

Public Rights of Way Sub-Committee

Date of Meeting:	5th December 2022
Report Title:	Wildlife & Countryside Act 1981 – Part III, Section 53. Application No. CO/8/54: Application for the Deletion of Public Footpath No. 66, Congleton.
Report of:	Jayne Traverse, Executive Director Place
Ward(s) Affected:	Congleton

1. Purpose of Report

- 1.1. This report outlines the investigation into an application made by Andrea Bossen to amend the Definitive Map and Statement to delete Public Footpath Congleton No. 66. This report includes a discussion of the consultations carried out in respect of the deletion application, the historical evidence, witness evidence provided by the landowner 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 delete the public footpath.
- 1.2. The work of the Public Rights of Way team contributes to the Corporate Plan priority “A thriving and sustainable place”, and the policies and objectives of the Council’s statutory Rights of Way Improvement Plan.

2. Executive Summary

- 2.1 The report considers the evidence submitted and researched in the application to delete Public Footpath No. 66, Congleton. The evidence consists of a detailed letter from the applicant with reference and statements as to why they believe the route should be deleted. It includes reference to historical documents such as the Enclosure Award, sale plans, Tithe Map, Finance Act Map, Peak and Northern Footpath Society reports and more. The report determines whether on the balance of probabilities the application to delete this public footpath meets the legal tests to make an order to do so.

3. Recommendations

- 3.1** That an Order is not made under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement to delete Public Footpath Congleton No. 66 as shown on Plan No. WCA/026.
- 3.2** The application be refused on the grounds that there is not any robust evidence to overturn the legal presumption that the Definitive Map and Statement are correct.

4. Reasons for Recommendations

- 4.1** The evidence in support of this claim must demonstrate significant and robust evidence to overturn the presumption that the Definitive Map and Statement are correct.
- 4.2** Whilst a substantial amount of research by the applicant has been undertaken it is concluded that there is not sufficient convincing supporting evidence to overturn the legal presumption that the Definitive Map and Statement are correct at this point in time. The reasons for this recommendation have been discussed in detail within this report.
- 4.3** In particular, it is concluded that the evidence examined does not meet the legal test laid out in the case law 'Trevelyan vs. Secretary of State' (2001) which clearly states that some evidence of substance has to be put in the balance if it is to outweigh the initial presumption that a way has been correctly included. There has to be some evidence that was 'beyond the realms of credibility that a right of way existed'.
- 4.4** Following on from the investigation it has been concluded that whilst there are several statements made by the applicant that there may have been an error in recording Public Footpath No. 66 on the Definitive Map, it is concluded that the documentary information provided by the applicant is not deemed sufficient to overturn the presumption that the Definitive Map is correct. In particular, it is clear that the correct legal procedures were followed during the time of recording Public Footpath No. 66 on the Definitive Map and Statement with no objections being received at the time. In addition, there is also evidence of the public having used the footpath over many years and it serves a key link in the overall network.
- 4.5** It is considered that the requirements of Section 53(3)(c)(iii) have not been met in relation to deleting a public footpath and it is recommended that the Definitive Map and Statement should not be modified.

5. Other Options Considered

- 5.1.** *Not applicable.*

6. Background

6.1. *Introduction*

6.1.1 The Application was made to Cheshire East Council in February 2022 by Andrea Bossen the landowner of the property Puddle Bank, Congleton, at the far southern end of Public Footpath No. 66. The application consisted of evidence from numerous historical documents and maps. The application is based on purely historical evidence and statements by the landowner.

6.1.2 A site visit was made on 25th August 2022. The route was walked in full south to north and back again and an interview conducted and documented with the applicant. The landowner at the north end at Castle Farm did not respond to the consultation but a brief phone conversation was held as well as speaking to other residents on the ground at Castle Farm on 25th August 2022.

6.2 *Description of the Application Route*

6.2.1 Congleton Footpath No. 66 commences near the southern end of Congleton Edge Road (UY694) adjacent to the Methodist Church at Congleton Edge and heads in a north westerly direction passing nearby to the property of Puddle Bank. The route passes via a pedestrian gate and stone stile enclosed by a stone wall to the west of Puddle Bank before continuing in a north westerly direction across farmland past a few small ponds and via various gates before approaching Castle Farm. The route is mostly a grassy surface in nature apart from the tracks at either end near properties. The route meanders a little east as it enters Castle Farm and then proceeds between outbuildings and passes the main farm courtyard. The last section where the route joins a crossroad junction of other public footpaths (namely Footpaths Nos. 64 & 66 and Newbold Astbury Footpath No. 29); on the ground it heads down the tarmac drive to join the other public footpaths (however the legal line just here is shown on the Definitive Map as running close to the house then directly north across a small field but this does not appear open on the ground, although there is a small metal gate in the wall as you leave the yard but no exit onto the drive and link to other footpaths). No width of the route is recorded on the Definitive Statement. On the ground the width varies but is an average of 1.5 metres in most places.

6.3 *Main Issues*

6.3.1 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: -

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

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

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.”

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

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

DEFRA Government Circular 1/09 (1990)

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

Trevelyan v SoS [2001] EWCA Civ 266

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

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

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

6.4 *Investigation of the Claim*

6.4.1 An investigation of the available evidence has been undertaken. 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**.

6.5 *Documentary Evidence*

6.5.1 *1798 Enclosure Award*

Extracts from the 1798 Enclosure Award were provided by the applicant, but it has not been possible to conclude exactly what is being said about the route. However, it is of limited relevance to the recording of a footpath over 150 years later. The route appears to be awarded as a private drift and carriage road.

An extract from the enabling Act for the 1798 Enclosure was also supplied with the application, which would have been a private Act and pre-dates the general Enclosure Acts of the 19th century.

6.5.2 *Congleton Tithe Map and Apportionment 1845*

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.

The Tithe Map of Congleton and apportionment dated 1845 viewed online from Cheshire Archives (ref EDT 123/2) and supplied in part by the applicant, is a second-class map. The route is shown as through route either bounded by solid or pecked double lines. The apportionment accompanying it seems to imply that the route is (at least in part) a public road, with the rest described as a “thoroughfare” – as a public way of some sort. Interestingly it is also noted that the Tithe Map has what is now Castle Farm annotated as Puddle Bank at the northwest end of the route. The modern Puddle Bank is obviously now at the southern end and was not built at the time of the Tithe Map.

6.5.3 *Ordnance Survey Records*

Ordnance Survey (O.S.) 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 is not evidence of the existence of a right of way. It can be presumed that this caveat applied to earlier maps.

O.S. 1st edition 1 inch to 1 mile 1841

This mapping shows the route as a very clear through route shown with bounded double solid lines as depicted by other roads in the area along the same route the public footpath is now marked. Puddle Bank is annotated on the northwest end of the route which is now Castle Farm. The modern Puddle Bank was not built at the southern end until later in the 1900s.

O.S. 1st Edition County Series 25” to 1 mile 1871

The route is shown on this map in the same alignment as it is in the current day. It is more difficult to see on this map but there is still a clear through route along the footpath alignment mostly depicted by a double pecked line braced to nearby fields and more solid feature at the far end. Again, Puddle Bank is annotated at the northern end.

O.S. 2nd Edition County Series 25" to 1 mile 1890

The route is shown throughout as a through route mostly with double pecked lines across the fields braced to nearby fields and more solid lines nearer the south and north end. Puddle Bank is again annotated at the northern end.

O.S. 3rd Edition County Series 25" to 1 mile 1910

The route is again shown as in previous editions and is perhaps even clearer now as a through route. Near the southern end the route is annotated with the letters 'F.P' to indicate the physical nature of a public footpath.

6.5.4 *Bartholomew's Half Inch to a Mile*

These maps were revised for the benefit of tourists and cyclists with help from the Cyclists' Touring Club (CTC). Local CTC members would generally have cycled every available route in their area, and it is subsequently assumed that any route that appeared on these maps had initially at least, been used without hindrance. These maps were well used by cyclists for their outings so the depiction here is likely to have led to it being used.

Several versions of the Bartholomew map were examined (1902, 1923, 1941 and 1943). All versions show the route of the existing footpath as a very clear through route bounded by solid lines all the way along the route as an uncoloured lane ("other road").

6.5.5 *Finance Act 1910*

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.

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.

In this case, the Field Book that accompanies the Land Valuation Book relating to the Finance Act Map, gives a deduction of £40 for public rights of way for the hereditament No. 2881 which covers a fairly large area in the Congleton Edge locale, including Puddle Bank

at the north (now Castle Farm) and the modern Puddle Bank at the south end and encompasses a number of public rights of way not just the application route. The applicant has provided two copies of the map (a working copy and a final version obtained from the National Archives in Kew). The Field Book notes there are 3 footpaths 6500 feet in length. The deduction for public rights of way in the Congleton Edge area is not specific as to what location or routes this relates to, although the applicant believes the length of public rights of way listed in this hereditament No. 2881 must not have included the part of Public Footpath No. 66 in question as the length stated would be too short. However, no specifics as to how the lengths in the area are added up is detailed in the Field Book to be conclusive enough evidence to make and justify this argument. Whilst it might appear on mathematical calculations that the application route would appear to have not been included; given the total length of other routes there could be various possibilities for this. Why the total length of routes appears shorter in the Field Book than if it included the application route is unknown and there could be various explanations for this. Either way this is not felt sufficient evidence alone for the route to be removed from the Definitive Map. In addition, the maps supplied do not seem to cover the whole of the hereditament. See also further comments in Section 7.4

6.6 *Definitive Map Process – National Parks and Access to the Countryside Act 1949*

6.6.1 The Definitive Map and Statement is based on surveys and plans produced in the early 1950s by each parish in Cheshire, of all the ways they considered to be public at that time and the process was advertised and should have been well known about in the local area given it took place over a number of years. The surveys were used as the basis for the Draft Definitive Map which was then followed by the Provisional Map. In this case the relevant date for the Congleton Definitive Map is 1st Nov 1953 which means it was the 20 years prior to this that users claimed to have used the route.

6.6.2 Examining the various different maps leading to the final Definitive map the maps consistently always show the part of Footpath No. 66 subject to this application both on the draft and provisional map. Footpath No. 66 is also shown consistently on these maps continuing north past the now Castle Farm. The Statement is detailed with the only obstruction described at the northern end of the path and not on the length subject to this application. There are no obvious problems seen with the drafting of the map or statement. There were two surveys – one in 1952 by members of Congleton branch of CPRE – then one in 1953 by two engineering assistants from the Congleton Borough Engineer and Surveyor's Dept. The

route is described as going “through farmyard (Castle Farm) then across field along S.E side of hedge and out onto Congleton Edge Road by the Chapel via a grassy path”. Therefore, it is clear that the route described matches with what is now shown on the Definitive Map and was consistently shown on the previous map stages. Definitive Maps and Statements do vary in detail, but Footpath No. 66 is a clear record.

6.7 *Land Registry Information*

6.7.1 The full extent of the Public Footpath existing runs over 2 different landownerships: Puddle Bank owns/occupies the southern end of the land the footpath crosses. Castle Farm owns/occupies the northern end of the land the footpath crosses.

6.8 *Photographs and other evidence*

6.7.2 The applicant also supplied some additional documentary evidence:

- (i) A photograph has more recently been supplied by the applicant, the date of which we are informed is around the 80s or possibly before, taken by a neighbour who has since moved away. It shows the southern end of the route where the applicant believes the route was historically obstructed. It is difficult to see any obstruction but it does appear to be some barrier, whether wall, fence or gate or combination of, adjacent and near to where the modern Puddle Bank has been built.
- (ii) Sale particulars from 1932 for Puddle Bank Farm describe the route as “second driveway” to Congleton Edge.
- (iii) The Peak and Northern Counties Footpaths Preservation Society reports for 1931 & 1932 refer to problems of obstruction of the route of Footpath No. 66. In 1932, the report says many more people have provided user evidence – now over 40 witnesses giving evidence of up to 50 years user evidence (i.e. back to at least 1882) – but that “conflicting evidence” is preventing the Corporation taking action to remove any obstruction.

7 **Conclusion**

7.1 A large amount of historical information has been examined in this investigation of the application both documentation before and leading up to the formation of Footpath No. 66 being confirmed on the Definitive Map

and documents post Definitive Map. The historical evidence examined in this case does not show that a clear mistake has occurred and is not backed up by robust supporting evidence.

- 7.2** The strict legal test for an application such as this, has set the bar very high as per case law *Trevelyan vs SoS* (2001) which clearly states that some new overwhelmingly robust evidence must be evidenced to overturn the legal presumption that the Definitive Map is correct. In addition, guidance notes state '*An enquiry cannot simply re-examine evidence examined when the way or ways in question were first entered on the Definitive Map, there must be some new evidence, when considered with all the other evidence available, justifies the modification*'. The test is high because in order for a public right of way to appear on the Definitive Map & Statement it has already gone through a lengthy process with opportunities for objections/corrections. Consequently, some very clear evidence of substance has to be provided or found to overturn the legal presumption.
- 7.3** In the case of Footpath No. 66 there were no objections to its recording on the Definitive Map and the process of recording it on the Definitive Map was followed correctly. Indeed, the Definitive Map recording for this Footpath is one of the most consistent and thorough seen compared to others.
- 7.4** There are two main arguments the applicant mentions as to why they strongly believe a mistake was made on recording the route on the Definitive Map. The first being the Finance Act Map argument that this part of Footpath No. 66 could not have been included in the length of path recorded in the hereditament 2881. However, it is not considered that this is a sufficiently strongly evidenced argument as Footpath No. 66 is longer in length than just between Puddle Bank and Castle Farm and also the length referred to in the Field Book is one general length not itemised with lengths for each of the paths; there is no specific evidence that identifies this part of Footpath No. 66 as having been omitted. Also, even if the calculation was done to add up various combinations of different lengths of path in this hereditament, this would still not be sufficient evidence alone to justify removal of the route from the Definitive Map and Statement. In addition, none of the Finance Act maps appear sufficiently good quality to draw any conclusions from (even the Kew extract), except to say that they do not seem to show anything that could support an argument that this part of Footpath No. 66 could not exist at that time. All they appear to show is that it was unlikely to have been considered to be a public road in 1910.

The second main argument put forward refers to a belief that the Public Footpath could not have been walked properly as they believe the route was physically blocked off at the southern end prior to it appearing on the Definitive Map and that there could not have been 20 years' uninterrupted use prior to its recording on the Definitive Map in 1952. In addition, it is pointed out that the Peak District and Northern Counties Footpaths

Preservation Society mention an issue of obstruction on the route but with no detail and that, because after 1932 they do not mention it in their annual report, this is evidence of non-existence. However, it is not considered that this is a sufficiently strongly evidenced fact as it could equally mean that the issue of “conflicting evidence” mentioned in their report of 1932 was resolved or in stalemate until the 1952 survey; in any case, is not evidence of non-existence. Even if there was some barrier in part or full at the southern end, users may have still used the route for at least 20 years prior to the Definitive Map.

7.5 Other points and document assessment where there is a difference of interpretation with the applicant’s viewpoint are as follows:

7.5.1 The Enclosure Award 1798 map showing the route as a private drift and carriage road along with enabling Act all pre-dates the general Enclosure Acts of the 19th century and the Definitive Map process. The fact the status of the routes does not include any public rights in 1798 does not mean such rights did not accrue after.

7.5.2 The sale particulars of 1932 relating to the historic position of Puddle Bank Farm (which relates to Castle Farm, previously called Puddle Bank) describes the route along which the Public Footpath runs as a “second driveway” to Congleton Edge which may very well have been true. It is understood that the route of the Footpath was the route from what is now Castle Farm to Congleton Edge before the more modern access road, to the north, was put in as the main access to Castle Farm. However, this does not exclude the possibility of there also being a public footpath over a driveway, which the applicant believes. Given this was also the time an obstruction was mentioned it is possible that the reason no progress on any obstruction was made was because the farm was for sale at that time.

7.6 Overall whilst there are always possibilities mistakes could have happened in the past when the Definitive Map was drawn up, in this case it does not appear that sufficient robust evidence has come to light to overturn the Definitive Map and Statement to delete the route. Obviously, a lot of time has passed which makes this more difficult. In addition, the route has obviously been well walked for many years since its inclusion on the Definitive Map as evidenced from the consultation responses.

8 Consultation and Engagement

8.1 Consultation letters and a plan of the application route were sent out to the Ward Member, Town Council, user group organisations, statutory undertakers and landowners on 26th July 2022. Further letters were sent to the landowners at either end of the application route.

- 8.2** There were 5 formal written responses from consultees summarised below.
- 8.3** The Open Spaces Society representative sent a brief response to say they would object if a deletion order was made as they did not believe there was any information to support a deletion order.
- 8.4** The Congleton Ramblers Group representative responded with a table of the groups record of surveying the public footpath in 2013, 2014 and 2018 where it was recorded as an open and available route. They also stated the public footpath was a vital recreation route and had obviously been walked for a long period of time and noted a further inspection in 2019 by the group noting it remains open.
- 8.5** The Sandbach Footpath Group representative responded to say he objects to the possibility of Footpath No. 66 being deleted as it is a direct and natural link that has been used for many years since the early 1950s and is not a useless route. They mentioned if there was a problem with people walking near the farm, that the path could be diverted at that location or a permissive route put in place.
- 8.6** A local resident, responded stating the route is a useful way connecting routes on and around the slopes leading up to Congleton Edge and Mow Cop and mentions could be possibly diverted around farm if issue.
- 8.7** BT Openreach responded to say they have no issues with the application from a utility stance.

9 Implications

9.1 Legal

- 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** Legal implications are also included within the report.

9.2 Finance

- 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

9.3.1 There are no direct policy implications of this report.

9.4 Equality

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

9.5.1 There are no direct implications for Human Resources

9.6 Risk Management

9.6.1 There are no direct implications for risk management

9.7 Rural Communities

9.7.1 There are no direct implications for Rural Communities.

9.8 Children and Young People/Cared for Children

9.8.1 There are no direct implications for Children and Young People.

9.9 Public Health

9.9.1 There are no direct implications for Public Health.

9.10 Climate Change

9.10.1 The Council has committed to becoming carbon neutral by 2025 and to encourage all businesses, residents and organisations in Cheshire East to reduce their carbon footprint.

9.10.2 The deletion of a public footpath on the Definitive Map which has been recorded on the Definitive Map for over 50 years would represent the formal removal and recognition of pedestrian opportunities, creating less opportunities for travel/leisure on foot and potentially increasing the use of cars for short local journeys and therefore energy consumption. It would also remove potential for the improvement/promotion of healthy lifestyles as part of a recognised recreational route.

Access to Information	
Contact Officer:	Clare Hibbert clare.hibbert@cheshireeast.gov.uk 01270 686063
Appendices:	Appendix 1 – Archive List Plan No. WCA/026
Background Papers:	File No. CO/8/54