

# CHESHIRE WEST AND CHESTER BOROUGH COUNCIL

## OFFICER DELEGATED DECISION REPORT

<b>Application Number</b>	<b>CH-6-36</b>
<b>Description</b>	<b>Wildlife and Countryside Act 1981 – Section 53 Addition of a bridleway to the Definitive Map of Public Rights of Way</b>
<b>Location</b>	<b>Between Goldford Lane, Larkton and Long Lane, Bickerton between points A &amp; B on Drawing No. MO/547.</b>
<b>Applicant Name</b>	<b>V Garner, Malpas</b>
<b>Ward</b>	<b>Broxton Ward and Wrenbury Ward (CE)</b>
<b>Ward Members</b>	<b>Councillor Ann Wright and Councillor (CE) Stanley Davies</b>
<b>Case Officer</b>	<b>Adele Mayer, Greenspace Technical Officer adele.mayer@cheshirewestandchester.gov.uk 01606 271822</b>
<b>Date</b>	<b>23<sup>rd</sup> August 2011</b>

### **Recommendation:-**

- (1)** That an Order be made under section 53(2) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a bridleway as shown between Points A-B on drawing No. MO/547 and that the requisite notice of the making of an Order be given.
  
- (2)** That the Head of Culture and Recreation be authorised to take any action considered necessary in respect of the confirmation of the Order hereby authorised to be made.

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## **1. BACKGROUND**

- 1.1** In September 2007 Cheshire County Council received an application under Section 53(5) the Wildlife and Countryside Act 1981("the 1981 Act") requesting

that a Definitive Map Modification Order be made to add a bridleway to the Definitive Map and Statement (“the DM”). The application seeks the addition of a bridleway along the route shown between points A and B on the attached plan, Drawing No. MO/547 (“the Plan”).

- 1.2** The application was made on the basis provided for in Section 53(3)(b) of the 1981 Act, namely that a sufficient period of time has elapsed during which the public has used the claimed route such that it can be presumed that the route has been dedicated as a public right of way.
- 1.3** The claim in question was registered under the two newly created unitary authorities, Cheshire West and Chester Borough Council (CWAC) and Cheshire East Borough Council (CE). CWAC have the written authority from CE to proceed with this application on their behalf. A list of addresses that would normally be consulted by CE was provided and notification of the investigation was sent out to all relevant and interested parties.
- 1.4** The northern section of the land in question is unregistered although the adjacent landowner of Larkton Hall has been consulted on the application. The southern part is within the title for Pool Farm, Bickerton and both sections are understood to have been in family ownership for a period longer than the years under this claim. In 1972 both farms took down boundaries to what had been a double hedged/walled trackway. The county council received objections at the time and were involved at the behest of users and agreement was reached to install bridle gates between extant hedges/boundary.  
*“The longstanding controversy regarding the removal of boundary hedges , erection of gates etc...has now been resolved...Mr D Johnson, Larkton Hall, agreed to remove a linear fence which reduced the width of the route...As part of the deal Mr Johnson is to be provided with a self closing bridle gate which he is prepared to erect himself..”*(internal memo from Director of Countryside and Recreation, 8.10.1975). The route was also signed at either end as bridleway
- 1.5** A barbed wire fence was erected by Mr Johnson of Larkton Hall in 1975 and enforcement action threatened under s143 of the Highways Act 1959 to remove the fence; *“the strip of land which has been wired off is considerably less than the width of the former lane. The wire fence therefore should be set back to allow a width of 15”* (letter from County Secretary and Solicitor 20.01.1975) Enforcement action was also threatened against Mr R W Bourne Esq of Pool Farm about a steel gate in disrepair *“I am writing to give you notice that unless the obstruction is removed by repairing the gate so that the public can use the path without hindrance, the Authority will have to consider taking legal action to achieve this”* (letter from County Secretary and Solicitor, 20.01.1975)

**1.6** If the Order sought is made and confirmed the effect will be to add a public right of way on foot, on horse back and leading a horse to the DM from Goldford Lane, Larkton at OS grid reference SJ 5022 5218 (point A on the Plan) running for approximately 603 metres in a southerly direction to a point on Long Lane, Bickerton at OS grid reference SJ 5071 5186 (point B on the Plan). The surface is pasture. There are gates at either end and also two wooden bridle gates at the ownership boundary.

## **2. THE LEGAL TESTS**

**2.1** Section 53(2)(b) of the 1981 Act imposes a duty on the Council to keep the DM under continuous review and make any modifications to it that are necessary as a result of the occurrence of certain events. Section 53(3) sets out the events in question. Section 53(3)(b) provides that a route should be added to the DM when:-

*“the expiration...of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path...”*

**2.2** There are two ways in which a sufficient “period of enjoyment” can be demonstrated in order to raise a presumption or inference that the way has been dedicated for the purposes of Section 53(3)(b). Firstly, this can be achieved by meeting the requirements set out in Section 31 of the Highways Act 1980 (“the 1980 Act”). Additionally, or in the alternative, the requisite “period of enjoyment” can be demonstrated by satisfying the requirements of “common law”, or law established through a series of cases that have been decided by the courts.

**2.3** In addition, section 53 (3)( c)(i) provides that a route should be added to the DM where the discovery of evidence by the Council , when considered with all other relevant evidence available shows:-

*“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, being a right of way such that the land over which the right is a public path”*

**2.4** The available evidence must be evaluated and weighed and a conclusion reached as to whether on the balance of the probabilities public rights subsist or are reasonably alleged to subsist and any other issues such as safety, suitability, desirability or the effects on property or the environment are not relevant to the decision.

### **3. SECTION 31 HIGHWAYS ACT 1980 (“S31”)**

- 3.1** In order to satisfy the requirements of S31, use of the way by the public must have been for a period of at least 20 years. Section 31(2) provides that the 20 year period is to be calculated retrospectively from the date upon which the right of the public to use the way is brought into question.
- 3.2** The application to modify the DM which was made in September 2007. Section 31 (7A) of the 1980 Act (as amended by section 69 of the Natural England and Rural Communities Act 2006) provides for the application to apply as the matter bringing the right of public to use the way into question. The period of twenty years was calculated from September 2005 to September 2007.
- 3.3** S31 also requires that the public use made of the route during that 20 year period was uninterrupted, and that the use was made “as of right”, that is to say without secrecy or force, and without the permission of the landowner.
- 3.4** If uninterrupted user, “as of right”, for the 20 year period can be shown, then it is presumed that a public right of way has been dedicated unless there is sufficient evidence to show that the landowner did not intend to dedicate the route as a public right of way. Evidence of this nature will typically be of steps undertaken by the landowner in relation to the period of time in question to prevent use by the public or to disabuse the public of the notion that their use of the way was “as of right”.

### **4. COMMON LAW**

- 4.1** The rules relating to presumed dedication under common law dedication differ slightly from the rules under S31. The differences are however only material when presumed dedication under S31 cannot be demonstrated. If, for example, reliance was required on some period of use less than 20 years duration, or if reliance was placed on a period of user expiring at some point before an identifiable act which brings into question the public’s right to use the way, then resort to the common law rules of dedication may be necessary.
- 4.2** It is however the case in this application that the evidence available is considered to satisfy the statutory test, and in so doing that it also satisfies the common law requirements. There is, therefore, for the purposes of this report no need to distinguish between the two tests for the purposes of the conclusions drawn.

## 5. USER EVIDENCE

- 5.1** The application for the Order was accompanied by witness evidence forms from eight persons who have claimed to use the way. This user is summarised in the chart at Appendix A. Twelve user evidence forms were submitted, six of the witnesses have been interviewed. Four witnesses claimed use solely on horseback, 8 on foot and with a horse and one additionally claimed use by bicycle. The user evidence submitted collectively covers a period of continuous use from 1953 to the date of submission of the application in 2007.
- 5.2** All witnesses claimed that the way was used openly and without permission. None of the witnesses report any attempt to prevent or dissuade them from using the way until the middle gates became too difficult to use at the same time as holding a horse c.2007.
- 5.3** It is claimed that the route was used for recreational purposes, walking the dog or hacking with a horse, although one user claimed the route was used on the way to school in a period before 1964. Of those who had used the route one user stated the track *“was a well-known cut through to Bickerton Hill. As children me and my pony riding friends regularly used it as a short cut from Bickerton and Cholmondeley.”* Only one user claimed to have used the route daily on foot, other use on horseback was occasional or monthly.
- 5.4** None of the witnesses recalled there ever being any signs indicating that the route was not a public right of way. Witnesses reported a bridle sign at both ends of the track, one of which at Long Lane still stands. The witnesses interviewed claimed that at Goldford Lane there had been a bridle gate up to c2008 when it was replaced with a pedestrian kissing gate. Internal council records show that the kissing gate was installed to facilitate access to a public footpath at the same point on the highway as the claim.
- 5.5** Four witnesses described the route in the 1950's-1970's as bounded by a hedge on both sides. Three of the witnesses referred to what they referred to in their opinion as remnant stone walling apparently collapsed from the original boundary walling.
- 5.6** The claimed use on a bicycle was for a short period from c1966-1974 and was occasional use. Whilst requisite use by bicycle can give rise to a claim for a restricted byway, the necessary circumstances for such a claim to arise are not present in the current case.
- 5.7** The claimed use in a vehicle was occasional use by one witness between 1975 and 1980. One witness claimed to have seen a tractor using the route in the 1950's; the style of tractor of that date being of such width that the track could

accommodate the vehicle. Whilst requisite use by motor vehicle could not give rise only with exception for a Byway Open to All Traffic, the necessary circumstances for such a claim to arise are considered not to be present in the current case.

- 5.8** The witness evidence submitted with the application is sufficient to show that the public enjoyed use of the way on foot and on horseback that they did so “as of right” uninterrupted over the 20 year period in question. Furthermore, the user evidence submitted discloses no basis upon which to assert that there was, during that period any evidence that there was no intention on behalf of the landowner to dedicate the way.

## **6. FURTHER INVESTIGATIONS**

- 6.1** To corroborate the witness evidence submitted, further investigations were undertaken. Details of all evidence taken into consideration is summarised in Appendix B
- 6.2** The standard reference documents comprising historical maps and records have been consulted in connection with this application. The earliest map and document being an estate map and perambulation of the boundaries of the manor of Bickerton for Philip Egerton drawn up in 1735. Both documents list the field to the south-west of Deans Lane as “*deans flat*” which is an indication of the antiquity of the name, the map shows a bounded track on the northern section of the route and a single boundary to open fields on the southern section. A slightly later, although undated estate map for “*Larton Hall*” estate, shows the whole of the route as a bounded track. The map labels adjacent land as being in the ownership of “the late Sir Philip Egerton Esq” and is thought to date c late 18<sup>th</sup> century/early 19<sup>th</sup> century.
- 6.3** The claimed route is depicted on OS plans which are good documentary evidence of the physical record of the existence of the route. It is shown on the 1” scale map of 1842 and subsequent editions at different scales show the route between boundaries and apparently open at each end.
- 6.4** The route is shown on earlier county commercial maps, Burdetts map of 1777, Greenwoods of 1819 and Swire and Hutchings map dated 1830. Where a key is available, the route is depicted as a “cross road”, comparable to other highways which are public highways. Taken together, the maps are good evidence that the lane was physically on the ground and suggests that it was part of the local highway network.
- 6.5** Tithe maps were prepared to commute the payment of tithe taxes to a monetary payment. The purpose of the mapping was not to record public highways, but since the process was part of a statutory process under the Tithe Commutation Act of 1836, the veracity of the maps carries some weight. The map for Larkton parish dated 1842

shows the northern section of the route to the parish boundary, whereas the Bickerton map dated 1839 does not show the route, or does not show a bounded route.

- 6.6** The Finance Act 1910, repealed 1914, was almost a domesday record of England at that date. Landowners would be taxed on the sale of land and so as a consequence, they were able to apply for a deduction for public rights of way crossing their land, and the maps that were drawn up would be expected not to include public highways "*land held by or on behalf of a rating authority*" (s31(5) of the Act). The working maps for the claimed route shows the northern half of the route excluded from hereditaments but similarly to the Tithe map, the base mapping does not depict a bounded lane nor is a length of route excluded from the hereditament nor is there a deduction for a public right of way.
- 6.7** The parochial parish council meeting minutes for Bickerton parish have been publicly archived. It is recorded on 28<sup>th</sup> February 1972 that complaint was made against the ploughing of Dean's Lane, "*as the ends of the lane have not been fenced off, and access for the public has not been prevented, there is virtually no difference*". This is corroborated from evidence of the witnesses.
- 6.8** The council holds its own internal records including correspondence relating to complaints. Letters and memorandum for 1975 document complaints against the landowners adjacent to the lane as described above in 1.5. The county council issued a type of "self-closing" bridle gate to Mr Johnson of Larkton Hall, as problems seemed to have arisen following a change in farming practice from the ploughing referred to in correspondence dated 1972 and a few years later in 1975 when stock control gates and fencing were needed. Some degree of acknowledgement or acquiescence to the existence of a public right is also considered to exist insofar as the self-closing wooden bridle gate is still in situ.
- 6.9** An officer from the council undertook a site visit to the termination points for the claimed route on 14<sup>th</sup> January 2008 and physical conditions and signs noted. A bridle gate at the Goldford Lane junction with the route and a metal finger post for the public footpath. At the southern junction on Long Lane, there was a field gate, a wooden bridleway sign which had inscribed on it "*bridleway to Goldford Lane*". Access to the whole route was not available.
- 6.10** The registered landowner and adjacent owner were notified when the application was made in 2007. Notice of the application was advertised on site to landowners unknown from 10<sup>th</sup> May 2011 for 28 days. No other landowner has stepped forward and those known have been unable to provide any evidence to negate an intention to dedication or that any steps had been taken to prevent public use or disabuse the public of the presumption that a right of way existed. Both landowners have raised concerns that the recording and opening of a bridleway would create a risk of spreading disease between two herds of cattle. A letter submitted on behalf of

Larkton Hall estate states “*both farms have dairy cattle and it is essential they don’t mix for health reasons.*” Whilst these concerns are not considerations for an application under this part of the act, the council would need to pay consideration to those concerns in the event that an order is made.

- 6.11** An assessment of the consultation carried out by the Historic Environment Officer was carried out and revealed a record documenting the earliest date for the name *le dene* in 1306 in the Cholmondeley deeds. The lane lies on the township/parish boundary “*often marked by banks, ditches, stones and species rich hedgerows.*”. In itself the information is testament to the antiquity of the route.
- 6.12** The ward councillors for Malpas and for Wrenbury Ward (CE) attended a site meeting on 6<sup>th</sup> June 2011 and took the opportunity to view the claimed route and made comments on the affect of such a claim with regard to stock control. They are in support of both councils taking such action as deemed necessary to support both farms affected in the event that an order is made and successfully confirmed.
- 6.13** The parish council for Broxton were represented by a member at a site meeting held on 6<sup>th</sup> June 2011 and have made no adverse comments other than supporting the concerns of the landowners with regard to the safety and security of the herds.

## **7. Conclusion**

- 7.1** An application was duly made and registered in 2007 requesting that an order be made to add a bridleway from Goldford Lane, Larkton to Long Lane, Bickerton based on witness evidence. The evidence of the witnesses is considered sufficient to raise a presumption of dedication in law, and it is considered that there is insufficient evidence of any acts or intention which would negate that presumption.
- 7.2** Investigation of the application revealed documentary support for the existence of the route prior to the claim. The route is either partly or wholly shown in an estate map of 1735, county maps of the early nineteenth century, Tithe maps from that period and Ordnance Survey mapping shows the lane from the 1840’s through to the current mapping. The records for the Finance Act 1910 show the northern section was excluded from hereditament which is strong evidence that the way was considered to be public. The documentary evidence when considered with all other available evidence is considered to be sufficient to reasonably allege that a public path subsists.
- 7.3** The correspondence from the former Cheshire County Council legal service indicates that there had been a period during the 1970’s whereby public use was acknowledged by the council and by landowners and led to the installation of gates and setting of widths. It is also concluded that a case under common law could be met.

- 7.4** It is concluded therefore that on account of the expiry of the duration of a period of 20 years user, between 1987 and 2007, of the way by the public “as of right”, and in the absence of any evidence of a lack of intention to dedicate and the supporting documentary evidence, the requirements of section 53 of the 1981 Act are, on the balance of probabilities, satisfied and the requirements for the making and confirmation of the order sought would appear to have been met.
- 7.5** Accordingly, it is considered that the Definitive Map and Statement for the Rural District of Tarvin should be modified by addition of a public bridleway as shown between A-B on the plan MO/547 and the Cheshire East Definitive Map and Statement should be modified by the addition of a public path as shown between B-C on the plan MO/547.

**8. Associated documents**

Application file CH-6-36. Appendix A user summary. Appendix B relevant documentary evidence



## Appendix B Documentary Evidence

### 1. Communications Received

Application No. 6/36 made by Mrs V Garner, Malpas, registered 13.09.07

Cheshire East Council letter 13.10.2010

CWAC Specialist Environmental Services e-mail 10.01.2010

Wright Manley (agent for Larkton Hall) letter 21.09.2007, 07.02.2011; telephone 10.01.2011

Mr & Mrs Bourne, Pool Farm e-mail 11.01.2011, 14.05.201; telephone 16.05.2011

Glyn Davies, Broxton PC telephone 06.06.2011

### 2. Witness Evidence

J Anderson interview 03.03.11; E Batty interview 03.03.2011; V Knight interview 25.02.2011; B Yaud interview 03.03.2011; N Jones interview 03.03.201; J Mayers interview 03.03.2011; statements from V Garner, R Garner, T Hall, J I Mitchell, J Mitchell, A Hunter-Johnston

### 3. Other Evidence taken into consideration

Notes and photographs of site visit made by A Mayer, 14<sup>th</sup> January 2008

### 4. Documentary Evidence

**CRO= Cheshire Record Office**

**CWAC= internal records**

Date	Ref	Des	
22 October 1735	CRO DEO 211/9	Perambulation Bickerton manor boundary, Philip Egerton Esq. Survey Matthew Meakin	Map missing. "from there along the [hedge] side to Malpas Road and so along the road to malpas for three chains Then on the west side of Deans flat (being Lord Cholmondeley's land) to the south west corner therefor Then on the west side of [two] fields of lord Cholmondeley called [] to a new mear stone ,marked G which parts those townships viz Bikerton Larkton and Egerton then pointing south east to a mere stone in small moor"
1735	CRO DEO 1/5	Bickerton manor map August 1735 by W Williams	Bank House tenement John Alderhead 1) house ") big role croft 3) lower house croft Particulars of the Freeholds in Bickerton; Lord Colmondely 18) Jo Douns house yard; 19 - , 20) in the towns 21) riding 220 Dean Flatt 23)

			mrs jones 28) big nightmoor field 29) big rushey lake
Early 19 <sup>th</sup> c	DCH/C/193	Survey of Larton estate	Deans Lane is uncoloured; A11 Deans field/A6 Little Flash Field/A Riddings/A9 Thunderbolt field/A1 Dotted traces for footpaths, stiles drawn in at boundaries – inclu at north boundary of Deans field short path and stile
1819	CRO PM 13	Swire & Hutchings county map	Shows deans lane, north of Larkton Hall
1777	CRO PM 12/10	Burdett Map	Shows Deans Lane
1839	CRO EDT 46/2	Tithe Award Bickerton (Malpas)	Poor draughting; partial linework at hill edge. The lane is not shown except as a line
1842	CRO EDT 100/6	Tithe award Larkton (Malpas)	Deans Lane is shown; no bar across junction with goldford lane. Uncoloured.
1910	NVA NVB	Finance Act, Larkton	Notation on map LIV-IJ Sup Crewe; on the RD boundary – Tarvin/ 357 – A shone, Mqs Cholm, house and buildings/6 - Bickerton R Bourne, Sir Philip Egerton Esq
1840	CWAC 1" series	Ordnance Survey	
1874	CRO OS LIV 15	Main highways coloured	Cross highways uncoloured – deans lane and other public highways; no conclusion. Entrance to deans lane is broken line
1898	CRO OS LIV 15	FP is labelled, uncoloured,	Deans Lane is named (as other lanes are) parcel numbers are 46; 10
1910	CRO OS LIV 15	3 <sup>rd</sup> edition	
1972	Parish Council	Bickerton Parish Council parochial meeting minutes	
1970's	CWAC	Correspondence	
	Land registry	Title register CH 299561 and 547602	