

# CHESHIRE EAST COUNCIL

## Public Rights of Way Committee

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**Date of Meeting:** 17 December 2012  
**Report of:** Greenspaces Manager  
**Subject/Title:** WILDLIFE AND COUNTRYSIDE ACT 1981 –  
PART III, SECTION 53. Application No. CN/7/26:  
Application for the Addition of a Public Footpath Between  
Public Footpath No. 4 and Public Footpath No. 11, Parish of  
Wybunbury

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### **1.0 Report Summary**

- 1.1 The report outlines the investigation of an application made by Mr K Billington of Main Road, Wybunbury 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-D-E-F-G-H on plan number WCA/005;
- 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be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.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-D-E-F-G-H on plan no. WCA/005. 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 Wybunbury.

#### **5.0 Local Ward Members**

5.1 Councillor Janet Clowes

#### **6.0 Policy Implications including - Carbon Reduction - Health**

6.1 Not Applicable

#### **7.0 Financial Implications**

7.1 Not Applicable

#### **8.0 Legal Implications (Authorised by the Borough Solicitor)**

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 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 2007 by Mr K Billington to modify the Definitive Map and Statement for the parish of Wybunbury by adding a currently unrecorded route as a Public Footpath. The route applied for runs from public footpath no.4 in the parish of Wybunbury at the junction with Kiln Lane (point A on plan no. WCA/005), and runs in an easterly direction to join public footpath no.11 Wybunbury. Plan No. WCA/005 shows the route applied for between points A-B-C-D-E-F-G-H (OS Grid References SJ 6982 4996 to SJ 7000 4993). The application is based on user evidence; a total of 31 user evidence forms were submitted with the application.

##### *10.2 Description of the Claimed Footpath*

10.2.1 The claimed route commences at the northern end of the unadopted road known as 'Kiln Lane' which is also public footpath no.4 Wybunbury (point A on

plan no. WCA/005). It runs in an easterly direction to the front of garages. At point B the route runs between two wooden posts to the side of a field gate. The route narrows and runs to the back of properties which have frontages on Main Road. The narrow path runs between a fence which marks the property boundary and a post and wire fence on the field side. At point C on plan no. WCA/005 the path is currently blocked by a wooden pallet and between points C and D there is scaffolding to the side of a derelict barn. The claimed path runs along this narrow strip between the side of the barn and the post and wire fence. Between points E and F on plan no. WCA/005 the path previously ran between two hedges. The southern hedge between the path and the garden of no.14 Main Road has now been removed. There is a fence on the northern boundary and part of the hedge remains. At point F on plan no. WCA/005 there is a wooden stile. The path then enters land owned by Natural England; it follows the grass field edge to point G. There is currently a barbed wire fence at point G; witnesses have stated that originally there was no boundary at this point. The path then continues to join public footpath no. 11 Wybunbury at point H on plan no. WCA/005.

### *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 either the date the route was blocked, or the date on which the application was made could be used as the date the way is ‘brought into question’. However during the course of the investigation Mrs Colbert, the owner of The Hollies (no.14 Main Road), has provided copies of her late husband’s diary entries. The diary entries show dates when he closed the footpath for various reasons. The earliest date is 31<sup>st</sup> December 1990 when it is stated the footpath was “closed all day”. It is believed the date of 1990 should be used as the date the route was ‘brought into question’; therefore the relevant twenty year period to be considered for the user evidence is 1970 to 1990.
- 10.3.5 In this case there is evidence of use on foot prior to 1970 and subsequent to 1990; 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 *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.

- 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. The previous owner of The Hollies was Mr Stanley Robinson he was born there in 1926 and lived there until he sold it to Mr and Mrs Colbert in 1986. He has been interviewed by Officers and it is clear from his statement that he regarded it as a right of way, and use of the route was accepted by the public. The remaining land between points F and H on plan no. WCA/005 was previously owned by The Church Commissioners, therefore it maybe more difficult to prove common law dedication for this section, although for as long as any witness can remember there has always been a stile at point F.

#### 10.4 *Consultations*

10.4.1 Consultation letters were sent to the Ward Member; Wybunbury Parish Council; User Groups/Organisations and the landowners.

10.4.2 The local member Councillor Janet Clowes makes the following comments:

“This historic PROW around the Wybunbury Moss is a much-loved and valued village resource, and the loss of access on a short part of the path several years ago has given rise to a groundswell of public concern from local residents who have been campaigning throughout this period to have the path reinstated.

The path provides a circular route around the Moss and intersects with other well-established definitive PROW giving access to the wider local countryside. Local residents (including four generations of one local family, and a previous owner of part of the land involved) all testify to a regular historic and contemporary use of the path, and historic documentary evidence confirms this.

The circular path is primarily level with only moderate gradients for walkers at the Moss Lane end thus making it an attractive and accessible path for older residents as well as younger, fitter users. It also provides an accessible route for residents from the Stock Lane and Dig Lane area to the West of the Village to all village facilities (Post Office, Church, Public Houses, and School) enabling pedestrians to avoid sections of the highway where there are either no footpaths, or very narrow paths through the oldest part of the village (by Kiln Lane and the Post Office).

The restoration of this section will reinstate the integrity of the path and enable residents to enjoy once again, the valued amenity of this route.”

10.4.3 There has been no response from Wybunbury Parish Council.

10.4.4 Scottish Power responded to the consultation and confirmed they have no objection to the application.

- 10.4.5 The only user group to respond to the consultation was The Mid Cheshire Footpath Society, their representative Bernard Cook stated that members say this path had been used regularly by groups of at least 10 people until it was blocked off. He stated there had always been a stile at point F (on plan no. WCA/005).
- 10.4.6 Natural England has commented to say, this path order would not affect a statutory site for nature conservation (Site of Special Scientific Interest - SSSI, Special Area for Conservation – SAC; Special Protection Area – SPA or a Ramsar site) or designated landscape. Natural England have also been consulted as landowners, they own the land between points F-G-H on plan no. WCA/005. Officers have been in contact with Rupert Randall, Reserve Manager for Wybunbury Moss; he has no objection to the path and states he is happy to link it up to the 'Tower Path' (FP11 Wybunbury). He has stated Natural England would like to fence off the footpath between points F and G on plan no. WCA/005, this would avoid problems with dogs running after the cattle that they graze on the field.
- 10.4.7 Officers met with Mrs Colbert of The Hollies 14 Main Road on 17<sup>th</sup> July 2012. She moved to the property with her late husband in 1987. Mrs Colbert owns the plot of no.14 which includes the house, converted dairy barn and the derelict barn at the rear of the garden; she also owns the field to the back of her property (to the north of the claimed route). The claimed route itself between points A and F on plan no. WCA/005 is not registered with the land registry. Mrs Colbert showed Officers some of her husband's diaries where he had noted days when he had closed the footpath. Mrs Colbert showed Officers the barn at the end of her garden, adjacent to which is the claimed route. She stated that the barn has been in an unstable state since 2007 when scaffolding was erected to the side of the barn to repair the roof. Mr Colbert then blocked off the route and put up signs warning of the danger and advising that the path was closed. It was this action that prompted this application as it was discovered that the path was not recorded on the Definitive Map.
- 10.4.8 Mrs Colbert has also submitted written comments on the application dated 26<sup>th</sup> September 2012. She states that descendants of the Wainwright family who built The Hollies have said that the path was an access route to the rear of the property and the orchard. Originally land belonging to The Hollies extended east to include the plot which is now house number 10. She states that the building to the rear of number 14 was originally 'the dairy' and that there would not have been numerous people walking through this area. She also comments that in the adjacent field (between points F and G on plan no. WCA/005) the land is steep, was a dumping ground for rubbish and was affected by seepage from the inadequate drainage system from The Swan. She states people were not likely to use it as a short-cut to church on a Sunday. Mrs Colbert also states that over the last 20 years the path was closed on a number of occasions at different times of year and for different lengths of time.

- 10.4.9 Further to her comment regarding the various closures of the path, on 3<sup>rd</sup> November 2012 Mrs Colbert submitted copies of her husband's diary entries, there are four references to the footpath. On the 31<sup>st</sup> December 1990 it states "Repaired barbed wire closed footpath all day". On the 12/13<sup>th</sup> January 1996 it states "Hedges- closed footpath". On the 7<sup>th</sup> August 2000 it states "New gates fitted at Hollies. Blocked footpath". On the 14/15<sup>th</sup> January 2006 it states "Tiles fell off roof of barn closed footpath".
- 10.4.10 Mr Rick Carter of 10 Main Road, Wybunbury has made comments on the application in relation to safety issues. He has lived at this address for about two and a half years. He has said there is a gate at the bottom of his garden which opens onto the proposed footpath, he believes this would be a safety issue and if this became a public footpath he would not be happy to let his child play in the garden. He has also made reference to a pond on land belonging to Natural England, he believes it is a hazard and needs fencing off. He also states no one has walked the claimed route, he believes people have walked a different route diagonally across Mrs Colbert's field which is nearer to the moss. Members are reminded that issues such as safety are not relevant to the decision in this case.
- 10.4.11 Officers have interviewed Mr Peter Allcock of 24 Main Road in relation to his use of the claimed path. Mr Allcock's garden borders the claimed route at point B on plan no. WCA/005; he also owns the square piece of land next to the garages. Mr Allcock has lived in the village since the early 1950's and he has regarded the route as public and personally used it on foot since that time.

## 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 made on the basis of user evidence from 31 witnesses. In addition to the user evidence an investigation of the available historical documentation has been undertaken to establish whether the claimed route has an earlier origin. The standard reference documents (where available) have been consulted; details of all the evidence taken into consideration can be found in **Appendix 1**.

## 10.6 *Documentary Evidence*

### *County Maps 18<sup>th</sup>-19<sup>th</sup> Century*

- 10.6.1 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.

- 10.6.2 The following County maps were consulted; Burdett's Map (1777); Greenwood's Map (1819); Swire and Hutching's Map (1830) and Bryant's Map (1831). None of these maps show the claimed route but they are at a small scale which would be difficult to show the route.

*Wybunbury Tithe Map and Apportionment 1846*

- 10.6.3 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.
- 10.6.4 The Wybunbury Tithe Map shows Kiln Lane (Public Footpath no.4) and the garage area the same as the other public highways. It is not given a plot number and does not appear in the apportionment, which would indicate public status. The remainder of the route is not indicated on the map; however it may have existed at the time but did not affect the tithe charge.

*Ordnance Survey Maps*

- 10.6.5 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, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Editions*

- 10.6.6 The 6" 1<sup>st</sup> edition shows Kiln Lane as a route between solid boundaries and in the same way it depicts a continuation of the route as far as point C on plan no. WCA/005. After this point it is difficult to see because of the annotations used on the map, but the rest of the route does not appear to be shown. The 6" 2<sup>nd</sup> edition shows this first section of the claimed route in the same way but then it clearly shows a continuation from point C through to point H as a single dashed line. By the third edition the dashed line has been removed and the route is shown the same as the first edition.



*Ordnance Survey Map 25" to 1 mile, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Editions*

- 10.6.7 The 25" 1<sup>st</sup> edition shows the route more clearly, Kiln Lane and the claimed route between points A and B (on plan no. WCA/005) are shown between solid boundaries. The remainder of the route between points B and H is shown as a double dashed line, it does not appear to 'dog-leg' as shown between points D and E on plan no. WCA/005, but instead continues in a straight line. The dashed line is braced to be included within plots 266 and 289, both of which are described as 'Arable &c' in the book of reference which accompanies the 25" first edition.
- 10.6.8 The 25" 2<sup>nd</sup> edition shows the claimed route as it is shown on plan no. WCA/005, between solid boundaries from point A to F. There is also a single dashed line shown between point E and F, but this line is to the north side of the boundary, within the field. Between point F and H the claimed route is shown as a double dashed line.
- 10.6.9 The 25" 3<sup>rd</sup> edition again shows the route between solid boundaries from point A to F. However on this edition there are no dashed lines as on the second edition map, so the route appears to end at point F on plan no. WCA/005.

*National Parks and Access to the Countryside Act 1949*

- 10.6.10 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. The Wybunbury Parish Survey was completed by G. Holroyd and H. Farr in May 1951. The claimed footpath appears to be described in the schedule as commencing at 'North west side of church' and terminates at 'Wybunbury Road adjacent to Annions Lane'. It is described as part of a longer route including what became footpath no.4. Under the general description and condition of the path it is stated, "Between S1 and S4 path runs at the rear of village houses with fields on the other side. Between these points path appears to be used quite a lot...". This appears to be referring to the claimed route, is not known why this part of the route was then omitted from the draft definitive map. There is a note on the schedule which appears to have been made by an Officer at the time which states, "Check point of commencement".

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 thirty-one user evidence forms were submitted all claiming use of the route on foot. Officers have interviewed twelve of the witnesses, a separate chart showing their use is attached as **Appendix 3**.
- 10.7.2 Use of the route ranges from 1944 until the route was blocked in 2006/7. Mr Webster originally indicated on his user evidence form use from the year he was born 1936, Mr Webster was interviewed by Officers therefore his use on

Appendix 3 is shown from 1946 when Mr Webster was 10 years old. The frequency of use varies between daily, weekly and occasionally. The majority of the use appears to be for recreation/pleasure, exercise or as a dog walk; some witnesses mention that they used it as part of a circular walk around Wybunbury Moss.

- 10.7.3 From the information on the user evidence forms 21 witnesses state use of the claimed route on foot in excess of 20 years; 6 state use for less than 20 years and 4 have not completed the duration of their use. As stated above in paragraph 10.3.4 the relevant twenty year period to be considered is 1970-1990. A total of 14 witnesses have stated use of the claimed route for the full twenty year period; 6 witnesses have used the route for part of this period. There is also evidence of use before and after this period.
- 10.7.4 Twelve of the 31 witnesses have been interviewed by Officers and have signed statements. Six of the twelve persons interviewed claim use of the route on foot for the full twenty year period, 1970-1990. Five witnesses have stated use for part of this period. One witness states use before and after this period. All of the witnesses described the route in the same way, going past the barn and then between two hedges to the stile at point F on plan no. WCA/005; then along the field edge to join with the other footpath. None of the witnesses interviewed have been stopped or challenged when walking this path. Some have stated on occasions they spoke to Mr or Mrs Colbert and neither stopped them from walking past. There is no evidence of any notices on the route other than when Mr Colbert closed the path in 2006/7; some witnesses mentioned a notice advising that the path was closed. All of the witnesses also said they did not have permission to use the route, they just assumed it was a public path.
- 10.7.5 Officers have interviewed Mr Stanley Robinson the former owner of The Hollies 14 Main Road. Mr Robinson was born at The Hollies in 1926 and lived and worked there until he sold it to Mr and Mrs Colbert in 1986. He has stated that during his time there he would see lots of people using the footpath, neither he nor his father ever stopped anyone from using it, in fact they encouraged people to use the path rather than cut across the field. He stated that there has always been a stile on the route as long as he can remember.

## 10.8 *Conclusion*

- 10.8.1 It would appear that at least the first part of the claimed route existed in 1846 as shown on the Wybunbury Tithe Map. The entire claimed route is shown on the 1<sup>st</sup> and 2<sup>nd</sup> editions of the 25" Ordnance Survey Maps. However although this is good evidence of the physical existence of the route, the Ordnance Survey maps do not denote the status of the route and can therefore only be regarded as supporting evidence. The Parish Walking Survey dated 1951 describes the route in the schedule and stated that it appeared to be well used; it is therefore surprising that the route was not included in the Draft Definitive Map.

- 10.8.2 The user evidence submitted shows considerable use over a period spanning 60 years. The relevant period to be considered is 1970-1990. Twelve witnesses have been interviewed and six of these claim use of the route for the full twenty year period and a further five for part of this period.
- 10.8.3 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. Mrs Colbert has not claimed she or her husband ever challenged anyone seen on the path by their property. None of the witnesses interviewed state they were challenged anywhere on the route. There is no evidence of any notices until the route was blocked in 2006/7. There is no evidence of a challenge of any kind to the public during the relevant period.
- 10.8.4 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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