

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 7th December 2015
Report of: Public Rights of Way Manager
Subject/Title: WILDLIFE AND COUNTRYSIDE ACT 1981 –
PART III, SECTION 53.
Application to Upgrade Public Footpath Nos. 71 & 11(part)
Congleton to Bridleways.

1.0 Report Summary

- 1.1 The report outlines the investigation of an application made by Mrs P Amies of Home Farm, Hulme Walfield to amend the Definitive Map and Statement by upgrading footpaths in Congleton to bridleways. This includes a discussion of the consultations carried out in respect of the claim, the historical evidence, witness evidence and the legal tests for a Definitive Map Modification Order to be made. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether an Order should be made to upgrade these footpaths to bridleways.

2.0 Recommendation

- 2.1 An Order be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by upgrading Public Footpaths nos. 71 and 11(pt), Congleton to bridleway along the route shown between points A-B-D and B-C on plan number WCA/011.
- 2.2 Public notice of the making of the Order be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Orders be confirmed in exercise of the power conferred on the Council by the said Acts.
- 2.3 In the event of objections to the Orders being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

3.0 Reasons for Recommendations

- 3.1 The evidence in support of this claim must show, on the balance of probabilities that public bridleway rights subsist along the existing public footpaths. It is considered that there is sufficient user evidence to support the existence of public bridleway rights along the route A-B-D and B-C on plan no. WCA/011. It is considered that the requirements of Section 53(3)(c)(ii) have been met in relation to bridleway rights and it is recommended that the Definitive Map and Statement should be modified to show the route as a Public Bridleway.

4.0 Wards Affected

4.1 Congleton West

5.0 Local Ward Members

5.1 Councillor Bates; Councillor Baxendale; Councillor Hayes

6.0 Policy Implications

6.1 Not Applicable

7.0 Financial Implications

7.1 Not Applicable

8.0 Legal Implications

8.1 Under section 53 of the Wildlife & Countryside Act 1981 (WCA), the Council has a duty, as surveying authority, to keep the Definitive Map and Statement under continuous review. Section 53 (3) (c) allows for an authority to act on the discovery of evidence that suggests that the Definitive Map needs to be amended. The authority must investigate and determine that evidence and decide on the outcome whether to make a Definitive Map Modification Order or not.

8.2 Upon determination of this application, the authority must serve notice on the applicant to inform them of the decision. Under Schedule 14 of the WCA, if the authority decides not to make an order, the applicant may, at any time within 28 days after service of the notice, appeal against the decision on the Secretary of State and the authority. The Secretary of State will then consider the application to determine whether an order should be made and may give the authority directions in relation to the same.

8.3 The legal implications are contained within the report.

9.0 Risk Management

9.1 None

10.0 Background and Options

10.1 *Introduction*

10.1.1 This application was registered in November 2007 and made by Mrs P Amies on behalf of the Border Bridleways Association to modify the Definitive Map and Statement by upgrading two footpaths to bridleways along the routes

A-B-D and B-C in the parish of Congleton. The route applied for is currently recorded as public footpath no. 71, Congleton between points A-B-D; and public footpath no. 11(pt) between points B-C.

- 10.1.2 The applicant supplied user evidence to support the application; eleven user evidence forms from individuals who claim use of the route or part of it on horseback; and three who claim cycle use. The periods of use vary between 5 years and 28 years and were stated to be weekly, monthly or occasionally. The earliest use was from 1979 and it extended until 2007. Since the application was submitted in 2007 some witnesses have continued to use the route up to the present day.

10.2 *Description of the Claimed Bridleway.*

- 10.2.1 The claimed route begins at point A (plan no. WCA/011) on Astbury Street at the junction with Bridleway no.12 Congleton. It follows a grass verge for a short distance before entering an enclosed path between hedges with a compacted stone surface. The route has a gradual incline and follows a south westerly direction to point B where it meets Footpath no.11 Congleton.
- 10.2.2 From point B the surface is earth/grass and it follows a westerly then generally southerly direction. On the bend there is wooden knee rail fencing to one side which marks the boundary to the Astbury Mere Trust's land. To the east of the path, there is a playing field owned by Cheshire East Council, between the path and the field there is a partial boundary of trees, and there is a section with no boundary. There is a hedge and then trees on the western boundary of the path. The route continues in a southerly direction with an earth surface between trees. The final section has a wooden fence panel boundary and then a low stone wall to the eastern side to point D (on plan no. WCA/011) where it meets Fol Hollow/Waggs Road.
- 10.2.3 The section B-C runs in front of a row of bungalows in a generally easterly direction, the surface is earth/grass. The path has partial hedges on each side and it meets BankyFields Crescent at point C (on plan no. WCA/011).

10.3 *The Main Issues*

- 10.3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Cheshire East Borough 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.
- 10.3.2 The event relevant to this application is section 53(3)(c)(ii), this requires modification of the map by the change of status of a right of way. The relevant section is quoted below:

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:-

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description;”

10.3.3 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 alleged 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.

10.3.4 Where the evidence in support of the application is user evidence, section 31(1) of the Highways Act 1980 applies, this states;-

“Where a way.....has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

This requires that the public must have used the way without interruption and as of right; that is without force, secrecy or permission. Section 31(2) states that “the 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question”.

10.3.5 A member of the Border Bridleway Association was challenged in 2007 while using the route on horseback and this seems to have prompted the application to upgrade the route, which was made in the same year. Therefore the relevant twenty year period would be 1987 to 2007.

10.3.6 In this case there is some evidence of use on horseback and cycle prior to 1987; eight witnesses state their period of use began before this time and six of the witnesses interviewed state their use continued after 2007 when they filled in the form. It has been stated that the evidence of use either side of the 20 year period being relied upon buttresses the use made during the 20 year period and can reinforce the conclusion that there was sufficient use during the core period as confirmed by *Rowley v. Secretary of State for Transport, Local Government and the Regions* (2002).

10.3.7 The case of *Whitworth v Secretary of State for the Environment, Food and Rural Affairs* (2010) is relevant to this case as there is evidence of use on pedal cycle. The Planning Inspectorate guidelines state, “Section 31, Highways Act 1980, as amended by section 68 of Natural Environment and Rural Communities Act (NERC) 2006, provides that use of a way by non-mechanically propelled vehicles (such as a pedal cycle) can give rise to a restricted byway. In *Whitworth* it was suggested that subsequent use by cyclists of an accepted, but unrecorded, bridleway, where use of the bridleway would have been permitted by virtue of section 30 of the Countryside Act 1968, could not give rise to anything other than a bridleway. Whilst Carnwath LJ accepted that regular use by horse riders and cyclists might be consistent with dedication as a restricted byway, it was also consistent with dedication as

a bridleway. In such an instance of statutory interference with private property rights, he determined, it was reasonable to infer the dedication least burdensome to the owner.”

- 10.3.8 In the case of *Godmanchester Town Council, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs (2007)*, the House of Lords considered the proviso in section 31(1) of the Highways Act 1980:

“...unless there is sufficient evidence that there was no intention during that period to dedicate it”.

The proviso means that presumed dedication of a way can be rebutted if there is sufficient evidence that there was no intention to dedicate the way, during the relevant twenty year period. What is regarded as ‘sufficient evidence’ will vary from case to case. The Lords addressed the issue of whether the “intention” in section 31(1) had to be communicated to those using the way, at the time of user, 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. Two of the witnesses indicate that they were challenged when using the route on horseback; although this was not until 2007 which was the date the application was submitted.

- 10.3.9 If for some reason the statutory test fails, the issue of common law dedication can be considered; that is whether the available evidence shows that the owner of the land over which the way passes has dedicated it to the public. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. In this case according to land registry records the path is unregistered between points A-B-C (on plan no. WCA/011) and also for approximately 35 metres at the southern end of the claimed route from point D. The remaining section of the claimed route falls within Cheshire East Council’s title, which also includes the playing field and garage area.

10.4 *Consultations*

- 10.4.1 Consultation letters were sent to the local Councillors, Congleton Town Council, adjacent landowners, user groups and statutory consultees in June 2014. In addition the new local Councillors for 2015 for the ward and Cheshire East Council’s Assets department were consulted in June 2015. The adjacent landowners were also informed of the Officers recommendation in June 2015 and invited to submit comments.

- 10.4.2 No response was received from the local members, or from the Town Council. The only comment from the Council's Assets department refers to the surface of the route; which it states would require improving to cater for horses and cyclists.
- 10.4.3 National Grid responded and objected to the application as they identified apparatus (gas pipes) in the vicinity which they state may be affected by the activities. However as no works would be required and the surface will not be disturbed it is believed that the apparatus would not be affected.
- 10.4.4 The Astbury Mere Trust responded to their initial notification of the application in December 2007. The chairman Robert Minshull objected to the application on safety grounds. He stated that footpath no.71 was too narrow in a number of places and it would be impossible for pedestrians and horses to pass. He also comments that if horse riders were to use Fol Hollow from the southern end of the claimed bridleway to join the Lambert Lane bridleway this would have horse riders going along a narrow, winding and very busy section of road. He also comments that it is not logical to include Footpath 11, the western end of which terminates in the Country Park; he states they object as they do not want horses in the Park. However this section of Footpath No.11 is not included in the application; no part of the claimed bridleway is on land owned by the Trust, although it is adjacent to it. Members are reminded that issues of safety and suitability are not relevant considerations to the decision. (See paragraph 10.3.3 above)
- 10.4.5 The Countryside Ranger who works at Astbury Mere Country Park has stated he has challenged horse riders on these paths in the past, particularly footpath no.71. He states this has been on a number of infrequent occasions since 1991, although he could not recall any specific incidents or dates. He has not challenged cyclists. The witness statements regarding any challenges are discussed below.
- 10.4.6 Officers met on site with the residents of some of the adjacent properties on Banky Fields. Their main concerns seemed to be safety issues, again relating to the width of the path. They stated it would be difficult for a walker to pass if a horse was using the path. Officers explained that safety issues are not relevant to the decision, and that there had been no reports of any incidents. One resident said she had heard horses galloping up the bank from Astbury Street.
- 10.4.7 A resident of Banky Fields, Mr Gordon Mellor has written to point out that the width of Bridleway no.12 is 9 foot whereas this path is 4 foot wide in many places. He asks if the committee could alter the route of the claimed bridleway at point C, so that it runs just to the south along the existing hardcore track. This is used as vehicle access to the bungalows and the garage area. Officers have explained to Mr Mellor that this is not possible under this legislation. The line of the claimed bridleway is the current definitive line of the public footpath. An application would need to be made to divert the route under a different legislative process. Alternatively it may be possible to have this as a permissive route.

- 10.4.8 The Peak and Northern Footpath Society have commented that in places the path is too narrow to enable horses to pass each other and/or pedestrians.

10.5 *Investigation of the Claim*

- 10.5.1 A detailed investigation of the evidence submitted with the application has been undertaken, together with additional research. The application was initially made on the basis of user evidence from 13 witnesses; one further form has since been received.

- 10.5.2 It has been discovered that footpath no.71 Congleton was not shown on the Definitive Map when it was first published. It was created by legal order as a public footpath in 1958 as an alternative route to parts of footpath no.10 (known as 'Lover's Walk') which were stopped up in 1957 and 1958 for the purpose of quarrying. Footpath No.11 was shown on the Definitive Map as linking with footpath no.10. When footpath no.10 was stopped up, the western end of footpath no.11 was left as a cul-de-sac path. The area has changed considerably with quarrying and housing development since the Definitive Map was first produced. Some of the standard historical documents have been consulted; details can be found in **Appendix 1**, however the case is based on the user evidence.

10.6 *Documentary Evidence*

10.6.1 *Astbury Tithe Map and Apportionment 1845*

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.

- 10.6.2 The Tithe Map of Astbury dated 1845 shows a dotted line on a route very similar to that of footpath no.11. The original line of footpath no.10 is shown partly between solid boundaries from what is now Astbury Street. The route of what is now footpath no.71 is not shown. The apportionment does not mention any of the routes but gives the name of an owner and occupier for each field.

Ordnance Survey

- 10.6.3 Ordnance Survey 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 or way is not evidence of the existence of a right of way. It can be presumed that this caveat applies to earlier maps also. These documents must therefore be read alongside the other evidence.

O.S. 1st Edition County Series 25" to 1mile c1872

- 10.6.4 The route of the former footpath no.10 is shown between solid lines on this map from Astbury Street to the western end of what is now footpath no.11. It is named as 'Lovers' Walk'. It was this section of path that was stopped up by legal orders in 1957 and 1958. The line of what is now footpath no.11 is shown in its entirety as a double dashed line, the line continues over what is now Banky Fields Crescent to join Waggs Road. The route of what is now footpath no.71 is not shown

O.S 2nd Edition County Series c1898

- 10.6.5 The routes are shown exactly the same as the 1st edition.

O.S. 3rd Edition County Series c1909

- 10.6.6 The routes are shown in a similar way to the previous editions. The only difference is that the route of footpath no.11 is now annotated 'F.P' and is shown between solid lines between approximately point B (on plan no. WCA/011) and where it meets Waggs Road. The western end of footpath no.11, between point B and where it meets 'Lovers' Walk', continues to be shown as a double dashed line. Again the route of what is now footpath no.71 is not shown.

Definitive Map Process - National Parks & Access to the Countryside Act 1949

- 10.6.7 The Definitive Map and Statement is based on surveys and plans carried out 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.
- 10.6.8 The survey plan for Congleton includes footpaths nos. 10 and 11; they are both identified as 'footpath' in the schedule. On footpath no. 10 a finger post, 'Public Footpath' is noted at the northern end on Astbury Street. Footpath no.11 is described as following a westerly direction from Banky Fields to FP10. Again a finger post is noted at the start of the path; a kissing gate and a squeeze stile are also cited. An obstruction to the stile is noted, with wooden posts either side of the stile reducing the width. The location of this

seems to be near to point B (on plan no. WCA/011). Footpath no.11 is described as well used with a ditch and hedge on the left hand side and a post and wire fence on the right hand side.

- 10.6.9 The Draft Map was the first step towards compiling the survey information into what would become the Definitive Map. On this map the routes are shown in the same way as on the survey maps and annotated the same. The subsequent provisional and definitive maps show the routes as footpaths. As footpath no.71 was created later as an alternative to the stopping up of footpath no.10, it does not feature throughout the definitive map process.

10.7 *Witness evidence*

- 10.7.1 Fourteen user evidence forms were submitted in total on standard user evidence forms, ten of these have been interviewed. A chart illustrating the user evidence is attached as **Appendix 2** (user evidence forms) and **Appendix 3** (interviews).
- 10.7.2 In order to show that public bridleway rights have been acquired along the length of the claimed route through usage, a twenty year period must be identified during which use of the route by horse riders/cyclists has been established. This period is usually taken as the twenty years immediately prior to a challenge to that use. In section 10.3.5 it is discussed that a challenge did occur in 2007, which is also the same year the application was made. Therefore the relevant period would be 1987 to 2007.
- 10.7.3 Of the fourteen user evidence forms submitted, nine claim to have ridden the routes with a horse; three have cycled and two have used it on both horseback and cycle. Twelve have used the whole of the claimed route; A-B-D and B-C (plan no. WCA/011). Two witnesses have only used the route A-B-C (Debbie Garnsey and Anndrea Bossen). Use of the route varies from 5 years to 28 years. All fourteen of the witnesses have some use during the period 1987 to 2007, three users claim use for the full twenty year period and a further two have used it for nineteen of those years. Frequency of use varies between the witnesses; most have used it monthly, some state weekly and some state occasionally.

Witness Interviews

- 10.7.4 Ten of the fourteen witnesses have been interviewed by Officers. Four of the ten persons interviewed claim use of the route for the full twenty year period, 1987-2007. Two of these were on horseback, one on cycle and the fourth person used it by horse and cycle. One other person used the routes on horseback for 19 of the 20 years, her use ended in 2006 as she moved from the area. Two further witnesses (Debbie Garnsey and Rachel Stafford) have used the route on horse back and cumulatively their use covers the twenty year period; although Debbie Garnsey only used the route A-B-C (on plan no. WCA/011). The remaining three witnesses have stated use for the latter part of the twenty year period.

- 10.7.5 Six of the ten witnesses stated their use began before 1987, the earliest being Mrs Crawford who's use began in 1979. Six witnesses state their use continued after 2007, three of those continue to use it to the present day.
- 10.7.6 All of the witnesses described the route in the same way, between two hedges from Astbury Street; then along the outside edge of the playing fields or out onto Bank Fields Crescent. Most described the route between points B and D (on plan no. WCA/011) as quite narrow, especially the southern section from behind the garages. However at some point in the past it would seem there was a barbed wire fence to the side of the path at this location, which has since been removed.
- 10.7.7 Two of the witnesses interviewed have been stopped or challenged when riding this path. Mrs Crawford stated in 2007 she saw workmen on the path and she was told she should not be riding there. Also in 2007 Rachel Stafford came across walkers on the path who told her it was a footpath and too narrow for horses. No other challenges are mentioned, all the other witnesses state they were never stopped or challenged throughout their period of use. As stated in 10.4.5 above the Countryside Ranger for the Astbury Mere Country Park has stated he has challenged horse riders in the past. However it is considered this would not be sufficient to rebut the presumed dedication (referred to in 10.3.8 above) as the section of claimed bridleway is not in the ownership of The Astbury Mere Trust and also none of the witnesses interviewed have been challenged until 2007. There is no evidence of any notices on the route other than the finger posts mentioned in the walking survey and the finger posts and waymarkers currently in situ.
- 10.8 *Conclusion*
- 10.8.1 The claimed route between points A-B-D (Plan no. WCA/011) was not created until 1958 (by legal order); it therefore does not appear to have any earlier historical origin. It does not appear on any of the historical Ordnance Survey maps consulted, nor is it mentioned in the Definitive Map process.
- 10.8.2 The route of footpath no.11 does appear to have an earlier origin; it is shown on the Tithe Map of 1845 and all three editions of the County Series Ordnance Survey maps. It does appear as part of a through route from Newcastle Road to Waggs Road, so had the potential to be used as a bridleway. It is not until the third edition of c1909 that the route is annotated 'F.P'. Although the Ordnance Survey Maps show a physical route existed on the ground, there is no known historical evidence to suggest it was used as a bridleway. The section from Newcastle Road to the junction with footpath no.10 was added as a bridleway as part of the Definitive Map process, but this became a cul-de-sac bridleway as the remainder of the route was added as footpaths no.'s 10 and 11. The walking survey in 1951 clearly refers to the route of footpath no.11 as a 'footpath'; kissing gates and a stile are mentioned in the schedule.
- 10.8.3 The area changed considerably with quarrying and housing development, several routes in this area were stopped up or diverted. Therefore a decision on this application is to be made on the basis of the user evidence.

- 10.8.4 The relevant period of use to be considered here is 1987-2007. During this period, from the user evidence forms and the witness interviews, it would seem that both routes were being used on a fairly regular basis by horse riders. One of the property owners on Banky Fields referred to a horse galloping along the route. There is also frequent use by those that have used it on a bicycle and they continue to do so. The applicant states she is aware of more recent frequent use by cyclists as more people are now cycling to commute into town or as a pleasure ride avoiding the busy main road. Despite the Countryside Ranger stating he has infrequently challenged horse riders, none of the witnesses have been challenged until 2007.
- 10.8.5 The evidence in support of this application must show, on the balance of probabilities that public bridleway rights subsist along the claimed routes. The balance of user evidence supports the allegation that a bridleway subsists along the routes A-B-D and B-C (Plan no. WCA/011). Therefore it is considered that the requirements of Section 53(3)(c)(ii) have been met and it is recommended that a Definitive Map Modification Order is made to upgrade footpaths nos. 71 & 11(pt), Congleton to bridleway and thus amend the Definitive Map and Statement.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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