

Report to
Planning Committee

12th April 2018

Report of
Deputy Chief Executive Place

Title:
Wildlife and Countryside Act 1981 Section 53
Application to add a Public Footpath from Broad Lane to Fir Tree Avenue

Ward affected: Westwood

Is this a key decision? *No*

Executive Summary:

The City Council has received an application from Mr Alan Clemmett to have a route recorded on the Definitive Map and Statement as a public footpath.

As a result of investigations into the application, authorisation is now being sought to make a Definitive Map Modification Order. 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 route as a public footpath.

Recommendations:

That Planning Committee are recommended to:

- (1) Authorise the Deputy Chief Executive Place to make the necessary Definitive Map Modification Order for the following route from between 171 and 175 Broad Lane to between 151 Fir Tree Avenue and 173a Broad Lane (on Fir Tree Avenue) in the City of Coventry pursuant to Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 by adding this route as a Public Footpath, as shown between points A-B on plan ref: Ref:T&T/ALM/X0010/Cttm2018 at Appendix 1.
- (2) Public notice of the making of the Order be given and, in the event of there being no objections within the specified time period, or any objections received being

withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Act.

(3) Agree that should objections be received to the making of the Order that cannot be resolved, then the matter be forwarded to the Secretary of State for determination.

List of Appendices included:

Appendix 1. Plan Ref:T&T/ALM/X0010/Cttm2018 showing the locations and routes of the proposed public footpath.

Appendix 2. Cabinet Member (Neighbourhoods, Health and Equalities) report dated the 26th October 2006

Appendix 3. Copies of the letters of objection from residents of Broad Lane and petition.

Appendix 4. Table showing periods of use of the path as claimed by witnesses.

Other useful background papers:

None

Has it been or will it be considered by Scrutiny?

No

Has it been or will it be considered by any other Council Committee, Advisory Panel or other body?

No

Will this report go to Council?

No

Report title: - Applications to add a Public Footpath from Broad Lane to Fir Tree Avenue.

1. Context (or background)

- 1.1 The Council has received an application from Mr Alan Clemmett to have a public footpath recorded on the Definitive Map and Statement.
- 1.2 No evidence has been submitted to demonstrate that the status of the route should be anything other than public footpath.

2. Description of the route

- 2.1 The claimed route runs from Broad Lane between Nos 171 and 175 in a generally southerly direction to Fir Tree Avenue between Nos 151 and 173a Broad Lane, (on Fir Tree Avenue). It is approximately 147 metres in length and at its commencement on Broad Lane and for 105 metres is approximately 3 metres wide surfaced with stone. It is then 2 metres wide for the remaining 42 metre length to Fir Tree Avenue and is surfaced with earth and stone. At the point where the route narrows from 3 metre to 2 metre there is a set of steel gates. One gate is open and the other is closed, locked to a bollard in the centre of the path. There is a further set of gates at the Fir Tree Avenue end of the path, one of which is open and the other closed. The path is divided from the adjacent residential properties by a mixture of close boarded timber fences and hedges.

3. The main issues

- 3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Coventry City 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.
- 3.2 One such event (section 53(3)(c)(i)) requires modification of the map by the addition of a right of way.

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

- (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...;

The evidence can consist of either documentary/historical evidence or user evidence or a combination of this evidence. All of the evidence must be evaluated and weighed so that a conclusion can be reached as to 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 a consideration or relevant in determining the decision.

- 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.”

- 3.4 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”.

- 3.5 A route can be presumed to have been dedicated under section 31(1) of the Highways Act if a route have been used by the public for 20 or more years. When calculating the 20 year period there must be a clear event that made the public realise that their rights are being challenged; referred to a calling into question. Events that can call a route into question include blocking the route, a notice, telling people not to use the route or submitting a definitive map modification Order to the Council.

- 3.6 While the 20 year usage is important it must be remembered that use outside of this period can be used to support usage by the public. Use before 20 years before the calling can be used as evidence to support a claim, use after the date of calling into question can be used to support the claim although this would depend on the calling into question. For example if the calling into question event is a DMMO application this would be highly supportive of the application but if gates have been locked and remained locked and people forced their way through this would not be in support of the application as the usage is not ‘as of right’.

- 3.7 In this case there are a number of events that can be regarded of a calling into question:-

- Firstly, the application submitted by Mr Clemmett in 2015 can be considered the trigger date, making the period for consideration as the relevant 20 years use from 1995 to 2015.
- Secondly, it is alleged by many witnesses that the path was closed by gates for a short period in 2005/2006.
- Open Spaces Society refers to an incident in 2001 when the council’s “gating officer” allowed gates to be installed on the route, which is referred to by many of the witnesses. The 2001 gating triggered the alleged application by the Open Spaces Society in 2001 to add the route to the Definitive Map although the Council has no record of this application.

- 3.8 The gating of the route in 2001 and 2005/06 may exclude the 2015 application as a calling into question. While the gating of the route clearly challenged the usage of

the route, consideration must be given to whether the person closing the route is capable of calling the route into question. The land in question is unregistered and the Council has not been able to trace the landowner which means the gating of the route might not be by the landowner. While it would normally be expected that the landowner would call the route into question it is possible for other people to call the route into question. This was considered in the case of *Applegarth v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 487 (28 June 2001)* where Munby J stated that, “whether someone or something has brought into question the right of the public to use the way is a question of fact and degree in every case”. This means there is no rule about who can or can’t call a route into question and an act on behalf of the landowner can bring the route into question. While it is not clear that the gating of the route, particularly the 2001 gating, was on behalf of the landowner the Council has no evidence to suggest it was not done on the landowner’s behalf.

- 3.9 A report submitted to the Cabinet Member (Neighbourhoods, Health and Equalities) dated the 26th October 2006 Appendix 2 considers a number of petitions that were submitted to the Council regarding the gating of the route. The report recognises that in 2001 it was believed that the route was a public footpath and states that enforcement action was taken to remove the gates in 2002 paras 3.1 and 3.2. It is not clear why an Order was not made or if an investigation was completed in 2001 but in 2002 enforcement action was taken to remove the gates. This arguably demonstrates that the Council believed that the route was highway at the time of the enforcement action.
- 3.10 In light of the above the above there are three dates that can be used for calling the route into question; 2015, 2006 or 2001. There is enough evidence to support the view that public rights on footpath subsist between 1995 and 2015. If the gating of the route is considered a calling into question the first gating in 2001 would have to be the used to calculate the date meaning a period from 1981 to 2001 would have to be used,k there is enough to support that public rights of foot have been accrued within that period.
- 3.11 It is recommended that the calling into question date should be 2001.

4. Results of consultation undertaken

- 4.1 A pre-order consultation was carried out from 12th October 2017 to 24th November 2017. Consultees included the user group representatives, statutory undertakers and the owners of Nos 173 Broad Lane and 173a Broad Lane which access their properties via the claimed route.
- 4.2 A letter was received from Cable and Wireless Ltd indicating that they had no objection to the proposal. The Open Spaces Society submitted a document citing a number of historical documents and 18 user witness statements in support of the application. Further the society claim that they submitted an application to the Council in 2001 to have the route in question added to the Definitive Map and the submitted user evidence forms and copies of documentary evidence comprise the extent of their submission in 2001. The Council currently has no record of this application but the evidence can be considered along with that submitted as part of the application from Mr Clemmett in 2015 that triggered this investigation.

4.3 The Council received 2 objections to making the Order:-

- A letter was received from residents of 173 Broad Lane and a petition, submitted with the letter, signed by 30 residents of the immediate area of Broad Lane and Fir Tree Avenue and
- A letter was also received residents of 173a Broad Lane.

4.4 The objections related primarily to various anti-social activities that the objectors feel are promoted by the existence of the path including public drinking, drug taking and dealing, littering, vandalism, un-bagged dog mess etc. The objections also related to the closing of the route on two occasions, questioning whether these acts have called into question the ability of the claimant and witnesses to assert 20 years use without interruption. This matter is dealt with at paragraphs 3.4 to 3.6 above.

4.5 In a general response to the objections it has been explained that the process to consider an application of this nature under the provisions of Wildlife and Countryside Act 1981 s53 cannot take into count considerations that relate to matters such as anti-social behaviour as out lined in the two objections. It has been explained that the committee can only consider matters of an evidential nature relating purely to considerations of whether or not the alleged rights subsist and their concerns over the use of the route and the anti-social behaviour it generates would be matters for the council to consider from a management perspective if it was found that the claimed route is in fact a public footpath. The objectors were however assured that their concerns would be brought to the attention of the committee.

4. Documentary evidence

4.1 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 other evidence.

4.2 The 1st, 2nd and 3rd editions of the large scale 1:2500 County maps consistently show the path running as an unenclosed footpath across fields from Broad Lane in a generally southwards direction abutting onto Tile Hill Lane. There is some minor variation in the alignment of the path through time but it is clear that the route on the ground today which is the subject of this investigation is part of the same path portrayed on these early maps. The fact that the path is shown running unenclosed across agricultural fields simply connecting two public roads with no apparent private purpose such as serving agricultural premises is suggestive that it was being used by the public as a route between Broad Lane and Tile Hill Lane. The surrounding agricultural landscape is shown as beginning to change with the emergence of residential developments on the 1913/1914 3rd edition map with change increasing into the 20th century with Fir Tree Avenue appearing on a map of

1935. By which time evidence of the cross field path south of Fir Tree Avenue had disappeared.

5. Witness evidence

- 5.1 A total of 27 witness evidence forms have been considered. A table showing the periods of use is attached in Appendix 4. Of these, 9 witnesses have been interviewed. 17 witnesses have claimed they have used the route for the requisite 20 year period prior to 2001 with 2 witnesses claiming continuous use from 1942 and 1945 respectively. A further 9 witnesses have claimed continuous use for the requisite period since 2001 to 2015 with one witness claiming continuous use since 1945. Use of the route outside the 20 year period to 2001,(prior to 1981) is provided by a further 3 witnesses who claim to have used the path for extensive periods, from 1944 to 1960, from 1939 to 1956 and from 1939 to 1958. This evidence can support the application as the route was being used by the public continuously from 1944 through to 2001 without interruption.
- 5.2 The witnesses interviewed expressed consistent reasons for using the route which also generally mirrored the reasons expressed in the witness evidence forms. The reasons varied from access to bus stops on Broad Lane, visiting shops and friends who live locally and as part of a recreational circuit for exercise and dog walking. Most witnesses recollected the installation of the gates and that after a short period they were locked in an open position. No witnesses were ever challenged whilst using the route or recall seeing any signs prohibiting use and all regarded it as an existing public footpath.

6. Conclusion.

- 6.1 The user evidence submitted shows use of the claimed route from 1939 to 2015 with the majority using the route in the 1960's and 80's. The relevant period to be considered is from 1981 to 2001; it was in 2001 that the path had locked gates installed, (albeit temporarily), triggering the 20 year period.
- 6.2 Nine witnesses have been interviewed and all of these claim use of the route on foot for the full twenty year period prior to 2015 including one from the immediate post war period. 4 witnesses interviewed claimed to have used the route for in excess of 20 years prior to 2001. Additionally of the 27 user witness forms submitted 16 claimed to have used the path for at least 20 years at some period prior to 2001.
- 6.3 Under section 31(1) of the Highways Act 1980 public footpath rights can come into existence by prescription unless there is evidence to the contrary. Therefore the landowner must provide evidence to that effect, which is normally evidence of a challenge or notices put up during the relevant twenty year period. There is no registered owner of the land and no party has come forward to claim ownership. All of the witnesses interviewed state they were not challenged at any time when using the route. There is no evidence of a challenge to the public during the relevant period that would constitute calling into question the use of the route by the public of an evidential level to qualify under the provisions of Highways Act 1980 S31 prior to 2001. It is therefore considered that the presumed dedication of the way has not

been rebutted as there is no evidence from a landowner or any other party that has the qualities to demonstrate that there was no intention to dedicate the way.

- 6.4 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.

7. Options considered and recommended proposal

- 7.1 The options have been considered and the recommended proposal is:-

Make an Order to record the route as shown on the attached plan in Appendix 1, as public footpath.

- 7.2 The Council is under an obligation to keep the Definitive Map and Statement under review, public rights of way should be recorded on the Definitive Map and Statement.
- 7.3 The width of the path will be approximately 3 metres wide for a length of 105 metres from Broad Lane whereupon it narrows to approximately 2 metres for the remaining 42 metres length to Fir Tree Avenue.

8. Comments from Director of Finance and Corporate Services

- 8.1 Financial implications

The costs of making the Order mainly consist of internal officer time and advertising and will be met from existing budgets. If there is an appeal, the costs would mainly be internal officer time, again met from existing budgets.

- 8.2 Legal implications

Under the Wildlife and Countryside Act 1981 the Council is obliged to make a Modification Order as soon as reasonably practicable on the occurrence of certain specified 'events'. These events including:

- (i) the discovery by it of evidence which (when considered with all other relevant evidence available) shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates (section 53(3)(c)(i);

Section 31(1) of the Highways Act 1980 provides that where a way over land is enjoyed by the public "as of right" and without interruption for a full period of 20 years the way is presumed to have been dedicated as a highway unless there is sufficient evidence that there was no intention

during that period to dedicate it. Enjoyment by the public “as of right” means use by the public without force, without secrecy or permission.

Section 31(2) provides that the 20 year period referred to in section 31(1) is to be calculated retrospectively from the date when the public’s right to use the way is brought into question.

Section 31(3) provides that a notice erected on the site by an owner of the land over which a way passes in a manner visible to person using the way, and maintained by him is, in the absence of proof to a contrary intention, sufficient evidence to negate the intention of the owner or successors in title to dedicate the way as a highway.

Section 31(6) provides that an Owner may provide sufficient evidence to show his lack of intention to dedicate by depositing with the Council a map and statement showing any way over the land he admits to having dedicated as highways and denying the existence of other ways over it and then lodging declarations to deny the addition of ways at intervals of not less than 20 years. This will be in the absence of proof to the contrary intention, sufficient evidence to negate the intention of the owner or his successors in title to dedicate any additional way as a highway.

The House of Lords in a 2007 judgment (the Godmanchester decision [2007] UKHL 28) has clarified what other evidence could be evidence of “no intention to dedicate” for the purpose of section 31(1). The evidence can relate to just one point in time during the period of enjoyment, and ‘during’ in the context of section 31(1) need not be throughout the whole period. ‘Intention’ in this context means what the relevant audience (the users of the way) would reasonably have understood the landowner’s intention to be. A letter from the landowner to his own solicitor or estate agent would not be enough; some element of communication to users of the way of ‘no intention..... to dedicate’ is required.

Unless evidence is provided of one or more specific steps having been taken by the landowner within the period to communicate overtly to the public using the route that (s)he does not intend to grant a public right of way over it, the presumption of the dedication will arise under section 31(1) where there is a full period of 20 years uninterrupted public use, calculated retrospectively from the date when the public right to use the way is brought into question.

Where there is insufficient evidence to establish a presumption to dedicate under section 31(1) of the Highways Act 1981, there is sometimes sufficient evidence to establish an inference of dedication by the landowner under common law. In the case of *Nicholson v Secretary of State for the Environment* (2006), Dyson J stated: “*Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication...*”. No minimum period

of use is required to raise such an inference, but there must be evidence which is sufficient to infer that there was an intention to dedicate a public right of way.

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 Other implications

6.1 Equalities / EIA

None

6.2 Implications for (or impact on) the environment

None

6.3 Implications for partner organisations?

None

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