

Report to
Planning Committee

27th September 2018

Report of
Deputy Chief Executive (Place)

Title:
Wildlife and Countryside Act 1981 Section 53
Application to add a number of Public Footpaths to the Definitive Map and Statement for Coventry on land lying between Leaf Lane and the A444 Stivichall Cheylesmore by pass.

Ward affected: Cheylesmore

Is this a key decision? *No*

Executive Summary:

The City Council has received an application from a local resident to have several routes recorded on the Definitive Map and Statement as public footpaths.

As a result of investigations into the application, authorisation is now being sought to **refuse** to make a Definitive Map Modification Order. This report includes the consultations carried out in respect of the claim, the witness evidence, historical 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 or not an Order should be made to add the routes as public footpaths.

Recommendations:

That Planning Committee are recommended to:

- (1) Authorise the Deputy Chief Executive (Place) to refuse to make an Order on the basis that the application does not satisfy the legal tests required for the making of an Order.
- (2) Authorise the Deputy Chief Executive of Place to give notice of the refusal to make the Order.

List of Appendices included:

Appendix 1. Plan showing the locations and routes of the claimed public footpaths.

Appendix 2. Table showing periods of use of the path as claimed by witnesses.

Appendix 3. List of historical documents consulted.

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: - Application to add a number of Public Footpaths to the Definitive Map and Statement for Coventry on land lying between Leaf Lane and the A444 Stivichall to Cheylesmore by-pass.

1. Context (or background)

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

2. Description of the site and claimed routes

- 2.1 The claimed routes are on land comprising approximately 26 acres of Council owned land lying between Leaf Lane and the A444 Stivichall Cheylesmore by-pass north of the Festival roundabout interchange with the A45. The land is largely laid to permanent grass with a belt of planted woodland approximately 30 metres wide running north / south alongside Leaf Lane. Areas of trees and regenerating scrub woodland also exist at the northern end of the land and there is a broken belt of trees forming a barrier between the land and the A444. An area at the south end of the land that is separated from the main area by a band of trees has recently (2015) been fenced from the main area of land and used as a materials store by contractors working on a new slip road and bridge over the A444.
- 2.2 The land was acquired by the Council from Chrysler UK Properties Ltd in 1971 as part of the required land take for the construction of the A444 Stivichall to Cheylesmore by-pass.
- 2.3 The claimed paths form a circuit running round the periphery of the main open area of the land, together with two routes running roughly east / west across the main site and a third route running roughly north / south through the middle of the site. There are also five short spur paths running through the belt of woodland connecting to Leaf Lane and acting as access points to the area of land. A second circuit of footpath is claimed running round the area of land fenced off in 2015 at the south end of the site together with a north / south path and a connecting spur to Leaf Lane. In total this would comprise up to twelve individual paths throughout the area of land.
- 2.4 The paths on the open land comprise of grass surfaces approximately 2 metres wide whilst the paths connecting to Leaf Lane through the belt of woodland consist of a single trodden line approximately 1 metre wide comprised of an earth surface.
- 2.5 A 12ft field gate is present at Ordnance Survey grid reference SP 3420 7619, (point E on the plan). The gate is locked and is presumed to allow access for management and maintenance of the land. Pedestrian access has been acquired round the gate as evidenced by the worn ground. Four signs exist at approximately points B, D, E and F on the plan, fronting onto Leaf Lane prohibiting motorcycling and stating that Coventry City Council permit the public to use footpaths on the

land. Correspondence provided as part of the evidence by the applicant suggests these signs were installed in 2017.

The signs are located at:

- Opposite 83 Leaf Lane in the pull in
- Opposite Okehampton Road
- Opposite Buckfast Close
- Opposite Exminster Road

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 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.**

- 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”.

- 3.4 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.

- 3.5 In this case the date that must be used to calculate the twenty year period will run backwards from the date when the smaller area of land was fenced off, preventing access and calling it into question, an action which contributed to triggering the application.

4. Results of consultation undertaken

- 4.1 A non-statutory consultation was carried out from 6th April 2018 to 18th May 2018. Consultees included user group representatives and statutory undertakers.

- 4.2 The Open Spaces Society responded supporting the application citing information from the 1990s suggesting that the City Council at the time regarded some of the routes, which are the subject of the claim, to be public rights of way albeit that they were not registered on a Definitive Map. Maps of no formal or legal provenance showing paths had traditionally been made available to the public by the Council in this period although they were subsequently withdrawn by the then Public Rights of Way Officer in 2008.

- 4.3 No other responses were received.

4. Witness evidence

- 4.1 A total of 27 witness evidence forms have been submitted and considered. A table showing the periods of use is attached as Appendix 2. Of the witnesses in general, 19 have claimed use exceeding 20 years with the maximum length of time claimed by two witnesses being 50 years from 1963. The land which is the subject of the claim changed significantly in the period 1971 to 1973 when the Stivichall to Cheylesmore A444 by-pass was constructed and it came to its current layout following that development. However it is clear from many of the witnesses that the land was used in a similar way prior to the construction of the by-pass. Whilst the land may have been regarded as agricultural land and indeed historically it was part of How Lane Farm, (Leaf Lane was originally known as Howes Lane). It is clear from the testimony of many witnesses that the characteristics of the land did not preclude public access. The land was predominantly unimproved pasture and emergent scrubland of the nature of a common. Several witnesses claim to have used routes in this period which they continued to use after the construction of the by-pass, the only change being that routes to the eastern part of the land in the vicinity of the River Sherbourne were lost to the development. It is not clear to what extent if any, use was interrupted by the construction of the by-pass but notwithstanding that, the period after the development was concluded, 1973 to 2016 is adequately in excess of 20 years to demonstrate use as of right.

- 4.2 The witnesses interviewed expressed consistent reasons for using the routes which also mirrored the reasons expressed in the witness evidence forms generally. The reasons used were predominantly exercising dogs where users would walk a variety of the several circuits available on a regular basis with the highest frequency

being twice daily. Others would use the area for exercise and to observe wildlife. The geographical distribution of user's addresses demonstrates that use was predominantly from local people living on the adjacent estates. Amongst the main classes of users, the dog walkers and the general exercise walkers, there is a fundamental division. Whilst some would only ever use the land in question, a significant number of users utilised the routes as part of longer walking journeys. These users, predominantly used the north / south route parallel to Leaf Lane. Some witnesses recall using the route as part of longer walks to Baginton to visit the Mill Public House, whilst others walked as far as Stoneleigh and Kenilworth. Others recall walking in a northerly direction, using the route to access other paths to get to Whitley to visit the shops and again to visit the pub. This latter use came to an end when the access to the Jaguar Engineering Centre was improved with the development of new slip roads from the A444 which cut the path used in this direction.

- 4.3 No witnesses were ever challenged whilst using the routes or recall seeing any signs prohibiting use. All regarded the routes as existing public footpaths or paths on public open space or, in many cases, witnesses regarded the land as part of Whitley Common. Several witnesses recall seeing signs in the 1980s describing the land as being part of Whitley Common and therefore considered that the land was subject to the byelaws that applied to Whitley Common. One witness, who was interviewed, described how over time the signs deteriorated and eventually fell down. He stated that he had recovered one sign and took it home for safe keeping. The sign was exhibited during the interview and states, "City of Coventry Byelaws Pleasure Gardens Whitley Common. It is an offence to wheel, ride or park any vehicle over or upon this area of the common." Others, also recall the much more recent installation of signs facing onto Leaf Lane stating that paths are used by permission of the City Council.
- 4.4 Under section 31(1) of the Highways Act 1980 public footpath rights can come into existence by deemed dedication 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 because the landowner is the City Council, a public authority, it is also necessary to establish on what basis the landowner acquired the land and for what purpose. This is because all Local Authorities are regarded as "statutory corporations". That is, whilst their actions are generally unfettered and they are free to do whatever they wish, they are limited in their actions in that there must be statutory authority for those actions. Thus, it is necessary to explore the statutory authority employed by the Council to acquire and manage the land.

Documentary evidence

- 4.5 As the land was only relatively recently acquired by the Council in 1971 the usual historical sources that are investigated in an inquiry of this nature have not been consulted to any great detail. However it is important, as referred to above at paragraph 4.4 to establish the authority and purpose for which the land was acquired. As such various documents associated with the acquisition of the land have been consulted at the Herbert Museum Archives.

- 4.6 The sale agreement between the City Council and Chrysler UK Ltd on 18th October 1971 makes reference in paragraph (c) of the recitals that “The Council further proposes to provide an open space on the western side of the said Stivichall / Cheylesmore by-pass and to execute ancillary works in connection with the said by-pass and open space”.
- 4.5 The by-pass development was part of a strategic road development undertaken by the City Council in conjunction with the Department of the Environment. The proposals were considered at a joint local public inquiry held on 19th October 1971 and in the Inspector’s decision letter the purpose for the acquisition of the land is discussed. The land formed part of three compulsory purchase orders and was cited as “The Town and Country Planning Act 1968 Acquisition of Land (Authorisation Procedure) Act 1946 City of Coventry (Leaf Lane No2) Compulsory Purchase Order 1971”. A total of 25.96 acres of the land was to be acquired to provide landscaping and grading works to soften the effects of the road on the existing residential areas; to reinforce the existing substantial hedge on the east side of Leaf Lane; to provide a green wedge from the city boundary almost to the central area containing a major pedestrian way linking Whitley Common and the south-east sector of the city with the proposed recreation area to the south of the Stonebridge Highway; to provide additional land, which although laid out in a different manner from that part of Whitley Common taken by the highway scheme would compensate for the part lost.
- 4.8 In the Inspector’s findings of fact at paragraph 74 (i) he states that the scheme provides for a large open space area adjoining Leaf Lane to offset the loss of part of Whitley Common whilst paragraph 74 (m) relates that the compulsory purchase order (Leaf Lane No2) was primarily to compensate for the loss of part of Whitley Common.
- 4.9 The Inspector also refers at paragraph 21 to the management of Whitley Common which was held as public open space to be managed for public resort and recreation under the Public Health Acts following the de-registration of Whitley Common by the Coventry Corporation Act 1927.
- 4.10 The Inspector’s findings and recommendations were supported by the Minister’s confirmation letter of 8th June 1972. In the letter the minister also makes references to the land at Leaf Lane being acquired to replace land lost at Whitley Common.
- 4.11 In the minutes of the Planning and Development Committee of 25th April 1972 the City Architect and Planning Officer reported that a certificate had been issued under the provisions of the Land Compensation Act 1961 S17 to the effect that no other alternative use could be made of the land other than public open space.
- 4.12 The Coventry Corporation Act 1927 referred to by the Inspector at para 4.9 above had the effect of extinguishing all rights over the commons within the city other than the rights of the Corporation. It further stipulated that the Corporation would forever hold the commons in complete ownership, maintained as open spaces and the provisions of the Public Health Acts relating to parks and pleasure grounds are to apply.

- 4.13 The Public Health Act 1875 and the Public Open Spaces Act 1906 are the two statutes that Local Authorities have traditionally used to provide statutory authority to acquire land for public open space. In this case the references to the land being acquired to replace part of land lost at Whitley Common and to be managed in the same way as Whitley Common indicates that the statutory powers applied are those of the Public Health Act 1875.
- 4.14 Section 164 of the Act provides a power for an Urban Authority to acquire land for the purpose of being used as public walks or pleasure grounds, and an authority may make byelaws for the regulation of any such public walk or pleasure ground.
- 4.15 The latest version of the relevant bylaws is from 1962, "The Bylaws as to Pleasure Grounds in the City of Coventry." The bylaws cite that they are formulated under the powers provided by The Public Health Act 1875 S164 and Whitley Common is included in the list of lands to which the byelaws apply.
- 4.16 That the land at Leaf Lane was acquired to replace part of Whitley Common and managed in the same way as Whitley Common is quite conclusive. That the land was acquired and managed in the way described above can have an impact on the ability of the public to acquire public rights of way over the land either by statutory dedication under Highways Act 1980 s31 (1) or by common law dedication. The critical difference is that use of any land acquired by a Local Authority under the provisions described above is by permission and by rights granted in those statutory provisions. Such use, by definition cannot be "as of right" but is "by right". This subtle difference in description of use is critical to an application of this nature which is dependent on user evidence alone.
- 4.17 In recent years the courts have given this argument considerable attention so there are very clear legal principles for us to draw on. Litigation has arisen in the area of claims for village green status, where communities have attempted to register land as village green to protect it from development. The acquisition of village green status by user is predicated on exactly the same legal tests as the acquisition of public rights of way by user. That is, use over a significant period, usually over 20 years and use "as of right" which means the use must be without secrecy, without violence and without permission. A number of these cases have concerned land owned by public authorities where consideration of the interpretation of use has been critical.
- 4.18 The most recent cases that have been considered by the Supreme Court are; *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2014] 2 WLR 1360 and; *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another* [2015] UKSC 7. Both cases gave considerable attention to the interpretation and application of use "as of right". In *Barkas*, Lord Neuberger gave the leading judgment and accepted the argument that "So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise." In *Newhaven*, the nature and effect of the statutory powers used to acquire and manage the land was discussed and it was concluded that such powers precluded use "as of right" because use was by statutory permission so had to be "by right". The point was

made explicitly clear by the court when discussing the application of bylaws. There was no byelaw that expressly permitted the public to use the land. However, the court found that it was necessary and obvious to imply a permission to so do in circumstances where particular byelaws were framed so as to regulate recreational activity. Thus, the byelaw that forbade dogs being brought into the Harbour unless it is on a lead gave rise to an implied permission to walk a suitably controlled dog. It was further held that it did not matter that those byelaws had not been communicated to the users during the relevant 20-year qualifying period. Lords Neuberger and Hodge held that the byelaws represented “*the local law applicable to Newhaven Harbour...*”. The position was, therefore, in the view of the court “*indistinguishable from that in Barkas*” because there was a public law right derived from statute: In *Barkas* it was the Housing Act and in *Newhaven* it was the legislation enabling the imposition of the byelaws. Members of the public were not to be held to be trespassers in these circumstances.

5. Conclusion.

- 5.1 The user evidence submitted shows use of the claimed routes from 1963 to the date of the application in 2016; however the majority of witnesses began using the route in the 1970’s and 80’s after the land had been acquired by the Council and the by-pass had been built. Whilst there may be sufficient use to consider that the requirements of Highways Act 1980 S31(1) may have been fulfilled, the impact of the ownership and the statutory powers used to acquire and manage the land can be fatal to such a claim.
- 5.2 There is insufficient evidence and clarity of routes used to consider that either the statutory test or the common law test had been met prior to the development of the by-pass. Only a total of 6 witnesses claimed to have used the land prior to the 1971 and none of them used it for 20 years.
- 5.3 Both the Highways Act 1980 S31(1) and presumed common law dedication are founded on three basic principles, in addition to use over a period in excess of 20 years. Those principles are that use must be “**as of right**” which is defined by a three part test as; use without secrecy, which means using the route openly, use without force. That is without breaking down fences or barriers and lastly use without permission. If any one of these three parts of the legal test fails then the consequences are that it is fatal to the claim.
- 5.4 It is quite clear that the *Barkas* and *Newhaven* cases considered by the Supreme Court have provided clear legal principles that where a public authority has acquired land under a statutory power that includes a right for the public to use the land then that use is “by right” and not “as of right” thus defeating any attempt to acquire public rights “as of right”. The statutory powers used in the above cases were the Housing Act 1985 and the 1875 *Newhaven* Act respectively which whilst not overtly or directly relevant to recreational access and walking, nevertheless were fatal to the claimed use. The statutory powers used in the case considered here are far more directly relevant.
- 5.5 Whilst the land at Leaf Lane was acquired in 1971 as part of a major road development, the fact that it was acquired as replacement for part of Whitley

Common and was intended to be managed as such means that the same powers that control Whitley Common apply to the land at Leaf Lane. These powers are those contained in the Public Health Act 1875, specifically S164 that provides that any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds and S182 of the same Act which provides a power to make byelaws.

5.6 The use of these powers to acquire and manage the land must mean that subsequent use by the public is by statutory permission or “by right” thus the application considered here for the acquisition of public rights of way “as of right” has to fail. Whilst the Council as the landowner has a discretion to manage the land to create paths for the public if it so wishes and indeed, it even has a discretion to dedicate public rights of way, (a provision in the Coventry Corporation Act 1927 provides for the dedication of highways on land held as commons), it has no discretion in the matter considered here. As a Highway Authority it is barred from making an Order to add the claimed paths to the Definitive Map because the claim has to fail in light of the judgements of the Supreme Court referred to above at paragraph 4.18.

6. Options considered and recommended proposal

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

Refuse to make an Order to record the routes as shown on the attached plan at Appendix 1, as public footpaths.

7. Comments from Director of Finance and Corporate Services

7.1 Financial implications

The costs of investigating the claim mainly consist of internal officer time 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.

7.2 Legal implications

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.

8 Other implications

8.1 Equalities / EIA

None

8.2 Implications for (or impact on) the environment

None

8.3 Implications for partner organisations?

None

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