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 Congleton district, the date of the survey is 1953 which is referred to as the “relevant date”.

- 24 The parish survey for Odd Rode was conducted in 1950/51 on a “1:6” OS base map. The schedule from the parish describes FP34 a footpath commencing at Old School Lane 140 yards west of “Boarded Barn Smithy and runs in a westerly direction” to terminate at a stile on FP28 “200 yards north east of “Pearhouse””. The schedule lists a field gate and bridle gate and “stile 1”, then “stile 2” a hurdle stile and “stile 3” which is 4 foot from stile 2 and is a ladder stile type. The description is of a path that is “well marked”. The path is recorded as being 7 foot wide and a cinder track along the “s side of hedge”. The parish map records a field gate at the junction with the lane, and the second stile at the junction with FP28.
- 25 The Parish Survey Schedule for FP36 describes the path commencing from “Knutsford Road (UC/3/102)” as “200 yards north of Snapes Aqueduct” and “runs in an easterly direction to terminate “northwest of Brick House Farm at the junction with FP32”. The furniture is logged so that from a stile numbered “S4” the path runs into Bratts Wood to “FB5” of two planks running to “S6” to “S9”. The schedule description is consistent with the accompanying map, with particular note of the location of stiles at field boundaries matching those on the south side of the woods.
- 26 The Public Rights of Way team hold records that pre-existed the DM process and date to approximately 1930. This is represented by a DM (for Congleton) which recorded the footpaths and has a record of the maintenance issues. A hand drawn red line on the OS base map shows Footpath 36 running alongside the south of Bratt’s Wood. Footpath 34 runs along a field boundary, but it is not clear to see on the map if the path is south of the boundary.
- 27 There is consistency with how the parish survey recorded the location of FP34 and FP36 and the successive maps of the DM process.
- 28 Draft Map for Footpath 36 is a hand drawn purple line drawn on an OS base map of 6” to 1 mile. The footpath commences on the unclassified road and runs easterly through Bratt’s Wood and turns on the south side of the woods to a northeast direction. The stiles coincide with the field boundaries on the south side of the woods, indicating the path was running alongside and not in the woodlands. The Draft Map for Footpath 34 shows the path commencing on the unclassified road, runs in a westerly direction to join Footpath 28 and lists a field gate from the road, and a stile which coincides with a field boundary on the south side. The path reflects the routes shown on the parish survey.

- 29 The Provisional Map is hand drawn onto an OS Map at 6" to 1 mile. Footpath 36 is shown by a purple line, running from the unclassified road easterly to and through Bratt's Wood and turning to run on the south side of the woods in a north easterly direction. The underlying OS map has a corresponding double dashed line and "F.P." indicating the route of a path. Footpath 34 is similarly drawn over a double dashed line on the OS map base, labelled "F.P." and running on the south side of a boundary line.
- 30 The three maps all reflect the route that is shown on the DM. In the case of Footpath 36 the footpath runs through Bratt's Wood to turn and run south of the woodland. There is no indication that other than crossing through the woods, the footpath continues a run within the woodland. Footpath 34 is consistently shown to run from the road, Holehouse Lane, on the south side of a field boundary. The routes shown are currently depicted on the electronic map (the GIS map) on the same alignment.

#### Ordnance Survey maps

- 31 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.
- 32 OS 1st Edition County Series (6" to 1 mile 1882, 1888 and 1910 Sheet L, LI and LVII) showing a double broken line running from the Knutsford Road, crosses fields, runs through woodland and then running on the easterly and south side of woodland to "Brick House" consistent with the alignment for FP36. On sheet LI a single broken line running westerly from the unnamed lane is shown on the alignment of FP34 on the south side of a field boundary. The series doesn't change and is consistent with the location of the footpaths on the DM.

#### Tithe Map Odd Rode 1836

- 33 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. In Cheshire there appears to be no tithe map which has produced a map key

- 34 The map depicts a single broken line indicative of FP36 running easterly from Knutsford Road, to plot number 593 "Beatts Wood" and continuing along the south side of the wood running north easterly to plot 625 "lane with pit". The plot names do not indicate where a footpath runs. A single broken line running along the edge of a field, parcel number 514, from "School Lane" (now Holehouse Lane) on the south side of a field boundary.

### **Consultation and Engagement**

- 35 The applicant is no longer in post but the Landowner has been in contact to discuss the applications. The discussion with the Landowner was to confirm the landowner statements that had been submitted with the application. The Landowner has agreed that the applications are not relevant since the location of the footpaths are on the correct alignment as they believe and as shown on the DM and no correction is currently desired.
- 36 The Odd Rode Parish Council has also confirmed that they have walked the paths as they are on the ground and on their records and have no representations to make.
- 37 Representations from the Peak and Northern Footpath Society have not objected to the application.

### **Reasons for Recommendations**

- 38 Evidence was brought forward claiming that Public Footpaths 34 and 36 Odd Rode were 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.
- 39 A review of the DM documents shows that the successive maps for the DM process were consistent in showing the footpaths as they are currently shown on the DM and as they appear on the ground.

- 40 The Landowner was not able to find the evidence originally relied on regarding plans of the footpaths but has agreed that no Orders are required since the current and legal line of the footpaths are correct.
- 41 The evidence submitted with the claim, it is considered, is deficient in setting out the perceived error. The investigation found all the documents for the DM consistent, and consultation agreed that the current and legal line is correct. The recommendation is to refuse the applications.
- 42 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**

- 43 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*

- 44 The Council are complying with their duties under the Wildlife and Countryside Act 1981 which are set out in the Legal Matters section of this report (Paragraphs 15-25 above).
- 45 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.

- 46 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.
- 47 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*

- 48 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*

- 49 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*

- 50 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*

51 There are no direct implications for Human Resources.

*Risk Management*

52 There are no direct implications for risk management.

*Rural Communities*

53 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)*

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

*Public Health*

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

*Climate Change*

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

| <b>Access to Information</b> |   |
|------------------------------|---|
| Contact Officer:             | Adele Mayer<br><a href="mailto:adele.mayer@cheshireeast.gov.uk">adele.mayer@cheshireeast.gov.uk</a> |
| Appendices:                  | Appendix 1 list of resources : Appendix 2 Report Plans : Appendix 3 Site photographs                |
| Background Papers:           | Case Files CO-8-37 and CO-8-38  |

## Appendix 1

| <b>Primary Sources</b>           | <b>Date</b>             | <b>Reference Number/Source</b>   |
|----------------------------------|-------------------------|--|
| <b>Tithe Records</b>             |                         |  |
| Tithe Map                        | 1838                    | Cheshire Record Office<br>("CRO") EDT 309/2  |
| <b>Ordnance Survey Maps</b>      |                         |  |
| O.S. 6"                          | 1882,<br>1888, 1910     | Scottish Map Library ("SML")<br>Sheet L, LI and LVII   |
| <b>Local Authority Records</b>   |                         |  |
| Parish Survey Schedules and Maps | 1953                    | PROW   |
| Draft Map                        | 1953<br>(relevant date) | PROW   |
| Provisional Map                  | 1968                    | PROW   |
| Definitive Map & Statement       | 1971                    | PROW   |
| Correspondence                   | 2007-2009               | PROW   |
| <b>Additional records</b>        |                         |  |
| Photos                           | 2024                    | PROW– see photo sheet  |
| Witness statements x2            | 2008                    | Application  |
| Case Law                         | 2003                    | R (on the application of) Leicestershire County Council v Secretary of State for the Environment, Food |

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|  |  | and Rural Affairs [2003]<br>EWHC 171 |
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