

Public Rights of Way Committee

Date of Meeting: 10 June 2019

Report Title: Wildlife & Countryside Act 1981– Part III, Section 53 Application No.CO/8/40, for the Addition of a Public Footpath between Newcastle Road (A34) to Padgbury Lane, in the Town of Congleton.

Senior Officer: Frank Jordan, Executive Director Place

1. Report Summary

- 1.1 This report outlines the investigation of an application made by Mr Alan Wrench on behalf of The Congleton Group of The Ramblers' Association to amend the Definitive Map and Statement by adding a public footpath. This report 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 public footpath.
- 1.2 The proposal contributes to the Corporate Plan Outcomes 4 "Cheshire East is a green and sustainable place" and 5 "People live well and for longer", and the policies and objectives of the Council's statutory Rights of Way Improvement Plan.

2. Recommendations

- 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 on Plan No. WCA/018;
- 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be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.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. Reasons for Recommendation/s

- 3.1 The evidence in support of this claim must show, on the balance of probabilities, that public rights subsist or are reasonably alleged to subsist along the claimed route. It is considered there is sufficient use of the route without force, secrecy or permission, that is without interruption and as of right; to support the existence of footpath rights along the route shown on Plan No. WCA/018. It is also considered that the historical evidence discovered adds weight and supports the existence of footpath rights on the claimed route.

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 submitted in July 2014 by Mr Alan Wrench on behalf of The Congleton Group of The Ramblers' Association to modify the Definitive Map and Statement for the Town of Congleton by adding a footpath. The application was supported by user evidence. A total of 7 witnesses submitted evidence initially with the application in 2014, a further two witnesses have since submitted user evidence in 2019.

5.1.2 The Applicant sought a direction from the Secretary of State for a decision to be made on the application as it was still awaiting investigation. A direction decision dated 7th February 2019 was received from an Inspector representing the Secretary of State. The decision, pursuant to paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981, directed the Council to determine the application no later than 9 months from the date of the direction.

5.2 *Description of the Application Route*

5.2.1 The claimed route runs from Newcastle Road, Congleton (A34) between the properties Marsh House and Portland (point A on Plan No. WCA/018) and follows a south westerly direction for approximately 85 metres to Padgbury Lane (UY940). The full width of the route between the boundaries varies between approximately 5 and 7 metres. The whole route has a grass/earth surface apart from a small section of approximately 2-3 metres of tarmac surface at the start of the route at the Newcastle Road end. Witnesses have reported that the route has been very overgrown at times in the past, however, when Officers visited the site in March 2019 there was a clear trodden path with grass/bushes to the side.

5.3 *The Main Issues*

5.3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the 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)(i)) is where

“(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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic

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 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.

5.4 *Investigation of the Claim*

5.4.1 An investigation of the evidence submitted with the application (CO/8/40) has been undertaken, together with some additional research. The application was made on the basis of user evidence from seven witnesses; with a further two witnesses later submitting evidence. In addition to the user evidence submitted an investigation of any available historical documentation is also undertaken to establish whether the claimed route had an historical origin. The documentary evidence that has been examined is referred to below and a list of all the evidence taken into consideration can be found in **Appendix 1**.

5.5 *Documentary Evidence*

There was no documentary evidence submitted with the application. The documents referred to are considered by collective groupings.

Commercial County Maps

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 route is shown on *Greenwood's Map (1819)* and *Swire and Hutching's Map (1830)*. It is also shown on *Bryant's Map (1831)* the full length of the claimed route is shown on the correct alignment. It is not labelled but the depiction is referred to in the key as '*Lanes & Bridle Ways*'.

Tithe Maps and Apportionment

- 5.5.3 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.

- 5.5.4 The Congleton Tithe Map of 1845 shows the claimed route as part of the public roads. There is a spur path shown, off the north side of the claimed route, which appears to be access to a field, plot number 379. The accompanying apportionment records Plot number 1540 as Public Roads, and states land use as 'Thoroughfare'. This is good supporting evidence that the claimed route was in existence and considered public at the time.

Ordnance Survey Maps

- 5.5.5 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.

5.5.6 *O.S. 1st Edition County Series 25" to 1 mile 1871/2*

There is a physical depiction of a road/track on the same alignment as the claimed route, the additional spur on the northern side is shown; the spur is braced with the adjacent plots but the claimed path is not braced and does not have a plot number.

5.5.7 *O.S. 2nd Edition County Series 1897*

The road/track shown on the first edition O.S. Map is shown in the same way on this edition with the addition of a brace also on the claimed route. It is braced with the plot to the northern side where Marsh House/Marsh House Farm is located. There are also dashed lines at each end of the claimed route and one along most of the southern length of the route.

5.5.8 *O.S. 3rd Edition County Series 1909*

The road/track shown on the first edition O.S. Map is shown in the same way on this edition, with the addition that the claimed route is braced with the plots either side and there are dashed lines at each end of the route.

5.5.9 *Ordnance Survey Six-inch 1st, 2nd and 3rd Editions*

There is a road/track from Newcastle Road to Padgbury Lane on the same alignment as the claimed route shown on all three editions.

5.5.10 *Ordnance Survey One-inch to 1 Mile England and Wales, Revised New Series 1897*

There is a road/track linking Newcastle Road and Padgbury Lane on the same alignment as the claimed route shown on this edition.

5.5.11 *Ordnance Survey One-inch to 1 Mile New Popular Edition 1947*

There is a road/track linking Newcastle Road and Padgbury Lane on the same alignment as the claimed route shown uncoloured on this edition; the key on the map would seem to indicate the route is classed as 'Other Motor Roads' 'narrow', uncoloured indicates a description of 'bad'.

Finance Act 1910

5.5.12 The Finance Act of 1910 involved a national survey of land by the Inland Revenue so that an incremental value duty could be levied when ownership was transferred. Land was valued for each owner/occupier and this land was given a hereditament number. Landowners could claim tax relief where a highway crossed their land. Although the existence of a public right of way may be admitted it is not usually described or a route shown on the plan. This Act was repealed in 1920.

5.5.13 Two sets of plans were produced: the working plans for the original valuation and the record plans once the valuation was complete. Two sets of books were produced to accompany the maps; the field books, which record what the surveyor found at each property and the so-called 'Domesday Book', which was the complete register of properties and valuations.

5.5.14 Officers have viewed the working plan at the County Records Office. The working plans are on Ordnance Survey 3rd edition base maps; only one plot is marked on the plan near to the claimed route, that is the area around Marsh House Farm; it is given plot number 3333. The claimed route is not included in this plot. The Domesday Book was checked for plot number 3333; no deductions were made for right of way.

National Parks and Access to the Countryside Act 1949

5.5.15 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. Congleton Municipal Borough Council completed the survey for this area at the time and did not claim the route in question as a right of way; the route was subsequently omitted from the published Definitive Map.

The Dane Valley Way Walking Leaflets

5.5.16 The Congleton Ramblers Group have published two walking guide leaflets covering the 'Dane Valley Way', a walk from Buxton to Congleton and Congleton to Northwich, closely following the River Dane. The claimed path is referred to in 'The Lower Dane Valley Way leaflet' as a ginnel. The description of the route guides walkers along the claimed route. The Dane Valley Way project was started by The

Ramblers' Association in 1994; it is not known when the leaflets were first published but the latest versions were produced in 2014.

5.6 *Witness Evidence*

5.6.1. A chart illustrating the user evidence is at Appendix 2. The chart indicates the relevant 20 year period which is 1994 - 2014. This is because no challenge to use of the route has taken place so 2014, when the application was made, is used as the date the route was 'brought into question'.

5.6.2 Nine people claim use of the route; they have all completed standard user evidence forms. Seven witnesses completed their evidence forms in 2014 when the application was submitted, an additional two completed forms in 2019. Four of the witnesses have been interviewed. All of the initial witnesses were written to, however, not all of the witnesses responded.

5.6.3 All of the use of the claimed route is by foot; the first reported use is from as early as 1966. Eight of the nine witnesses state they have used the claimed route in excess of 20 years. Six witnesses have used it for the full relevant 20 year period, 1994 – 2014; two further witnesses have used it for 16 years during this period. The route has been used for a variety of recreational purposes; walks to the Astbury Mere; dog walking; visiting friends and organised walks with the Congleton Ramblers. Seven witnesses state they used the claimed route 'occasionally', the remaining two stated 'weekly' use.

5.6.4 Witnesses do not report being challenged; there is no evidence of any signs at any time anywhere along the claimed route. No obstructions have been reported other than the vegetation. Most of the witnesses mention that the route has been overgrown at certain times with heavy vegetation/nettles/long grass. The applicant has stated that clearance works have been carried out on occasions in the past by a walking group working party.

5.6.5 The witnesses numbered 4, 6, 8, and 9 (on the user evidence chart at Appendix 2) have been interviewed and in addition to their completed user evidence forms have each signed a statement from their interview. All four witnesses have known of the claimed route and used it on foot for a significant number of years (between 30 and 44 years). Although all four state their frequency of use as 'occasional', this varies from very occasionally to 3-4 times a year, to monthly. Over a significant time period such as this it is not unusual for witnesses to have used it more or less often at certain times in their life. None of witnesses interviewed report any challenges to their use.

5.7 Summary of User Evidence

5.7.1 The witness evidence shows clear evidence of use of the claimed route over a significant time frame. Nine people have claimed use of the route A-B and of those four were interviewed by Officers to verify their evidence.

6. Landowner Evidence

6.1 The claimed footpath is on land which is unregistered with the Land Registry, apart from a very small section at the beginning of the route at the Newcastle Road end which has a Caution against first registration (Point A on Plan No. WCA/018). This Caution was made in June 2017 by the owners of Marsh House; it was made to protect their right to access their property. In a statement of truth accompanying the Caution, the owners of Marsh House state they have always used this land to access the property since they purchased it in 1973. The property opposite known as 'Portland' also appears to use this small section of the claimed path as access, however, this is not recorded at the Land Registry. No other part of the claimed path is registered, consequently Notice of the application could not be served on the landowner when the application was made in 2014; therefore Notices were placed at each end of the claimed path. At the start of investigations in March 2019 all five properties which border the claimed path were consulted regarding the application.

6.2 The owner of Marsh House contacted Officers following the consultation. They confirmed they had lived there since 1973 and stated they believed the route was a footpath (known as Cinder Lane) and they would support the application. They stated that Marsh House (built in 1795) and Marsh House Farm were one property at one time, but are now separate.

6.3 Another landowner who lives adjacent to the claimed path, at the Padgbury Lane end, contacted Officers. She also regards the route as a footpath; she has no objection to the path being added to the Definitive Map, she was aware that it is part of the Dane Valley Way. She stated she had seen a man cutting back the vegetation. She explained that there are four manhole covers along the path; there has been a historic problem with flooding in the area. The problem is with the foul drain, the utility company are aware, and on occasions they have to come to clear the drains. She also explained that the path has been used to dump waste in the past, with Christmas trees and garden waste and cuttings.

6.4 No further comments have been received from the adjacent landowners.

7. Bringing the right to use the route into question

7.1 In order to show that public 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 the public has been established. This period is usually taken as the twenty years immediately prior to a challenge being made to that use. In this case no challenges to the use have taken place, therefore it is considered that the date of the application, July 2014 would have brought the right to use the route into question. The relevant period would therefore, be 1994 to 2014.

8. Conclusions

8.1 The user evidence submitted shows use of the claimed route from 1966 to 2019; however the majority of use seems to be from the 1990s onwards. The relevant period to be considered is 1994 to 2014; as no challenge has been made to the use of the route and it was in 2014 that the application was made. Six of the nine witnesses claim use of the route on foot for the full twenty year period. Four witnesses have been interviewed by Officers.

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. In this case there is no registered landowner, and the adjacent landowners have not registered any objections. All of the witnesses interviewed state they were not challenged at any time when using the route. There is no evidence of any challenge to the public during the relevant period.

8.3 There is documentary evidence to show that a route was in existence along the alignment of the claimed route as early as 1819. The Commercial County Maps; Congleton Tithe Records and Ordnance Survey Maps are all good supporting evidence that public rights exist along the claimed route.

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.

9. Implications of the Recommendations

9.1 Legal Implications

9.1.1 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.

9.1.2 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.

9.1.3 The legal implications are contained within the report.

9.2 Finance Implications

9.2.1 If objections to an Order lead to a subsequent hearing/inquiry, the Council would be responsible for any costs involved in the preparation and conducting of such.

9.3 Policy Implications

9.3.1 There are no direct policy implications.

9.4 Equality Implications

9.4.1 The legal tests under section 53 of the Wildlife & Countryside Act 1981 do not include an assessment of the effects under the Equality Act 2010.

9.5 Human Resources Implications

9.5.1 There are no direct implications for human resources.

9.6 Risk Management Implications

9.6.1 There are no direct implications for risk management.

9.7 Rural Communities Implications

9.7.1 There are no direct implications for rural communities.

9.8 Implications for Children & Young People

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

9.9 Public Health Implications

9.9.1 There are no direct implications for public health.

10 Ward Members Affected

10.1 The Councillors in office at the time of the consultation, Councillor Paul Bates, Councillor Gordon Baxendale, and Councillor George Hayes, all representing Congleton West Ward, have been consulted. No comments have been received.

10.2 The new elected Councillors from May 2019 Councillor Suzie Akers Smith and Councillor Sally Holland have been sent a copy of the report. Any comments will be reported verbally.

11 Consultation & Engagement

11.1 The user groups, neighbouring landowners and statutory undertakers have been consulted.

11.2 United Utilities responded in an email dated 5th March 2019 and stated they have no objections.

11.3 Cadent, National Grid, Plant Protection, replied in a letter dated 6th March 2019 advising that they have apparatus in the area and therefore, object to activities pending further investigation. Officers have responded and stated that apparatus would not be affected, if an Order were made the only works that would be required would be the cutting back of vegetation.

11.4 The local correspondent for Cheshire East Open Spaces Society responded by email dated 5th March 2019, and stated that he has walked the path unchallenged for many years, but not for as long as the applicant and the witnesses. He states he continues to walk the path, which is a very useful addition to the public rights of way network; he states additionally it provides a safe pedestrian access to the crossing on the A34. He would welcome the addition of the footpath to the Definitive Map.

12 Access to Information

12.1 The background papers relating to this report can be inspected by contacting the Officer below.

Contact Information

Any questions relating to this report should be directed to the following Officer:

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