

Public Rights of Way Committee

Date of Meeting: 11 June 2018

Report Title: Wildlife & Countryside Act 1981– Part III, Section 53 Application No. MA/5/232 & 233: Applications for the Upgrade of Footpath No.13, Siddington to Bridleway and Upgrade of Footpath No. 8(pt) Siddington to Bridleway.

Senior Officer: Genni Butler (Acting PROW Manager)

1. Report Summary

- 1.1. The report outlines the investigation of two applications made by Pat Amies on behalf of the Border Bridleways Association to amend the Definitive Map and Statement by the upgrading of two public footpaths to bridleways. This includes a discussion of the consultations carried out in respect of the claim, the historical evidence, witness evidence and the legal tests for a Definitive Map Modification Order to be made. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether an Order should be made to upgrade one of the Footpaths to bridleway status.

2. Recommendations

- 2.1. An Order be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by upgrading to bridleway, that part of footpath no. 8 in the Parish of Siddington as shown between points A-B on plan number WCA/014 (application no. MA/5/233).
- 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be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.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.

- 2.4. That application no. MA/5/232 be refused, on the grounds that there is an unclassified county road along the length of the claimed route as shown between points A-B-C-D on plan number WCA/014(2).

3. Reasons for Recommendation/s

- 3.1. The evidence in support of this claim must show, on the balance of probabilities that public bridleway rights subsist along the claimed route. It is considered that there is sufficient user evidence to support the existence of bridleway rights along the route A-B on plan no. WCA/014. On the balance of probabilities, the requirements of Section 53 (3)(c)(ii) have been met and it is recommended that the Definitive Map and Statement should be modified to show the route as a Public Bridleway.
- 3.2. It is considered that the status of Nursery Lane that runs along the same alignment as Footpath no. 13 Siddington and its connection to Woodside Close have now been verified as highways and that bridleway rights are in effect already recognised therefore it is recommended that this application be refused.

4. Other Options Considered

- 4.1. Not Applicable

5. Background

5.1. *Introduction*

5.1.1 These applications were submitted in April 2005 by Pat Amies on behalf of the Border Bridleways Association to modify the Definitive Map and Statement for the Parish of Siddington by upgrading Public Footpath nos. 8 (pt) and 13 to bridleways. The length of footpath 8 applied for runs from Congleton Lane to its junction with Restricted Byway no. 12, Siddington. Footpath 13 runs from its junction with Chelford Road (UW2624) to Congleton Road (A34). The applications are based on user evidence and documentary evidence. A total of 9 user evidence forms were submitted at the time of the applications and a further one since the investigation commenced. The application MA/5/232, was made following uncertainty about the status of Woodside Close which lies towards the south western end of Footpath 13 and the obstruction of the original Nursery Lane (and part of FP 13) by a small housing development. As the two routes claimed are largely used in conjunction with one another via the interconnecting Restricted Byway no. 12, it was proposed to consider both applications simultaneously.

5.2 *Description of the Footpaths to be upgraded to Bridleways*

5.2.1 That length of Footpath no. 13 to be upgraded runs from a point to the north of the cul-de-sac end of Woodside Close (point C on Plan no. WCA/014(2) in a generally north then east north easterly direction to its junction with Congleton Road (A 34) along what is known as Nursery Lane (UW 4571A). Shown on the Plan No. WCA/014(2) between points C-D. The application also included use of the route along Woodside Close (A-B-C on Plan no. WCA/014(2) to link with Footpath 13 at point C. Part of Woodside Close was shown as adopted at the time of the application; however there was a section between B-C (Plan No. WCA/014(2)) that had no apparent status and so the whole length was included in this claim.

5.2.2 The second claim involves a short section of Footpath no.8 which runs from Congleton Lane (UW 4457) in a generally north north easterly direction to its junction with Restricted Byway No.12. Shown on Plan No. WCA/014 between points A-B. The route also forms part of the access track to Blake House Farm and has a sealed surface.

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)(ii)) requires modification of the map by the change of status of a recorded right of way.

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

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

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.

5.3.3. 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”.

5.3.4. In this case the date the use of Footpath 8 as a bridleway was brought into question was the date that Capesthorne Estate deposited a Section 31 (6) Statement and Map declaring that they had no intention to dedicate any additional rights except those shown on the map attached to the statement. This was made in 2008. Therefore the relevant twenty year period to be considered for the user evidence would be 1988 - 2008.

5.3.5. In this instance there is evidence of use on horse prior to 2008 and from approximately 1978; 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)*.

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

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

The proviso means that presumed dedication of a way can be rebutted if there is sufficient evidence that there was no intention to dedicate the way, during the relevant twenty year period. What is regarded as ‘sufficient evidence’ will vary from case to case. The Lords addressed the issue of whether the “intention” in section 31(1) had to be communicated to those using the way, at the time of use, or whether an intention held by the landowner but not revealed to anybody could constitute “sufficient evidence”. The Lords also considered whether use of the phrase “during that period” in the proviso, meant during the whole of that period. The House of Lords held that a landowner had to communicate his intention to the public in some way to satisfy the requirement of the proviso. It was also held that the lack of intention to dedicate means “at some point during that period”, it does not

have to be continuously demonstrated throughout the whole twenty year period.

5.3.7 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. Some of the users say they have seen the tenant farmer whilst riding along Footpath 8 and have not been challenged about their use; however the submission of the s.31 (6) statement indicates the intention of the landowner not to dedicate any further rights than those acknowledged on the accompanying plan.

5.4 *Investigation of the Claims*

5.4.1 Consideration of the application for the upgrade of Footpath 13 (MA/5/232), soon revealed that the whole of the route is now recorded as an unclassified road. The section of Woodside Close that was of uncertain status was the subject of a Highway Dedication agreement in 2005 between Macclesfield Borough Council, the landowner, and Cheshire County Council as the Highway Authority. The date of this agreement is almost contemporaneous with the date of this application. This added a section of highway between the already adopted part of Woodside Close and the part of Nursery Lane (also FP 13) which was left as a cul de sac following the stopping up at Magistrates Court of part of the lane in 2003 due to the construction some time previously of a row of terraced bungalows on the line of the route. Therefore the rest of this report will be primarily concerned with the consideration of application MA/5/233, the upgrading of part of Footpath no. 8.

5.4.2 An investigation of the evidence submitted with the application (MA/5/233) has been undertaken, together with some additional research. The application was made on the basis of user evidence from nine witnesses, with an additional one being submitted during the investigation. Also submitted were copies of five County Maps and one 3rd edition Ordnance Survey map extract from 1909. In addition to the evidence submitted an investigation of any other available historical documentation is also undertaken to establish whether the claimed route has an historical origin. The historical evidence that has been examined is referred to below and details of all the evidence taken into consideration can be found in **Appendix 1**.

5.5 *Documentary Evidence*

The documents referred to are considered by collective groupings.

County Maps 18th-19th Century

5.5.1 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.

5.5.2 The applicant submitted five copies of County Maps which all show Nursery Lane as a cross road but do not show Footpath no. 8. The current status of Nursey Lane as an unclassified road is therefore in keeping with these records which were produced by: Burdett (1777); Cary (1787); Greenwood (1819); Swire and Hutchings (1830) and Bryant (1831).

Ordnance Survey Maps

5.5.3 Ordnance Survey mapping was originally for military purposes to record all roads and tracks that could be used in times of war. This included both public and private routes. These maps are good evidence of the physical existence of routes, but not necessarily of status. Since 1889 the Ordnance Survey has included a disclaimer on all of its maps to the effect that the depiction of a road or way is not evidence of the existence of a right of way. It can be presumed that this caveat applies to earlier maps also. These documents must therefore be read alongside the other evidence.

5.5.4 The Ordnance Survey 1 inch to 1 mile 1842

Nursery Lane is depicted throughout its length as an enclosed route with Restricted Byway No. 12 leading from it towards Blake House Farm and continuing beyond. Footpath No. 8 is not shown.

5.5.5 O.S. 1st Edition County Series 25" to 1mile 1870-71

This is the first physical depiction of Footpath no.8 which shows a track commencing from Restricted Byway no.12, slightly further to the east than the current position but then crossing Snape Brook at approximately the same point and also where it meets Congleton Lane.

5.5.6 O.S 2nd Edition County Series 1897

The track shown on the first edition O.S. Map is shown in the same way on this edition but there is now also a second separate dashed line with a footbridge over Snape Brook running flush along the field boundary then curving to rejoin the track before it reaches Congleton Lane. This suggests that the footpath is partly separate to the track which also forms the access to Blake Farm.

5.5.7 O.S. 3rd Edition County Series 1909

On this edition the track is now shown in exactly the same position as the current depiction of Footpath 8. The separate footpath is also depicted running in the same way as the second edition map with a footbridge crossing Snape Brook.

5.5.8 O.S. revised New Series 1: 63,360 (1 inch: 1 mile) 1897

Footpath no. 8 is shown as a double dotted track which indicates an unfenced, unmetalled road according to the key. Interestingly Restricted Byway no.12 is shown as a third class road which forms a continuous link with the north eastern part of Nursery Lane running through to the A34.. The section of Nursery Lane running to the south west (to Woodside Close) from the point where the restricted byway meets, is depicted as a footpath.

5.5.9 Bartholomew's Half Inch to a Mile 1902-06 and 1919-1924

These maps were revised for the benefit of tourists and cyclists with help from the Cyclist's Touring Club. Both these editions indicate a through route of no specific status linking Nursery lane, Restricted Byway no. 12 and the section of Footpath no. 8 joining Congleton Lane. This is a similar depiction to the O.S. revised New Series.

5.5.10 Rights of Way Act 1932

Under this Act a Landowner could submit a plan indicating those paths which were accepted to be public rights of way on their land. The Capesthorne Estate prepared such a plan in 1933 with the signed agreement of Siddington Parish Council; Marton parish Meeting; Macclesfield Rural District Council and Alderley Edge & Wilmslow Footpaths Preservation Society. On this map the claimed route is shown as a footpath, as is Restricted Byway no.12. Nursery lane is not shown suggesting it was accepted to be a road at that time. The Rights of Way Act was superseded by the Highways Act s. 31 1980 which required the submission of a Statement and Plan on a six yearly basis to afford protection from additional rights being accrued across the land indicated. A Statement and Plan were submitted by the Estate in 2008 under these provisions.

5.5.11 National Parks and Access to the Countryside Act 1949

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. Siddington Parish Council completed the survey for this area at the time and claimed the route as a footpath with a description of Cart Road for the first 85 yards. This corresponds with the length of the path up to its junction with Restricted Byway no.12. The route is then shown consistently as a Footpath on the Draft Map and subsequent Provisional and Definitive Maps.

5.5.12 Siddington Parish Minutes 1894 – 1967

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 many entries throughout the time period of the minutes referring to issues along Nursery Lane and the condition of it, however there is no reference to Footpath 8 and the connection to Restricted Byway no.12.

5.6. Witness Evidence

5.6.1 Nine completed standard user evidence forms were submitted with the application including one made by the applicant. All of these witnesses were written to, however given that most of the forms had been completed in 1998; it is unsurprising that not all of the witnesses responded. Two have moved away, one to New Zealand. Two didn't respond and it was later learnt that one of these is now elderly and living in a Care Home. A further one did respond by telephone but didn't wish to continue with her evidence as she had only ridden for 3 or 4 years and always with another rider leading. A further one witness came forward and completed a user evidence form in November 2017. A chart illustrating the user evidence is attached as **Appendix 2**. Four of the original nine witnesses have been interviewed.

5.6.2 In order to show that public equestrian rights have been acquired along the length of the claimed route through usage, a twenty year period must be identified during which use of the route by horse riders has been established. This period is usually taken as the twenty years immediately prior to a challenge to that use. It was referred to in paragraph 5.5.10 that the Capesthorpe Estate had submitted a statement and plan under the provisions of section 31(6) of the Highways Act in 2008. This would effectively have been a challenge to use therefore the relevant period in this instance would be 1988 to 2008.

5.6.3 Use of the route has varied from intermittently to everyday depending on the proximity of the rider to the route. One local rider who still uses the route on an almost daily basis also rode it with her four children and husband. Another local witness used to ride once or twice a week as did their three children. Witnesses have met other riders when using the route as it forms part of a circuit using Nursery lane and Restricted Byway no. 12 and also forms part of a longer ride which was referred to as the 'Quarry Ride' taking in other local bridleways across Dingle Bank Quarry. One witness said that the claimed route forms part of a ride that is currently described on the North Cheshire Riders website. Another witness used to keep her horses locally from where it was a convenient route for exercising about once a week. Use of the route ranges from 1978 to the present day. One of the riders who were interviewed has had use over the full twenty year period between 1988 and 2008. Two others have had a full twenty years use prior to the challenge date with a further five having used the route for between ten and fourteen years within the relevant period. Five of the riders have used the path for six or more years in the time preceding the relevant twenty year period. One of the witnesses interviewed was aware of many other local riders who use the route who would be able to give evidence if required.

5.6.4 None of the riders have ever been stopped or challenged whilst using the route or seen any signs or notices to indicate that they shouldn't ride there. A couple of the riders say they have seen the tenant farmer when riding the route but have not been queried about their use on horseback. All of the witnesses interviewed commented that without the use of this link, the Restricted Byway would be redundant for use other than by pedestrians.

5.7 Conclusion

5.7.1 The user evidence submitted claims use of the Footpath as a bridleway over a period of thirty years up to 2008 and use has continued to the present day. The relevant period however is 1988 to 2008 when the Capesthorne Estate submitted a deposited statement and plan under the provisions of S.31(6) of the Highways Act 1980.

5.7.2 Under section 31(1) of the Highways Act 1980 public bridleway 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. In the period prior to the 2008 deposited statement there has been no evidence of challenges or interruptions to the use.

5.7.3 Footpath no. 8 connects with Restricted Byway no. 12 which has been recorded with a status compatible with bridleway rights since the Definitive Map process commenced in the early 1950's. It is a reasonable presumption

that in order to access this route, the section of Footpath No. 8 linking it to Congleton Lane would have been in use as a route of a higher status. It forms a naturally preferential continuation avoiding the use of Chelford Road and Congleton Lane.

5.7.5 The evidence in support of this application must show, on the balance of probabilities that public bridleway rights subsist along the claimed route. The balance of user evidence supports the allegation that a bridleway subsists along the route A-B (Plan no. WCA/014). Therefore it is considered that the requirements of Section 53(3)(c)(ii) have been met and it is recommended that a Definitive Map Modification Order is made to upgrade footpath no. 8(pt), Siddington to bridleway and thus amend the Definitive Map and Statement.

6. Implications of the Recommendations

6.1. Legal Implications

6.1.1. 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.

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 objections to the Order lead 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 & 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 & 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

Councillor L Smetham, Gawsworth Ward

8. Consultation & Engagement

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

8.2. Councillor Smetham responded to say that she had no comment to make. The Rambler's Association have commented that they have no evidence that would help in the investigation.

8.3. Fisher German, the agents for the landowners, the Capesthorne Estate, was in contact to say that they would object to the proposal to upgrade Footpath no.8. It was thought that the path to be upgraded included the section running through Blake House farmyard. They were informed that this was not the case. However we have since received confirmation that the tenant with the Landowner's support still objects to the proposal on the grounds of the interference it will have on his day to day farming operations.

8.4. The tenant *'is concerned that by allowing the path to become a bridleway this will lead to more inconvenience when accessing the farm and just as importantly he is concerned over the Health and Safety implications of the narrow driveway being shared by horses, cars and farm machinery. As*

you will know the driveway is narrow and from the farm side you come around a blind bend that meets the existing footpath. The concern is if this path was upgraded and become very popular the risk of an accident occurring will only increase’. Additional comments were also received from the tenant referring to occasions when he has witnessed horses using the route and causing damage to the banked grassed area to the side of the track near the entrance point. This problem stopped when one individual *‘was caught going across’* suggesting that a challenge to the rider was made but possibly only in relation to sliding down the bank. They also witnessed a horse ‘spooking’ on the footpath near the junction with the road and trampling over this grassed area.

8.5. A response has been sent acknowledging the comments and setting out the legal basis on which this application must be decided, which is that the evidence in support of this claim must show, on the balance of probabilities, that public bridleway rights subsist. No other factors such as suitability, safety etc. can be taken into consideration. The route in question is currently in use and has been for many years which is the basis for this claim.

8.6. United Utilities stated that they have a water pipeline adjacent to the route as far as Snape Brook however this would not be affected by this proposal.

8.7. National Grid (Cadent Gas) initially objected due to the proximity of apparatus to the claimed path however they withdrew this when it was shown that their pipeline is actually on the south western side of Congleton Lane and not affected.

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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Job Title: Definitive Map Officer

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