

Public Rights of Way Committee

Date of Meeting: 10 June 2019

Report Title: Wildlife and Countryside Act 1981– Part III, Section 53

Application no. MA/5/252: Application for the Deletion of Footpath nos. 15 (part) and 23 between Charles Head Farm and Neighbourway Farm Parishes of Rainow and Kettleshulme

Application no. MA/5/174: Application for the Deletion of Footpath no. 23 Parish of Kettleshulme

Senior Officer: Frank Jordan, Executive Director, Place

1. Report Summary

- 1.1. The report outlines the investigation of an application made by Marie Cunningham to amend the Definitive Map and Statement by deleting Public Footpath nos. 15 (part) and 23 between Charles Head Farm and Neighbourway Farm in the two parishes of Rainow and Kettleshulme. The report also makes reference to a previous application which was made to delete Public Footpath no. 23 in the Parish of Kettleshulme. The report includes a discussion of the consultations carried out in respect of the application, the historical evidence, witness evidence and the legal tests for a Definitive Map Modification Order to be made for a deletion case. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether an Order should be made to delete Public Footpath nos. 15 (part) and 23 (referred to as FP15/23 throughout this report).

2. Recommendations

- 2.1. An Order not be made under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 to delete Public Footpaths nos. 15 (part) and 23, in the parishes of Rainow and Kettleshulme, as shown between points C-D-E-F-G-H-I-J-K-M on Plan no. WCA/015.
- 2.2. Definitive Map Modification Order applications nos. MA/5/252 and MA/5/174 be refused, on the grounds that there is not any robust evidence

to overturn the legal presumption that the Definitive Map and Statement are correct.

3. Reasons for Recommendation/s

- 3.1. The evidence in support of this claim must demonstrate significant and robust evidence to overturn the presumption that the Definitive Map and Statement are correct.
- 3.2. Whilst a substantial amount of research has been undertaken, it is concluded that there is no substantial supporting evidence to overturn the legal presumption that the Definitive Map and Statement are correct at this point in time. The reasons for this recommendation have been discussed in detail within this report.
- 3.3. In particular, it is concluded that the evidence examined does not meet the legal test laid out in the case law 'Trevelyan vs Secretary of State' (2001) which clearly states that some evidence of substance has to be put in the balance if it is to outweigh the initial presumption that a way has been correctly included. There has to be some evidence that was 'beyond the realms of credibility that a right of way existed'.
- 3.4. Following on from the investigation it has been concluded that whilst there are several opinions made by the applicant that there may have been an error in recording FP15/23 on the Definitive Map, it is concluded that the documentary information provided by the applicant is not deemed sufficient to overturn the presumption that the Definitive Map is correct. In particular, it is clear that the correct legal procedures were followed during the time of recording FP15/23 on the Definitive Map and Statement with no objections being received at the time. In addition in more recent years there is evidence of the public having also used the footpaths.
- 3.5. Matters relating to obstructions on the route of FP15/23; difficulties of using the route; the missing footbridge; the cost of making the route safer and little use or lack of awareness of the route are all matters that cannot be taken into account as they are not relevant to the legal tests to be applied in such applications.

4. Other Options Considered

- 4.1. Not Applicable – this is a non-executive matter.

5. Background

5.1. *Introduction*

5.1.1 The application was made by Marie Cunningham on 16th March 2016 and included a large amount of documentary evidence such as maps, letters and other material sourced from Cheshire Archives, Cheshire East Council Records and elsewhere. In addition there were also 20 statements attached from individuals who state they did not believe FP15/23 was correct or indeed a public footpath at all. This application was registered as MA/5/252.

5.1.2 It was noted that with the application made in 2016 there was reference to a previous application, made in 1991 (applicant now deceased), to delete public footpath no. 23 Kettleshulme. Copies of statements and documentary evidence from the previous application were once again submitted. Officers understand this previous application was left undetermined at the time; it was Officers' opinion that there was insufficient evidence in 1991 to support the deletion; however, Officers gave the applicant further time to submit additional evidence. The applicant did not submit any further evidence and the application was held in abeyance. This application was registered as MA/5/174.

5.1.3 The main body of this report considers the new application in 2016 (MA/5/252). The 2016 application is for the deletion of Public Footpath no. 15 (part) in the Parish of Rainow and Public Footpath no. 23 in the Parish of Kettleshulme. The 1991 application only concerned the deletion of Public Footpath no. 23 in the Parish of Kettleshulme. Considering the witness evidence, there are mostly identical witness statements in both applications although there were a few other witnesses in 1991 (mostly deceased now) that did not submit statement information in 2016 and some additional letters in the 1991 application. This matter has also been considered in section 5.6 of this report. Consequently, as both the 1991 and 2016 applications are concerned with the same subject, this report investigates all the evidence concerning the deletion of FP15/23, evidence from both applications has been taken into account.

5.1.4 Cheshire East Council appointed a consultant to investigate this case and conduct interviews with witnesses to form the basis of this report. This is in light of the fact there is a Secretary of State direction to determine the case either way as a matter of priority.

5.2 *Description of the Footpaths to be deleted*

5.2.1 That length of Footpath no. 23 proposed to be deleted runs from a point just to the west of Neighbourway Farm (point C on Plan no. WCA/015) in a

generally westerly direction past an old cow shed building, along a sunken lane known locally as 'cow lane' then past a small old gunpowder hut. It then proceeds across two fields in a more south westerly direction before descending steeply crossing over Todd Brook for a short distance to meet the Parish boundary on the other side of the bank (point I on Plan no WCA/015) where it joins Footpath no. 15 Rainow.

5.2.2 That length of Footpath no. 15 (part) proposed to be deleted runs from Todd Brook (point I on Plan no WCA/015) and continues in a south westerly direction upslope towards Charles Head Farm. At point K the route proceeds through a small paddock before meeting a junction of other public rights of way in Charles Head Farm, specifically Footpath no. 9 at (point M on Plan no WCA/015).

5.3 *The Main Issues*

5.3.1 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.

5.3.2. One such event (section 53(3)(c)(iii) requires modification of the map and statement to delete a public right of way where:

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

(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.

5.3.3 The evidence can consist of documentary / historical evidence or user evidence or a mixture of both. All the evidence must be evaluated and weighed before a conclusion is reached. Any other issues, such as safety, security, suitability, desirability, cost or the effects on property or the environment, are not relevant to the decision.

5.3.4 The legal test for deleting a public right of way is somewhat different than for claiming a public right of way or for applications to change the status or alignment of a route. In particular, there are specific case law tests and government guidance notes to be considered when examining deletion cases:

DEFRA Government Circular 1/09 (1990)

5.3.5 This circular states that *‘in making an application for an order to delete or downgrade a right of way, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map is in error by the discovery of evidence, which when considered with all other relevant evidence clearly shows that a mistake was made’*. The circular further states *“it is not for the authority to demonstrate that the map is correct, but for the applicant to show that an error was made”* and *‘the evidence needed to remove a public right from such an authoritative record, will need to be cogent’*.

Trevelyan v SoS [2001] EWCA Civ 266 and Burrows v SoS [2004] EWHC 132.

5.3.6 In the above case the Court of Appeal held that where an application was made to delete path from the Definitive Map, and it fell to the Secretary of State or an inspector to decide whether the right of way did exist, he had to start with an initial presumption that it did. Some evidence of substance had to be put in the balance if it was to outweigh the initial presumption that the way had been correctly included. There has to be some evidence that was *‘beyond the realms of credibility that a right of way existed’*.

5.3.7 **Planning Inspectorate Rights of Way Section Advice no 9 (2006)** on such cases also states, *‘An enquiry cannot simply re-examine evidence examined when the way or ways in question were first entered on the Definitive Map, there must be some new evidence, when considered with all the other evidence available, justifies the modification’*.

5.3.8 The guidance notes also refer to the maxim *“once a highway, always a highway”*. Meaning once a highway such as a public footpath has come into being by whatever means it continues indefinitely no matter whether it is used or not. In the case of *Harvey v Truro RDB (1903)* the judge states *“mere disuse of a highway cannot deprive the public of their rights, Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper”*.

5.4 Investigation of the Evidence

5.4.1 An investigation of the evidence submitted with the application (MA/5/252) has been undertaken, together with some additional research. The application was made on the basis of user evidence from 20 witnesses plus a statement from the applicant. A large amount of documentary information was also provided with the application including:-

- Rainow Walking Survey Map and Schedule by Thomas Rowbotham

- Macclesfield District Footpath Map
- Correspondence regarding the condition of a bridge at Todd Brook
- Rainow Parish Council Records
- Rainow Draft Map and Amendment and Statement
- Kettleshulme Parish Council records on correspondence during Definitive Map process
- Kettleshulme Draft Map and Amendments and statement
- Peak and Northern Footpath Society map and records during the Definitive Map process
- Provisional Map Rainow and Kettleshulme
- Definitive Map Rainow and Kettleshulme
- Correspondence regarding Definitive Map Modification Order 1991 on Footpath no. 9 Charles Head
- Definitive Map Modification Order for Footpath no. 9, Charles Head
- Sales Particulars, Land at Charles Head 1987
- 1910 Finance Act Map
- Field book entry for Neighbourway Farm
- Bryant's Map 1831
- Tithe Map and Apportionment for Rainow
- Tithe Map for Kettleshulme
- Earl of Derby, Lord Courtown William Brocklehurst Estate Maps
- Various Ordnance Survey maps – 1840, 1875, 1881, 1910, 1970.
- Ordnance Survey Reference Object book for Rainow and Kettleshulme.

5.4.2 The applicant also submitted some additional documentation for consideration in 2019 which has been reviewed as part of this investigation. This includes:

- Thomas Rowbotham's letters to County Surveyor (1950s)
- Site meeting summary notes regarding Public Footpath no. 23, Kettleshulme in 1994 with landowners, representatives and other countryside access staff
- Draft Map of Kettleshulme 1950
- Peak and Northern Footpath Society Annual report for 1957
- Extract from Rainow Parish Council minutes 15/2/49.

5.4.3 All the historical evidence that has been examined within this investigation is listed at Appendix 1.

5.5 *Documentary Evidence*

The documents referred to are considered by collective groupings.

Ordnance Survey Maps

5.5.1 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.

5.5.2 The Ordnance Survey 1 inch to 1 mile 1840 (Sheet 81 NW)

The route 15/23 does not appear on this map and neither is the other nearby footpath 95/16 leading to Mangers Carr.

5.5.3 The Ordnance Survey 1st Edition 25" map, 1875

No route is shown between Charles Head and the parish boundary for Footpath no.15 and no route is shown for route of Footpath no. 95 either. Part of Footpath no. 14 Kettleshulme is shown as a coloured road past Thorneycroft, Neighbourway and Near Carr. A cul-de-sac track is shown for part of Footpath no. 23 Kettleshulme.

5.5.4 The Ordnance Survey 1inch to 1 mile map, 1881

No route is shown between Charles Head and the parish boundary. No route is shown for the route of footpath no. 95 Rainow either although a track is shown for part of footpath no. 23 on the Kettleshulme side.

5.5.5 The Ordnance Survey 3rd Edition 25" map, 1910

No route is shown between Charles Head and the parish boundary and no route is shown on public footpath no. 95 Rainow. A track feature is shown for part of Public Footpath no. 23 Kettleshulme. The 'gunpowder hut' is shown at the end of 'cow lane' on what is now Footpath no. 23 Kettleshulme.

5.5.6 The Ordnance Survey 3rd Edition County Series 1970

No route is shown between Charles Head and the parish boundary (Footpath no. 15 part). A track is shown for part of Footpath no. 23 in Kettleshulme. A dashed line is shown between Charles Head and Mangers Carr Farm annotated 'path' on the Kettleshulme side with 'FB' on the crossing point at Todd Brook all corresponding with Footpath 95/16. In addition a dashed line is shown on the route of Footpath no. 98 and Footpath no. 9 south of Charles Head Farm.

5.5.7 The Ordnance Survey Boundary Remark Book of Rainow 1869 and Ordnance Survey Boundary Sketch Map of Kettleshulme 1871

The Ordnance Survey Boundary Remark Book for Rainow dated 1869, reference OS/26/1076 also shows the wording F.W (Face of Wall) it is noted at the point where Footpath no. 15 and Footpath no. 23 meet at the parish boundary. 'Footbridge' is also noted at the point where footpath nos. 95/16 meet. The Ordnance Survey Boundary Sketch Map for Kettleshulme dated 1871; reference OS/27/537 also shows the same.

Commercial Maps

5.5.8 These are small scale maps made by commercial map-makers, some of which are known to have been produced from original surveys and others are believed to be copies of earlier maps. All were essentially topographic maps portraying what the surveyors saw on the ground. They included features of interest, including roads and tracks. It is doubtful whether map-makers checked the status of routes, or had the same sense of status of routes that exist today. There are known errors on many map-makers' work and private estate roads and cul-de-sac paths are sometimes depicted as 'cross-roads'. The maps do not provide conclusive evidence of public status, although they may provide supporting evidence of the existence of a route.

Bryant's Map (1831)

5.5.9 Andrew Bryant produced commercial, fairly detailed maps between 1822 and 1835. Many show field boundaries, roads and hamlet names. The map showing the location in question was produced in 1831. Footpath nos. 15 and 23 are not shown on the map. Nearby Footpath no. 95 in Rainow is shown but there is no continuation of the route shown into Kettleshulme.

Estate Map 1865

5.5.10 Estate maps generally refer to the private assets held within an estate holding and will include private rights rather than public rights of way. They may also show public rights as reference points or refer to them with estate documentation but this was not their sole purpose; and the non-admittance of public rights of way on estate plans does not mean no public rights of way existed, the Definitive Map and other records must be considered alongside such estate maps.

5.5.11 The estate map (c. 1865) provided with the application for the land belonging to Earls Courtown and Derby and Mr William Brocklehurst shows no route between Charles Head and the parish boundary. Also, no route is shown for Public Footpath no. 95 nearby. For the land belonging to Lord

Derby no route is shown between Charles Head and the parish boundary with no route marked for Footpath no. 95 either.

Tithe Map and Apportionment

5.5.12 Tithe maps and the written document which accompanied them, (the apportionment) were produced between 1837 and the early 1850's in response to the Tithe Commutation Act 1836, to show which landowner owned which pieces of land and as a result how much they owed in monetary terms.

5.5.13 A map was produced by the Tithe Commissioners which showed parcels of land with unique reference numbers, and these were referred to in the apportionment document, which contained details of the land including its ownership, occupation and use. Public roads which generated no titheable produce were not given a tithe number. Some private roads, due to use could be equally not liable to a tithe. However, public and private roads could be subject to a tithe, if for instance, they produced a crop – grazing or hay cut from the verges. The Map and Apportionment must be considered together. Roads were listed at the end of the apportionment; there was often a separate list for private roads. Tithe maps and apportionments were not prepared for the purpose of distinguishing between public and private rights; they were intended to apportion a monetary rent in lieu of tithe payments in kind. Tithe maps provide good topographical evidence that a route physically existed and can be used to interpret other contemporary documents. If a route is not marked on a tithe map that does not mean it is not a public right of way.

5.5.14 On the Rainow side Footpath no. 15 is not shown from Charles Head to the parish boundary. It is noted no route is shown for the route of Footpath no. 95 Rainow either. Thomas Brocklehurst is recorded in the apportionment as the owner. For Kettleshulme, Footpath no. 23 is not shown either.

Finance Act Map 1910

5.5.15 The Finance Act of 1910 provided, among other things, for the levy and collection of a duty on the incremental value of all land in the United Kingdom. Land was broken into land ownership units known as hereditaments and given a number. Land could be excluded from payment of taxes on the grounds that it was a public highway and reductions in value were sometimes made if land was crossed by a public right of way. Finance Act records consist of two sets of documents which are:-

- Working Plans and Valuation Books. Surviving copies of both records may be held at the Local Records Office. Working maps may vary in

details of annotation and shading. The Valuation Books generally show records at a preparatory stage of the survey.

- The record plans and Field Books (small bound books) are the final record of assessment and contain more detail than the working records. The Record Plans and Field Books are deposited at The National Archives, Kew.

5.5.16 While the Valuation and Field Books were generally kept untouched after 1920, many of the working and record maps remained in use by the Valuation Offices and sometimes information was added after the initial Valuation process.

5.5.17 The 1910 Finance Act material did not become widely available until the mid 1980s. It cannot therefore have been considered during the Definitive map making process and can be considered “new evidence”, if it is relevant.

5.5.18 Various field books have been examined relating to the Finance Act Map for surrounding farms around footpaths 15/23. Ref: IR 58/20331 ‘Charles Head House and Land’ shows a £10 deduction for Public Rights of Way, but it is not clear which plots the deduction is relevant to as there are numerous public footpaths at Charles Head. In addition field book entry, Ref: IR 58/20203 refers to ‘Green Low Heath’ (previous name of Neighbourway Farm), which has a deduction for a footpath recorded, but without viewing plot numbers it is difficult to say what this could refer to as it could possibly be Footpath no. 14 or Footpath no. 23 Kettleshulme which both run through/near the farm.

5.5.19 It is difficult to draw any conclusion from the accompanying Finance Act Map information as the map provided with the application is just a working copy plan from the local records office which does not provide sufficient detail. Unfortunately, no final certified sheet for Map Sheet NVB XX1X.11 is available from the National Archives in Kew either.

National Parks and Access to the Countryside Act 1949

5.5.20 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 parish surveys were used as the basis for the Draft Definitive Map. At the same time the Peak and Northern Footpath Society carried out their own surveys of some parishes in Cheshire.

5.5.21 Rainow Parish Council completed their survey, with their Parish walking survey map dated May 1950, although records show the survey was being carried out up to March 1951. It is stated in the Parish Council minutes that the map and schedule were proposed to be submitted to the Surveying

Authority in August 1951. The part of Footpath no.15 Rainow in question is clearly marked from Charles Head Farm to Todd Brook, with the accompanying schedule stating that Footpath no.15 proceeds 'in the direction of Thorneycroft farm' (rather than Neighbourway Farm). It does, however, mention a footbridge over Todd Brook but that it 'is in not too good condition' and there is no beaten path, but as both focal points are visible the path is easy to follow. The general description of Footpath no. 15 on the walking survey states *'carry on keeping to well used farm track into Charles Head Farm Yard. Crossing no.9 path at this point. Continue straight on through farm gate F.G, and down steep field, bearing right hand, to the bottom of the field, Cross Todd Brook by wooden footbridge FB, to the Kettleshulme boundary, aiming for Thorneycroft Farm'*. Whilst there is clearly some possible ambiguity in the description here as Thorneycroft Farm is just north of the terminus at Neighbourway Farm, the general direction of travel is clearly not south of Neighbourway Farm. Whilst there is also mention of bearing right down slope, in practice as the slope is steep from Charles Head, a user would bear right a little before descending on Footpath no. 15.

5.5.22 The situation in Kettleshulme Parish is not so clear: it is believed a survey was completed and submitted at one time, however, there is currently no Parish walking survey map or schedules in the Public Rights of Way records; it is believed to be missing. A map believed to be a copy of the Kettleshulme walking survey (in the possession of Kettleshulme Parish Council) dated May 1950, was submitted by the applicant. A footpath numbered 23 is marked in a different location on this map, between Gap House via Broadcarr to Hardygreen (east-west). There is no footpath marked on this map between Todd Brook and Neighbourway Farm.

5.5.23 In a letter dated 25th August 1955 from the County Surveyor to the Clerk of Cheshire County Council, it is stated that Kettleshulme was one of the parishes from whom no survey particulars were received. A copy of the map submitted by the Peak and Northern Footpath Society for Kettleshulme parish was sent to the Parish Council, this map was prepared by Mr Norman Redford the footpath survey secretary. Every path shown on the Society's map was marked on the Draft Definitive Map and two others were also included. The footpath that became Footpath no.23 Kettleshulme, between Todd Brook and Neighbourway Farm, is not shown on the Society's map it is however on the Draft Definitive Map. With no parish minutes available for Kettleshulme and no correspondence in relation to this, it can only be assumed the Parish Council was consulted with regards to the inclusion of Footpath no.23 on the Draft Definitive Map.

5.5.24 The whole route of both Footpath no. 15 and 23 is then shown consistently as a Footpath on the Draft Map and subsequent Provisional and

Definitive Maps; and there are no records of objections at any stage during the Definitive Map process. On the final Definitive Map and Statement both footpath no.'s 15 and 23 are described clearly and match what is shown on the accompanying Definitive Map i.e. Footpath no. 23 is clearly described as *'From FP14 at "Neighbourway" in a westerly direction to Rainow Parish Boundary'*. Footpath no. 15 is described as *"From the Class II County Road (B5089) generally in a easterly direction to Kettleshulme Parish Boundary"*.

Parish Minutes

5.5.25 Parish Minutes are often a good source of local information regarding any issues that might have arisen on the local footpaths and roads. There are extensive detailed entries in the Rainow Parish minutes in 1951 often several entries each month discussing the Definitive Map process and the recording of public rights of way onto the Definitive Map. Unfortunately no similar records of minutes are now available from Kettleshulme Parish around this time period.

5.5.26 In the Rainow Parish minutes during the year 1951 there is much discussion about public footpaths around Charleshead area to the extent it would appear the parish had good knowledge of paths in their area given the volume of recording on paths and issues. Many of the minutes in 1951 do refer to discussion regarding footbridge repair matters over Todd Brook but it is difficult to be sure from the minutes of the exact location. However, in one entry reference is made to the bridge being between field plot numbers 92 and 371. These plot numbers would be consistent with the nearby Public Footpath nos. 95/16 route out of Charles Head.

5.5.27 In the Rainow Parish minutes of 1955 there is evidence of months of discussion concerning the Draft Map and Statement which were open and available for public inspection and objection/representation. There is included in the evidence submitted a letter from Mr Rowbotham, a member of Rainow Parish Council who was also the surveyor of footpaths in the Rainow area, stating to Cheshire County Council in 1955 that *'the importance of this survey is of such necessity that it should be as near perfect as is humanly possible'* demonstrating he understood the importance of the survey. Whilst there is evidence in the Rainow Parish Council minutes and correspondence of other corrections and potential omissions from the draft map there is no evidence of objections to the Rainow Parish Draft Map to the inclusion of Footpath no. 15.

Other records

Gunpowder hut records

5.5.28 There is an old gunpowder hut (approx. 2 x 2 m) situated at the end of 'cow lane' on public footpath no. 23 leading out of Neighbourway Farm. The applicant provided much historical documentation with the application regarding gunpowder stores in the area at the time including this one and procedures governing them.

5.5.29 It was common for such huts to be situated a little distance from farms and not too far from villages in an area that had several such sites. Local history records explain that gunpowder from the hut along now Footpath 15/23 was sold in the nearby shop/post office in Kettleshulme (now closed). Records provided by the applicant and from interviewing people indicate that the gunpowder hut became redundant at the end of World War 1 so roughly by 1918. The applicant and others make the argument that a gunpowder hut would not be located next to a public right of way. However the public right of way may not have come into existence until later; its usage on foot by the public, to prove warranting its inclusion on the Draft and Definitive Map, would have been based on the 20 years use of the route prior to the 1950s, when the gunpowder hut was long out of operation, i.e. 1930s – 1950s. Interestingly a local history article also mentions that just the other side of Todd Brook at the bottom of Footpath no. 15 was a flat reed area where people used to make baskets.

5.5.30 It has been noted that whilst the gunpowder hut still remains in situ there is only a small space to pass to the side of the gunpowder hut on 'cow lane' via a fallen down stone wall. During interviews some of the witnesses indicated that the council knocked down this bit of stone wall in more recent years with an intention to install a stile here. If there had have been a long standing stone wall barrier by the side of the gunpowder hut this could have prevented access, however, there are no records to prove this or whether there was an historic stone stile or other structure here in the past. However, on the Draft Definitive Map for Kettleshulme the word 'gap' is annotated near to where the gunpowder hut is located on Footpath no. 23. Consequently, this is good evidence that there was a small gap located somewhere very near the gunpowder hut enabling access on foot.

Surveyors' letters (1950s)

5.5.31 It is clear that Mr Rowbotham was the key surveyor in the Rainow area at the time having had responsibility for surveying paths as part of the Definitive Map process and also being on Rainow Parish Council. Indeed as already mentioned above he clearly understood the importance and accuracy

of the work he was undertaking. There are various letters with the application obtained from Cheshire East Council (previously Cheshire County Council) records that show that Mr Rowbotham was in communication with a Mr Connolly, a representative of the County Surveyor. Mr Rowbotham's letters highlight that he had some concerns of lack of continuity of some routes from Rainow into Kettleshulme and other parishes. It is difficult to know exactly why Footpath no. 23 did not appear until the Draft Map stage, and there are letters on file regarding amendments taking place. In 1955 a letter from Mr Rowbotham, referring to other Draft Map amendments, mentions that Mr Connolly was at fault for not investigating all the points (what points is unclear) however, he goes on to say that Mr Connolly was at fault for not initially interviewing Mr Brocklehurst at Charleshead Farm, with Mr Rowbotham stating '*I made a point of Interviewing Mr Brocklehurst*' so on the Rainow side it would appear that matters were followed up.

5.5.32 There is some correspondence on the Kettleshulme side acknowledging that helpers failed to include a number of paths on their initial surveys, so it can only be assumed that some discussions were had that meant Footpath no. 23 then was included on the Draft Definitive Map, as otherwise Footpath no. 15 would have been left as a cul-de-sac path. Correspondence refers to other footpaths in Kettleshulme that were omitted from the Draft Map, but there is no mention of a mistake being made regarding Footpath no.23. Either way during the public consultation stage no objections were received to either Footpath no. 15 or 23 being recorded on the Draft, Provisional and then final Definitive Map.

Census information and Property deeds

5.5.33 The applicant has provided sales particular for 62 acres of mixed grazing in 1987 for land east of Charleshead. The plan attached to sales particulars shows no indication for Footpath 15/23 but does show nearby Footpath 95/16. However sales particulars and deeds do not have to show public assets such as public rights of way as this is not their primary purpose and only private assets (i.e. what someone is buying) are shown, therefore, it is not that unusual that Footpath 15/23 is not shown, especially if it was unavailable in 1987.

Peak and Northern Footpath Society Maps and Records

5.5.34 The Peak and Northern Footpath Society Maps (one for Kettleshulme and one for Rainow) do not show either Public Footpath nos. 15 or 23 between Charles Head and Neighbourway Farm. Both maps are dated in the 1950s. The nearby parallel route of Public Footpath nos. 95 and 16 is shown on both maps. Although another additional map for Kettleshulme by the Society does not show either FP15/23 or FP95/16.

Macclesfield Footpath Map c1933

5.5.35 There is a route shown as a dashed blue line between Charles Head and Mangers Carr with the key stating the blue line means 'Footpaths, repairs of which in the past have been doubtful'. No route is shown for Footpath no. 15 (part) between Charles Head and Neighbourway.

Ramblers Association Footpath Reports 1980s

5.5.36 These acknowledge the existence and some of the practical issues of both Public Footpath nos. 15 and 23. In reports in the summer of 1987 there is a note against Footpath no. 15 (Rainow) to say, "very poor stiles and route unclear at Charles Head Farm". In Kettleshulme the notes against Footpath no. 23 state "Path obstructed at all points by waterlogging, overgrowth and hedges". Later in 1990 there is mention against Footpath no. 15 that there is "no means of crossing the stream Todd Brook".

Definitive Map Modification Order (DMMO) Footpath no. 9, Charleshead 1991

5.5.37 An Order was made in 1991, further to an application from the Peak and Northern Footpath Preservation Society, to add Footpath no. 9 to the Definitive Map and Statement, just south of Charles Head farm yard. This was confirmed on the basis of evidence of unhindered use by the public for more than 20 years. The applicant of MA/5/252 believes that the very nearby Footpath no. 98 just south of Charles Head was recorded on the wrong alignment, and that what is now Footpath no. 9 south of Charles Head was the correct route of Footpath no. 98 as she believes it matches the survey description by Thomas Rowbotham. Consequently the applicant is of the opinion that as an error occurred in recording Footpath no. 98, south of Charles Head on the Rainow side, this therefore gives rise that it is likely that Footpath no. 15 out of Charles Head was also recorded wrongly. This argument is an opinion which may or may not be true.

Site visit notes 17/5/1994 regarding Public Footpath no.23, Kettleshulme

5.5.38 These site visit notes from Council Officers mention that at the time of the Definitive Map the council have evidence that the correct legal procedures and advertisements required at the Draft and Provisional stage were carried out to the letter and no objections were received at any stage of the process with no appeals from landowners. In addition these notes make reference to a Mr Thornley (a Council Officer) who was closely involved over a 3-4 year period in preparing maps at the special review stage in the 1970's. He walked the paths in the area, which he knew well, and remembers on Footpath no. 23 a wooden sleeper bridge at the crossing point. It is also noted that he

personally delivered the special review maps to the parish clerks and no comments or objections regarding Footpath no. 23 were received. Mr Thornley was present at the site meeting in 1994 where the history of Footpath no. 23 was discussed and was copied into the meeting notes, so he would have been aware his comments were being documented. He is the only person in this investigation to remember a crossing of any sort at 15/23 over the Todd Brook.

5.6. Witness Evidence

5.6.1 Twenty completed standard user evidence forms were submitted in total for both the 1991 and 2016 application (note the 20 statements cover a wide time period of submission as they included 10 statements that were completed between 1991-1994; 8 completed between 2015 and 2016 and 2 signed statements in 2016). All the witnesses known to be still alive were written to and invited to an interview to discuss their evidence. Ten individuals were interviewed which included three of the affected/abutting landowners to route 15/23. Most of the rest of the witnesses are either deceased or were unable to attend for personal reasons. A chart illustrating the user evidence is attached as Appendix 2. The chart demonstrates the dates the witnesses claim to have not been aware of the route FP15/23 as a public right of way according to their completed forms and also identifies those deceased.

5.6.2 Deletion applications are fairly rare and therefore detailed analysis of the standard user evidence forms, which are more suited to *claiming* public rights of way, means analysis of the original forms was difficult and provided little evidence of value. Most of the personal statements submitted in 2016 are almost identical and answered in a uniform way with simple denial of public right of way 15/23 existing. Consequently the witnesses themselves from their original forms seem to be relying on the limited or indeed non-use of the path in question, this is not of legal relevance in such cases. They also mention some of the issues that would be encountered on the path which could be interpreted as illegal obstructions. Very few of the witnesses alive by nature of their age have memory going as far back as the critical 20 year period prior to the parish surveys of the early 1950s.

5.6.3 The applicant however does mention in her original statement her belief that there was a possible recording error in the Definitive Map procedure at an early stage, whereby the route of Footpath 15/23 was recorded instead of public footpath 95/16. The latter path added subsequently, on a route parallel to and to the south of, the route in question.

5.6.4 Interviews were conducted from 7th - 9th March 2019 with those available to discuss their comments in more detail, further to their witness statements. The following people were interviewed:-

- Landowner, Neighbourway Farm
- Landowner, land near Charles Head
- Landowner, Charles Head Barn
- Applicant
- Local witness 1
- Local witnesses 2
- Local witness 3
- Local witness 4
- Local witness 5
- Local witness 6 and also acting as Kettleshulme Parish Council representative).

5.6.5 A fair amount of detail arose from the interviews particularly relating to what was on the ground at different points in time. None of the interviewees recalled a footbridge across Todd Brook on FP15/23, and all believed FP15/23 not to be a public footpath. All seemed to be aware of the public footpath FP95/15 running parallel nearby between Charles Head and Mangers Carr with many having used this route. It was only the applicant that provided any potential evidence of relevance by referring to historical material rather than just saying they did not believe FP15/23 to be a public footpath and/or had never used the route.

5.6.6 Some key points of interest from the interviews are below:-

- Many referred to the route running west out of Neighbourway Farm as 'cow lane' with many remembering the gunpowder building at the end of 'cow lane' but believing this stopped being in operation at the end of World War 1.
- The landowner at Neighbourway Farm who had lived there most of his life gave a lot of detail regarding the 'cow lane'. Including there having always been an enclosed area with cow shed at the start of FP15/23 and long standing drainage issues with water flowing down 'cow lane'. He also mentioned that until 2000s there had also been a barbed wire fence along the full length of eastern side of 'cow lane'. Only in recent years he claims to have witnessed people attempting to use the route. He also mentioned that fairly recently the council came into the yard to start works on FP15/23 and knocked down part of the wall at the end of

‘cow lane’, next to the gunpowder hut, with the intention of putting a stile there but never did.

- Many of the older local people interviewed remember playing generally along the river banks in this area and never remember a footbridge where FP15/23 crosses. At the parish boundary where there is a fallen down stone wall and barbed wire fence, one witness commented that there had historically been a well-made stone wall and that the fence came at later date when the wall started to deteriorate.
- Many of the witnesses remember a big flood in the valley in around 1989 and also remember a new bridge going in on Footpath 95/16.
- A builder working regularly at Neighbourway farm in the 1980s remembers building a stone wall to mark a parking area near the cow shed at the start of cow lane and also remembered the corrugated sheet fencing near the cow shed being in place for a long time which would have obstructed passage on FP15/23.
- On the Charles Head side of FP15/23 again there was mention of obstruction or no passage along FP15/23. One local witness living very close to Charles Head on the same driveway remembers an existing field gate and bypass gate going in, in around 2003, but mentioned that the only historical gate he knew of was in the north west corner of the small paddock east of Charles Head yard.
- No interviewee had any detailed relevant knowledge going back to the 1950s or before with regards to the Definitive Map process and public rights of way being recorded in this area.

5.6.7 Overall what is clear from all the witness evidence is that whilst public footpath 15/23 is not impossible to use there does not seem to be any evidence to date of a footbridge across Todd Brook where FP15/23 meet. In addition, it is also clear that there have been long standing obstructions for users to overcome along the route, particularly on the Kettleshulme side from sections of wet terrain in ‘cow lane’; a difficult river crossing; a stone wall /barbed wire fence on the parish boundary and some issues around access into Charles Head via the small paddock on the Rainow side.

5.7 Conclusion

5.7.1 A large amount of historical information has been examined in this investigation of the application, both documentation before and leading up to

Footpaths nos. 15/23 being confirmed on the Definitive Map and documents post Definitive Map. The historical evidence examined does not in this case show that a clear mistake has occurred backed up by robust supporting evidence. Whilst there are a few unknowns and ambiguities in some of the parish minutes and the original survey schedule, this is not sufficient to meet the high legal test that must be evidenced as outlined in 5.7.2. In addition detailed interviews have been conducted which has provided additional historical site knowledge.

5.7.2 There is a strict legal test for such applications; the bar is set very high as per case law *Trevelyan vs SoS* (2001) which clearly states that some new overwhelmingly robust evidence must be evidenced to overturn the legal presumption that the Definitive Map is correct. In addition guidance notes state *'An enquiry cannot simply re-examine evidence examined when the way or ways in question were first entered on the Definitive Map, there must be some new evidence, when considered with all the other evidence available, justifies the modification'*. The test is high because in order for a public right of way to appear on the Definitive Map and Statement it has already gone through a lengthy process with opportunities for objections/corrections. Consequently some very clear evidence of substance has to be provided or found to overturn the legal presumption.

5.7.3 In the case of Footpaths nos. 15 and 23 there were no objections to its recording on the Definitive Map and the Definitive Map process was followed correctly. Whilst there were clear issues with recording one linear route over a parish boundary and some documentary evidence that there were time differences between the timings of Rainow and Kettleshulme recording the route on their respective sides of the boundary both Footpaths nos. 15 and 23 ended up on Draft maps and the final Definitive Maps with no objections being received. Whilst there is some general correspondence post-Definitive Map regarding the correctness of routes, we do not believe there is any clear documentary evidence of any error being made for Footpaths nos. 15/23, only opinions.

5.7.4 The applicant places much weight on the Rainow parish survey walking schedule which states the route terminates at *'Todd Brook, 400 west of Neighbourway crossing on to the Kettleshulme Boundary and proceeding in the direction of Thorneycroft Farm'*. The applicant believes this proves an error has occurred as the route of 23 ends in Neighbourway Farm not Thorneycroft Farm. However whilst this is clearly an anomaly here in the end location of the route, the direction of travel is still clearly northeast not southeast and it is not believed evidence was confused with Footpaths nos. 96/16. The applicant believes this was an error and should have read in the

direction of Mangers Carr Farm but even if there had been a written error in the names of farms here there is no evidence to substantiate this.

5.7.5 A lot of time has passed, indeed over 60 years since Footpaths nos. 15/23 were recorded on the Definitive Map and Statement. It is clear that the route has been obstructed for many years, but it has been used, if only in recent years. There is one person during consultation who mentions leading 8 other people on the route as part of a larger circular walk in 2013. Obstructions along any public right of way are irrelevant to proving its legal non-existence as are health and safety concerns, cost of maintenance etc.

5.7.6 Whilst there is always a possibility that an error did occur, without very clear substantial and robust documentary evidence of an error in recording the route, or credible evidence of non-use between about 1930 and 1950 the application to delete Footpaths nos. 15/23 struggles to meet the legal tests required by statute and case law. Due to the number of years that have passed since the route was recorded on the Definitive Map there is barely anyone alive now who was available to interview who had detailed knowledge of this time period (pre 1950s) and the route in question.

5.7.7 Consequently, therefore it is considered that the requirements of Section 53(3)(c)(iii) have not been met and it is recommended that a Definitive Map Modification Order is not made to delete public footpaths nos. 15/23 from the Definitive Map and Statement.

6. Implications of the Recommendations

6.1. Legal Implications

6.1.1. Under section 53 of the Wildlife and 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.

6.1.2. 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.

6.1.3. The legal implications are contained within the report.

6.2. Finance Implications

6.2.1. If the determination of the case leads to a subsequent hearing/inquiry, the Council would be responsible for any costs involved in the preparation and conducting of such.

6.3. Policy Implications

6.3.1. There are no direct policy implications.

6.4. Equality Implications

6.4.1. The legal tests under s.53 of the Wildlife and Countryside Act 1981 do not include an assessment of the effects under the Equality Act 2010.

6.5. Human Resources Implications

6.5.1. There are no direct implications for human resources.

6.6. Risk Management Implications

6.6.1. There are no direct implications for risk management.

6.7. Rural Communities Implications

6.7.1. There are no direct implications for rural communities.

6.8. Implications for Children and Young People

6.8.1. There are no direct implications for children and young people.

6.9. Public Health Implications

6.9.1. There are no direct implications for public health.

7. Ward Members Affected

7.1. The Councillors in office at the time of consultation were Councillor Gaddum (Sutton Ward), Councillor Murray (Poynton East and Pott Shrigley Ward), Councillor Saunders (Poynton East and Pott Shrigley Ward). All of the above Councillors were consulted. Councillor Murray responded to say that he had no comment to make at this time. He mentioned that no member of the public had ever contacted him regarding Footpath nos. 15/23.

7.2. The new elected Councillors from May 2019, Councillor Gregory (Sutton Ward) and Councillor Wylie (Poynton East and Pott Shrigley Ward) have been sent a copy of the report. Any comments will be reported verbally.

8. Consultation and Engagement

8.1. Consultation letters were sent to the Ward Members; User Groups/Organisations; statutory undertakers and the landowners. There was an extensive number and range of responses.

8.2. The Open Spaces Society sent in a very detailed response strongly objecting to the deletion application. The main thrust of their objection is that they do not believe the application meets the legal tests for such deletion applications. They emphasise that the law clearly state the onus is on the applicant to demonstrate the Map is wrong and also refer to Planning Inspectorate guidance on such cases which states that *'An enquiry cannot simply-re-examine evidence when the way or ways in question were first entered on the Definitive Map, there must be some new evidence, which when considered with all other evidence available, justifies the modification'*.

8.2.1 The Open Spaces Society have inspected the case file to see the detail of the case and go into some detail on why they think individual arguments made by the applicant are not valid and do not meet the legal test. This includes:-

- i. The fact that they believed that the process of the formation of the Definitive Map seems to have been clearly carried out showing the footpath on many maps. There is a clear historical trail of the route being recorded on maps including survey maps leading up to the final Definitive Map.
- ii. The description of FP15/23 on the Walking Survey card they believe is not ambiguous at all and clearly cannot be confused with Footpath no. 9 to the south as it is clearly describing running in a north easterly direction.
- iii. They dismiss and do not agree with the applicant's argument of weight they place on the Finance Act 1910 Map not showing the public footpath. They state this would also apply to other public footpaths not shown so do not believe this is a valid argument.
- iv. They question the validity / correctness of some of the statements made by witnesses supporting the application such as claims the river is impassable when others have walked the route and that all maps with statements are identical.
- v. They believe the applicant's argument that there would never have been a gunpowder hut sited on a public footpath is irrelevant as at the time when this would have been in operation was when there was little in the way of a health and safety culture and its distance from the main farm yard would not be unusual.

- 8.3. Alderley Edge, Wilmslow and District Footpath Preservation Society responded stating that they did not believe the deletion of FP15/23 should take place. They state that Public Footpath nos. 15/23 has been on the Definitive Map and Statement since the 1950s/60s and that its presence on the Definitive Map is conclusive proof of its existence in law and it also forms part of an important national network lying within the Peak District National Park.
- 8.4. Cheshire East Ramblers also responded strongly objecting to the application. They firstly refer to well known case law of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCS Civ 266 which ruled that the presumption is in favour of the Definitive Map and Statement being correct; and that evidence of some substance must be put into the balance to outweigh that presumption.
- 8.5 Cheshire East Ramblers go on to state that the process at the time of drawing up the Definitive Map had a set period allowing for objections for the route to go on the Definitive Map and that it appears with this case that no objection was registered and the landowners did not appear to have engaged in the process i.e. objected at the time the map was formulated. They state they do not agree with the applicant's argument that an error might have been made, and the Walking Survey for Rainow Footpath no. 15 is extremely clear in describing the footpath running in the direction of Thorneycroft Farm which is a northeasterly direction and cannot be confused with any other nearby footpath.
- 8.6 The Peak and Northern Footpaths Society also responded with a detailed objection which in summary states they believe the applicant has provided no new or substantive evidence that outweighs the initial presumption that a right of way exists. They break down their objection into different points:-
- (i) They have examined both their own paper and online records of this route as well as files at Cheshire Records office for 1950-1973 around time of drawing up Definitive Map and assessed the evidence to see if it meets the threshold tests set out in case law *Trevelyan vs SoS* (2001) also referred to by the Open Spaces Society.
 - (ii) They find it curious that 68 years after the long and detailed process of the Definitive Map where there were no objections at the time, an application to delete the route has come in and state that the application in 2015/16 does not really have any/many statements able to provide evidence prior to 1951 that would outweigh the presumption that the right of way exists.
 - (iii) They mention they have reviewed their own paper and online reports on 15/23 and there are numerous reports about the

deterioration of the condition of the path from 1991 and there has been conflict with the landowner for those using route. They also refer to a comment on their files that the path has been used as a drainage outfall and obstructed on occasion by slurry.

- (iv) They state they do not agree with the applicant's stance on the missing footbridge across Todd Brook that it could have referred to FP95/16.
- (v) They do not believe the argument about the gunpowder hut at end of 'cow lane' is relevant as this would have ceased to be in use when surveyed in 1951.

- 8.7 Kettleshulme Parish Council initially responded to state they did not support the deletion application. They stated that to their knowledge the footpath had been in existence for a long period of time and is walked by many on a regular basis and therefore there seems no good reason for the closure. However a follow on response from Kettleshulme Parish Council stated that the Parish Councillors had subsequently walked the route with one of the landowners and obtained more information which meant they had reconsidered their position and responded again to say they had a change of view and now supported the deletion of FP15/23.
- 8.8 Rainow Parish Council responded to state that their footpaths group had met to walk the route. They make comments referring to the nature of the route i.e., not easy to access, it being wet and boggy in places, the lack of bridge over Todd Brook, and make note of the gunpowder store next to route. They conclude by stating that it is their opinion that the route was mistakenly marked as a footpath when they believe the line drawn on the map actually represents the route of a spring/water course as there was a well/spring at the top of the footpath and they do not ever recall a footpath in use at this location and it would be very costly to re-instate the footpath.
- 8.9 One of the property owners who lives adjacent to Charles Head Farm comments that they believe FP15/23 is redundant as it is uneven, not easily traversable and never been used to best of their knowledge. They state most people use FP96/16 nearby and support footpath nos. 15/23 being removed from the Definitive Map.
- 8.10 The applicant at the time of consultation asked if they could attend an accompanied site visit with the consultant investigating the case, to walk both public footpath nos. 15/23 and 96/16 in order to point out things on the ground. This was carried out on the morning of 7th March 2019.

- 8.11 The landowners of Charles Head Barn responded to the consultation stating that they felt the deletion of the footpath was both appropriate and desirable. They stated that the nearby public footpath no.16 provides a better alternative route to access Neighbourway Farm, which whilst slightly longer was a good footpath. The landowners state that walkers entering the yard are often confused by the presence of footpath nos. 15/23 on their maps when entering Charles Head where they have lived for 15 years and that it is their belief knowing about the lack of bridge etc at the river that money would be better spent on maintaining footpaths that are well used and on providing better signage.
- 8.12 A local resident got in touch with the Council via e-mail during the consultation period and commented that he had used public footpath nos. 15/23 as part of a walk with some friends in December 2013 and marks the public footpath as a link in a much longer circular walk. A follow up telephone call with the local resident confirmed that they had walked the route in 2013 with approximately 8 friends and planned the walk initially from Ordnance Survey mapping, 2013 was the first time they had walked FP15/23 but they have not walked it since.
- 8.13 United Utilities stated that they had no affected apparatus in the area over which Public Footpath nos. 15/23 runs.
- 8.14 Responses were sent acknowledging all the comments received during the consultation and it was made clear during consultation that with such applications it is the applicant who must prove that the map is in error by discovery of evidence, which when considered with all other relevant evidence, clearly shows that a mistake was made when the right of way was first recorded and that no other factors such as suitability, safety etc. can be taken into consideration.

9. Access to Information

- 9.1 The background papers relating to this report can be inspected by contacting the report writer below.

10. Contact Information

- 10.1 Any questions relating to this report should be directed to the following officer:

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