

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 15th June 2015
Report of: Public Rights of Way Manager
Subject/Title: WILDLIFE AND COUNTRYSIDE ACT 1981 –
PART III, SECTION 53. Application No. CN/7/22:
Application for the Addition of a Public Footpath Between
Public Footpath Audlem No. 28 and Cheshire Street,
Audlem

1.0 Report Summary

- 1.1 The report outlines the investigation of an application made by Audlem Parish 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 The application to modify the Definitive Map and Statement to record a footpath between points B-C-D as shown on plan number WCA/008 be refused on the grounds that there is insufficient evidence to show the existence of Public Footpath rights;
- 2.2 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-D-E on plan number WCA/008;
- 2.3 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be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.
- 2.4 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 insufficient user evidence to support the existence of public footpath rights along the route B-C-D on plan no. WCA/008 and therefore the requirements of Section 53(3)(c)(i) have not been met in relation to these footpath rights and it is recommended that this part of the application be refused

It is considered that there **is** sufficient user evidence to support the existence of public footpath rights along the route A-B-D-E on plan no. WCA/008. 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 Audlem.

5.0 Local Ward Members

5.1 Councillor Rachel Bailey.

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 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 April 2005 by Audlem Parish Council to modify the Definitive Map and Statement for the parish of Audlem by adding a

currently unrecorded route as a Public Footpath. The route applied for runs from public footpath no. 28 in the parish of Audlem, on the towpath to the south east of the Shroppie Fly Public house (point E on plan no. WCA/008), and runs in a generally north easterly direction to join Cheshire Street, Audlem (A529) (point A on Plan no. WCA/008). An additional loop was also claimed, from point D running north westerly through the pub car park then northerly up a grassy slope to point C, then turning south easterly along the top of a bank through a wooded area back to point B. Plan No. WCA/008 shows the whole of the route applied for between points A-B-C-D-E. The application is based on user evidence; a total of 10 user evidence forms were submitted with the application.

10.2 Description of the Claimed Footpath

- 10.2.1 The claimed route commences on Public Footpath Audlem No. 28, on the towpath to the south east of The Shroppie Fly public house. It runs up six brick steps from the towpath, a short distance along the access drive to the Shroppie Fly and then along the eastern boundary of The Shroppie Fly car park and up eight breeze block constructed steps. From here, it climbs six timber edged earth steps in a generally north easterly direction and through a small wooded area until it reaches the playing field. It then runs across the south eastern edge of the playing field to join a surfaced path along the eastern corner, then on entering the car park it continues in a east north easterly direction across the car park to join with a short length of pavement until it reaches Cheshire Street.

10.3 The Main Issues

- 10.3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Cheshire East Borough Council shall keep the Definitive Map and Statement under continuous review and make such modifications to the Map and Statement as appear requisite in consequence of the occurrence of certain events.
- 10.3.2 The event relevant to this application is section 53(3)(c)(i), this requires modification of the map by the addition of a right of way. The relevant section is quoted below:

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

(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 Where there has been no challenge, the Natural Environment and Rural Communities Act 2006 states that the date on which a Definitive Map Modification Order (DMMO) application is received by the Surveying Authority is to be taken as ‘bringing into question’ the public right of use. The date of 2005 should therefore be used as the date the route was ‘brought into question’; the relevant twenty year period to be considered for the user evidence is 1985 to 2005.

- 10.3.5 In this case there is evidence of use on foot prior to 1985 and subsequent to 2005; 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. Mr Derek McKelvey was interviewed by Officers and recalled a meeting between the owner of The Shroppie Fly and County Council Officers 30 years ago (which he attended as he was formerly a member of Audlem Parish Council) where the owner of The Shroppie Fly agreed to build and finance the breeze block steps leading from the car park. Another witness interviewed, Mr Bill Consterdine, recalled that at the time that these steps were built, British Waterways (as they were at that time) raised no objection to the licensee putting the steps in and may even have contributed towards them. The steps leading from the concrete steps to the playing field were constructed by the Parish Council around 10 years ago and were improved approximately 3 years ago when extra fencing, wooden rails, were installed for safety. The majority of witnesses interviewed recall the concrete steps existing since the early 1970's and have used the route since this date.

10.4 *Consultations*

- 10.4.1 Consultation letters were sent to the Ward Member; Audlem Parish Council; User Groups/Organisations and the landowners.
- 10.4.2 There has been no response from the Ward Member.
- 10.4.3 There has been no response from the user groups/organisations.
- 10.4.4 National Grid responded to the consultation and confirmed they have no objection to the application.

10.4.5 *Landowners*

Cheshire East Council's Parks Management (now part of ANSA) has been consulted. Parks Management has concerns that if an Order is made and confirmed, as events are held on the playing field occasionally, these could potentially obstruct the footpath. They are also concerned that a public footpath could cause operational difficulties between walkers and those playing formal sports on the playing field.

The route which has been applied for is based on user evidence. Although the field is marked out as a football pitch this does not preclude the public's ability to claim a public right of way, there are numerous public rights of way crossing playing fields/football pitches in Cheshire East and the status of a route can only be determined through examination of the relevant evidence. The DMMO

application process looks at unrecorded existing public rights, it does not dedicate new public rights, and health and safety issues cannot be taken into account.

10.4.6 Cheshire East Council's Insurance Team has also been consulted. They stated that there was no issue from an insurance point of view but suggested that, if the application is successful, suitable warning signs for drivers using the car park to watch out for pedestrians and vice versa would be appropriate.

10.4.7 The Canal and River Trust have been consulted, no comments have been received.

10.4.8 No comments have been received from the three remaining landowners; Mr Leonard Ernest Baker, Mr and Mrs P Silvester and Punch Partnership Ltd.

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 10 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 18th-19th 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 There is no evidence of a route on any of these maps.

Audlem 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 route is not indicated on the Audlem Tithe Map; 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, 1st, 2nd and 3rd Editions

- 10.6.6 The route is not indicated on these maps.

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

- 10.6.7 The route is not indicated on these maps.

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 Audlem Parish Survey was completed by A. Fielden and W. Timmis in February 1952. The claimed footpath is not recorded in this survey.

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 ten user evidence forms were submitted all claiming use of the route on foot. Officers have interviewed seven of the witnesses, a separate chart showing their use is attached as **Appendix 3**.

- 10.7.2 Use of the route ranges from 1969 until the application was submitted in April 2005. The frequency of use varies between daily, weekly and occasionally. The route is used as a link to access the Shroppie Fly public house, canal and

the village shops on Cheshire Street. It is also used recreationally and for leisure purposes, as a dog walk.

- 10.7.3 From the information on the user evidence forms, 8 witnesses state use of the claimed route on foot in excess of 20 years and 2 state use for less than 20 years. As stated above in paragraph 10.3.4 the relevant twenty year period to be considered is 1985 - 2005. A total of 8 witnesses have stated use of the claimed route for the full twenty year period; 2 witnesses have used the route for part of this period. There is also evidence of use before and after this period.
- 10.7.4 Of the seven witnesses interviewed only two claimed use of the loop, B-C-D, and this was only occasional use. Consequently this evidence is not sufficient to show rights have been acquired.
- 10.7.4 Seven of the ten witnesses have been interviewed by Officers and have signed statements. Five of the seven persons interviewed claim use of the route on foot for the full twenty year period, 1985 - 2005. Two witnesses have stated use for part of this period. All of the witnesses are consistent in describing the route they used; from Cheshire Street, across the playing field (at the tennis court side, behind the goal posts) and down the steps at The Shroppie Fly to the towpath. None of the witnesses interviewed have been stopped or challenged when walking this path. There is also no evidence of any signs or notices on the route. All of the witnesses said they did not have permission to use the route, they just assumed it was a public path.
- 10.8 *Conclusion*
 - 10.8.1 The user evidence submitted shows use over a period spanning approximately 36 years. The relevant period to be considered is 1985 - 2005. Seven witnesses have been interviewed and five of these claim use of the route for the full twenty year period and a further two for part of this 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. None of the witnesses interviewed state they were challenged anywhere on the route. There is no evidence of any notices or evidence of a challenge of any kind to the public during the relevant period.
 - 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 along the route A-B-D-E but insufficient use for the route B-C-D. On the balance of probabilities, the requirements of Section 53(3)(c)(i) have been met in the first instance 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:

Name: Hannah Duncan

Designation: Definitive Map Officer

Tel No: 01270 686062

Email: hannah.duncan@cheshireeast.gov.uk