

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 13th March 2017
Report of: Public Rights of Way Manager
Subject/Title: Wildlife & Countryside Act 1981– Part III, Section 53
Application No. MA/5/251: Application for the Addition of a Public Footpath between no.'s 95 and 97 King Street to Old Market Place, Knutsford

1.0 Report Summary

- 1.1 The report outlines the investigation of an application made by Knutsford Town Council for the addition of a public footpath to the Definitive Map and Statement. 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 add the route as a public footpath.

2.0 Recommendation

- 2.1 An Order be made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by adding as a Public Footpath, the route as shown between points A-B-C on plan number WCA/013;
- 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be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.
- 2.3 In the event of objections to the Order 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 footpath rights subsist or are reasonably alleged to subsist along the claimed route. It is considered that there is sufficient user evidence to support the existence of public footpath rights along the route A-B-C on plan no. WCA/013. On the balance of probabilities, the requirements of Section 53 (3)(c)(i) have been met and it is recommended that the Definitive Map and Statement should be modified to show the route as a Public Footpath.

4.0 Wards Affected

4.1 Knutsford.

5.0 Local Ward Members

5.1 Councillor T Dean; Councillor S Gardiner; Councillor H Wells-Bradshaw.

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 to the Secretary of State. 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 submitted in May 2016 by Knutsford Town Council to modify the Definitive Map and Statement for the parish of Knutsford by adding a currently unrecorded route as a Public Footpath. The route applied for runs from King Street to Old Market Place. The application is based on user evidence; a total of 14 user evidence forms have been submitted; 13 were submitted with the application and a further one since. The application was

submitted following the blocking of the claimed footpath with a fence in 2015 making it inaccessible to the public. A planning application was submitted for an outdoor ground level dining area (planning application no. 16/1717M). In August 2016 this planning application was given approval. The area to be used as an outdoor dining area would affect the claimed footpath.

10.2 *Description of the Claimed Footpath*

- 10.2.1 The claimed route commences at King Street (road no. B5083); in between numbers 95 and 97 (point A on plan no. WCA/013), and runs in a generally north easterly then northerly direction to join Old Market Place (road no. UW1764). Plan No. WCA/013 shows the route between points A-B-C (OS Grid References SJ 7520 7872 to SJ 7521 7874). The plan submitted with the application indicated that the route went between numbers 95 and 97 King Street and then turned to go behind numbers 97 and 99, close to the back of the properties. However from the user evidence forms, speaking to witnesses during interviews and how part of the path is laid out on the ground; it is believed that witnesses have used the route as shown on plan no. WCA/013.

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 One such event (section 53(3)(c)(i)) requires modification of the map by the addition of a right of way.

“(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 in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...;

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 or are reasonably alleged to subsist. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.

- 10.3.3 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”.

- 10.3.4 In this case the date the route was blocked should be used as the date the way was ‘brought into question’. Therefore the relevant twenty year period to be considered for the user evidence is 1995 to 2015.
- 10.3.5 In this case there is evidence of use on foot prior to 1995; 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)*.
- 10.3.6 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”.

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.

- 10.3.7 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. It would appear from the user evidence that this route has been in place and used by the public for many years. A previous owner of numbers 95 and 97 King Street, Julia Milward, has completed a user evidence form; she states she owned number 95 from 1983

to 1992. It is clear from her evidence that she regarded the route as a right of way, and use of the route was accepted by the public. She states the route was uneven cobbles when they bought the property; they overlaid the centre portion from King Street to the rear outbuilding with York stone. She states she believes the route is a public footpath after many years of constant use. Officers have attempted to contact Ms Milward for further information; however she now lives overseas and has not yet responded to correspondence. The remaining land between points B and C on plan no. WCA/013 is used as a car park; it was formally owned by Macclesfield Borough Council and is now owned by Cheshire East Borough Council.

10.4 *Consultations*

10.4.1 Consultation letters were sent to the Ward Members; User Groups/Organisations and the landowners.

10.4.2 The local members have made no comment. At the time of writing no comments have been received from the user groups.

10.4.3 Prior to the formal consultation the agent representing the owner of 97 King Street and the passageway area between the buildings, stated in an email dated 15th November 2016, that his client *“is of the view that there is not a public right of way over the land....Consequently, he is intending to contest the application that has been made to confirm the order and retain Counsel to contest any such application with the Planning Inspectorate, should the Committee decide that there is evidence to support the order.”* No comments have been received following the formal consultation or from any of the other landowners/adjacent landowners.

10.4.4 National Grid have identified that it has apparatus in the vicinity and have objected to the application, however no works affecting the apparatus would be required.

10.4.5 Scottish Power and United Utilities have responded to the consultation and confirmed they have no objection to the application.

10.5 *Investigation of the Claim*

10.5.1 An investigation of the evidence submitted with the application has been undertaken, together with some additional research. The application was made on the basis of user evidence from 14 witnesses. In addition to the user evidence usually an investigation of the available historical documentation is also undertaken to establish whether the claimed route has an earlier origin. However, in this case as the claimed route is a small urban route, there is limited historical evidence available that would show or refer to a route of this length in a built up area. The historical evidence that has been examined is referred to below and details of all the evidence taken into consideration can be found in **Appendix 1**.

10.6 *Documentary Evidence*

Ordnance Survey Maps

- 10.6.1 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.

Ordnance Survey Map 6" to 1 mile, 1st, 2nd and 3rd Editions

- 10.6.2 When looking at a small route on this scale the 6" maps are not very clear but they do appear to show a gap between the buildings at the same point as point A (on plan no WCA/013), however this seems to just lead to an enclosed area to the rear of what is now number 95. There is a row of buildings behind numbers 97 and 99 shown on these maps, therefore there does not appear to be a through route on the line of the claimed footpath.

Ordnance Survey Map 25" to 1 mile, 1st, 2nd and 3rd Editions

- 10.6.3 The 25" editions show the area more clearly, there is an open gap between the buildings (between 95 and 97) leading to an area to the rear of number 95 King Street, as shown by the 6" maps. The row of buildings behind numbers 97 and 99, are shown as described above, therefore there does not appear to be a through route to the Old Market Place at this time. The 25" 2nd and 3rd editions show the same except there is a boundary line across the gap between the buildings, possibly indicating there may have been a gate or boundary feature there at that time.

Ordnance Survey Map dated 1936

- 10.6.4 This map shows an open gap between the buildings, with no boundary line across. The row of buildings behind numbers 97 and 99 has now gone and there is an open area, as it is today; the map is annotated 'car park' in the centre of the old market place. This map shows that with the row of buildings removed it would now be possible to use the claimed route as a through route from the car park to King Street.

National Parks and Access to the Countryside Act 1949

- 10.6.5 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. Knutsford Urban District Council completed the survey for this area at the time and did not claim this route at the time.

10.7 *Witness evidence*

- 10.7.1 User evidence was submitted with the application on standard user evidence forms, a chart illustrating the user evidence is attached as **Appendix 2**. A total of fourteen user evidence forms were submitted all claiming use of the route on foot. Officers have interviewed seven of the witnesses plus an additional two witnesses who had not completed forms, a separate chart showing the use of those who were interviewed is attached as **Appendix 3**.
- 10.7.2 Use of the route ranges from 1934 until the route was blocked in 2015, although some witnesses stated it was 2016. Although the majority used it from the 1980's, a few used it prior to this. The frequency of use varies between daily, weekly and occasionally; the majority state weekly use. The majority of the use appears to be as a convenient route to/from the town for shopping or to meet friends. A few witnesses state they used it as a shortcut to/from the car park and some continued to walk across The Moor.
- 10.7.3 From the information on the user evidence forms 11 witnesses state use of the claimed route on foot in excess of 20 years; 3 state use for less than 20 years. As stated above in paragraph 10.3.4 the relevant twenty year period to be considered is 1995 to 2015. A total of 8 witnesses have stated use of the claimed route for the full twenty year period; 12 of the 14 witnesses have used the route for at least part of this period. There is also evidence of use before this period.
- 10.7.4 Nine witnesses have been interviewed by Officers and have given statements. All of the nine persons interviewed claim use of the route on foot for the full twenty year period, 1995 to 2015. All of the witnesses claim their use began before this period, most began to use it during the 1970's and 80's. All of the witnesses described the route in the same way, from King Street going between the buildings and then cutting across the car park to Old Market Place or vice versa. None of the witnesses interviewed have been stopped or challenged by anyone when walking this path. All of the witnesses also said they did not have permission to use the route, they just assumed it was a public path as it has always been open and available. Most of the witnesses interviewed mentioned a florist; she had a stall that was in the passageway between the buildings. Officers have seen photographs from around the 1980's, provided by Julia Milward a previous owner, one of the photographs shows the flower stall, most of the flowers are displayed along the side wall of number 97.
- 10.7.5 There is currently a sign on the side wall of number 97, in the passageway area; the sign states "Pedestrian Access by Kind Permission of Prego". It is believed that Prego was the name of a sandwich shop that previously occupied number 97. This sign is covering another sign; the original sign underneath has a silver fern leaf logo at the top, there is then some wording below which is not visible due to the second sign being placed on it. Only two of the nine witnesses interviewed mentioned a notice that they may have seen in the passageway; the remaining seven witnesses all stated they had seen no signs or notices whilst using the route.

10.7.6 The photograph provided by Julia Milward, referred to above, shows the flower stall had a canopy and the display appears to be mostly along the side wall of number 97, which is where the sign is located. Therefore if this sign or the original sign was present at this time (1980's – early 1990's) it is questionable whether this would have been visible to the public. In addition more recent photographs from 2016 show a considerable amount of ivy covering the side wall of number 97; therefore it would appear that the sign would not have been visible for some time prior to this. It is only since then, officer's photographs show that in January 2017, that the ivy had been cut back and the sign was visible on the side wall. As stated above in paragraph 10.3.6 The House of Lords have held that a landowner has to communicate his intention to the public in some way to satisfy the requirement of the proviso in section 31(1) of the Highways Act 1980. It is Officer's opinion that the landowner's intention has not been communicated if the sign has not been visible to the users of the path during the relevant period. Seven witnesses claim to have used the route for the relevant twenty year period and have not during that time seen any signs or notices informing them that the path is not public.

10.8 *Conclusion*

10.8.1 The user evidence submitted shows use of the claimed route from 1934 to 2015; however the majority began using the route in the 1970's and 80's. The relevant period to be considered is 1995 to 2015; it was in 2015 that the route was blocked by fencing and became inaccessible to the public. Nine witnesses have been interviewed and all of these claim use of the route on foot for the full twenty year period.

10.8.2 Under section 31(1) of the Highways Act 1980 public footpath rights can come into existence by prescription unless there is evidence to the contrary. Therefore the landowner must provide evidence to that effect, which is normally evidence of a challenge or notices put up during the relevant twenty year period. The current landowner has not provided any evidence to that effect. All of the witnesses interviewed state they were not challenged at any time when using the route. There is no evidence of a challenge to the public during the relevant period. There is currently a sign visible on the side wall of number 97 King Street which indicates that pedestrian access is by permission, it is unknown how long this sign has been there. However, there is photographic evidence which would suggest that the sign has not been visible for a significant length of time and therefore the landowner's intentions have not been made clear to the public. In addition the majority of witnesses who have used the claimed route for many years have not seen any signs or a notice indicating the route is not public. It is therefore considered that the presumed dedication of the way has not been rebutted as there is insufficient evidence from the landowner that there was no intention to dedicate the way.

10.8.3 The evidence in support of this application must show, on the balance of probabilities that public footpath rights subsist or are reasonably alleged to subsist along the claimed route. It is considered that there is sufficient user evidence to support the existence of footpath rights. On the balance of

probabilities, the requirements of Section 53(3)(c)(i) have been met and it is recommended that the Definitive Map and Statement should be modified to add the claimed route as a Public Footpath.

11.0 Access to Information

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

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