

**CHESHIRE WEST AND CHESTER BOROUGH COUNCIL**

**OFFICER DELEGATED DECISION REPORT**

<b>Application Number</b>	<b>CWAC/060</b>
<b>Description</b>	<b>Wildlife and Countryside Act 1981 – Section 53 Addition of footpaths to the Definitive Map of Public Rights of Way</b>
<b>Location</b>	<b>Between FP217 and FP269 Chester City, Chester City shown as points A-C and B-D on Drawing No. MO/566A.</b>
<b>Applicant Name</b>	<b>Mr K Armstrong-Braun, Saltney</b>
<b>Ward</b>	<b>Handbridge Park</b>
<b>Ward Members</b>	<b>Councillors Razia Daniels and Neil Sullivan</b>
<b>Case Officer</b>	<b>Adele Mayer, PROW Asset Management Officer</b>
<b>Date</b>	<b>25 October 2019</b>

**Recommendation:-**

- (1) That an Order be made under section 53(2) and 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of footpaths as shown between Points A-C and B-D on drawing No. MO/566A and that the requisite notice of the making of an Order be given.
- (2) That the Highway Commissioner be authorised to take any action considered necessary in respect of the confirmation of the Order hereby authorised to be made.

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**1. BACKGROUND**

**1.1** In July 2014 Cheshire West and Chester Borough Council received an application under Section 53(5) the Wildlife and Countryside Act 1981 (“the 1981 Act”) requesting that a Definitive Map Modification Order be made to add footpaths to the Definitive Map and Statement (“the DM”). The application

seeks the addition of footpaths along the routes shown between points A-C and B-D on the attached plan, crossing land known as “Shaws Field”, Drawing No. MO/566A (“the Plan”).

- 1.2 The Brewer’s Hall Estate Company Ltd owns the land affected which is located in an area between River Lane, the railway line, the River Dee and the Chester Golf Club. The land is leased to the Chester Golf Club. The landowners have stated that they purchased the affected land from British Rail in 1984.
- 1.3 If the Order sought is made and confirmed the effect will be to add public rights of way on foot to the DM from FP 269 OS grid reference SJ 3892 6542 to FP271 at OS grid reference SJ 3865 6537 (Point A to C and B to D on the plan). The surface of this path is trodden earth and grass.

## 2. THE LEGAL TESTS

- 2.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 imposes a duty on the Council to keep the DM under continuous review and make any modifications to it that are necessary as a result of the occurrence of certain events. Section 53(3) sets out the events in question. Section 53(3)(c)(i) provides that a route should be added to the DM when:-  
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”*
- 2.2 This will include evidence which can satisfy a sufficient “period of enjoyment” of a way in order to raise a presumption or inference that the way has been dedicated for the purposes of Section 31 of the Highways Act 1980. Additionally, or in the alternative, the requisite “period of enjoyment” can be demonstrated by satisfying the requirements of “common law”, or law established through a series of cases that have been decided by the courts.
- 2.3 The land was previously subject of a report to the former Cheshire County Council Public Rights of Way Committee meeting on 3 April 2006 (“CCC application”). The report is attached at Appendix D. An application had been made to the County Council in February 2000 for an Order to add public paths to the DM which included a claim for a path crossing Shaws Field referred to in the report as path “D-X”. The claim for a footpath crossing the field was refused. Reasons for the refusal are referred to in the CCC report at paras 45-46 and 53

**2.4** As a case had already been considered in 2006, the test that there is “discovery of evidence” also has to be satisfied for the second claim. The CCC application report is public document and accompanied by an appendix which lists the user evidence in support of the application. Drawing on this report and cross checking the current user evidence, it has been possible to verify the user evidence is new in all but two of the witnesses. The documentary evidence in this report describes the historical context of the field. The railway plan [para 6.4-6.4] and aerial photographs [para 6.11-6.18] were not used in the 2006 report but otherwise the documentary evidence is the same. For the purpose of this decision the documentary evidence has been reviewed for completeness. However this report considers the matter afresh taking into account the new evidence.

### **3. SECTION 31 HIGHWAYS ACT 1980 (“S31”)**

**3.1** In order to satisfy the requirements of S31, use of the way by the public must have been for a period of at least 20 years. Section 31(2) provides that the 20 year period is to be calculated retrospectively from the date upon which the right of the public to use the way is brought into question.

**3.2** The former CCC application report dated 3 April 2006 sets out a claim period of 1964 to 1984 for this route when user would have to satisfy the provisions in section 31. It is stated that fencing had been erected in 1984 that was a challenge to users, however there is no supporting evidence showing the location of fencing that would be a trigger to users of this path. As it has not been possible to confirm that the fencing was actually in situ directly around the field where it would be a challenge to user in 1984 for the purposes of this report, attention was drawn to the statement that notices had been displayed in 1999 by the Golf Club, and that those notices were a challenge to user.

**3.3** The CCC application report (para 17) states that in 1999 “permissive access” signage was placed on site. This would have brought home to users a challenge to their right to use the way. The date of 1999 is used in this report as the date of a challenge to user. Therefore, taking 1999 as being the date upon which the signs were erected, the period of user that has been used in this investigation for the purposes of S31 is the period 1979 to 1999.

**3.4** S31 also requires that the public use made of the route during that 20 year period was uninterrupted, and that the use was made “as of right”, that is to say without force or secrecy, and without the permission of the landowner.

**3.5** For this purpose use “**without interruption**” would exclude for example the locking of a gate for a period that stops public access. Examples of “**force**” would be breaking locks or using any other sort of force to create a passage.

“**Without secrecy**” requires that the use be exercised openly would be a user exercising a right openly and not so that the use would not be noticed by the landowner.

- 3.6** Use “**without permission**” requires that it not be pursuant to either an express permission such as a notice informing the public that the landowner is allowing access not an implied permission whereby the landowner permits the public to walk at will over an area of land. Use by permission by some users will not prevent use by the public in general
- 3.7** If uninterrupted user, “as of right”, for the 20 year period can be shown, then it is presumed that a public right of way has been dedicated unless there is sufficient evidence to show that the landowner did not intend to dedicate the route as a public right of way. Evidence of this nature will typically be of steps undertaken by the landowner during the relevant period of time in question to prevent use by the public or to disabuse the public of the notion that their use of the way was “as of right”. One way the landowner may prevent public rights accruing is by submitting to the local authority a plan and statement under section 31(6) of the Highways Act 1980 of the their land and the ways they admit to be public rights of way and stating the intention not to dedicate any other routes.
- 3.8** The landowner in this case has utilised this provision in law and submitted a statement and plan in 1999. The deposit between 1999 and 2006 is not secured by the part 2 application (a statutory declaration) and arguably may not have secured the protection for the landowner against public rights arising during the period 1999 to 2006. A second statement and plan was submitted in 2006 and secured by a statutory declaration. Witness evidence dated after 2006 will not be applicable to a claim since the succeeding highway deposit rebuts and claimed right of way since that time and it is important to note that the deposits will not have retrospective application pre-1999.
- 3.9** Before 1984 the land was held by British Rail. A question arises if the land may have been excepted from the provision of Section 31 of the HA80 by the British Transport Commission Act 1949 section 55 relating to operational land held by the railway. In this case, the evidence of the maps and the aerial photographs indicate that the land from the 1970’s onwards was not laid with rail lines and structures or field boundaries do not appear related to use of main railway. Witness evidence indicates the land possibly had an agricultural tenancy and had been used for keeping stock. In this report, the view has been taken that the land is not railway operational line and the effect is that section 31 may apply.

#### **4. COMMON LAW**

- 4.1** The rules relating to presumed dedication under common law dedication differ slightly from the rules under S31. The differences are however only material when presumed dedication under S31 cannot be demonstrated. If, for example, reliance was required on some period of use less than 20 years duration, or if reliance was placed on a period of user expiring at some point before an identifiable act which brings into question the public's right to use the way, then resort to the common law rules of dedication may be necessary.
- 4.2** It is however the case in this application that the evidence available is considered to satisfy the statutory test, and in so doing that it also satisfies the common law requirements. There is, therefore, for the purposes of this report no need to distinguish between the two tests for the purposes of the conclusions drawn.

#### **5. USER EVIDENCE**

- 5.1** The application for the Order was accompanied by witness evidence forms from 40 persons (two forms from couples) who have claimed to use the way and one person more was interviewed during the investigation. The summary of the witness evidence is summarised in the chart at Appendix A. Seven of the witnesses have been interviewed. All witnesses claimed use on foot, six of the witnesses also claimed they had used the route on a bicycle. The user evidence submitted collectively covers a period of continuous use from 1928 to the date of submission of the application in 2013.
- 5.2** Altogether, of the statements submitted, the number of users stating they used the path in the relevant 20 years period before 1999 equalled 38 users. Of the 38 relevant witnesses there is variable use in the period and at a frequency that is variable; with 9 users claiming occasional, monthly or less usage and 21 users claiming weekly or daily use. 8 user statements do not record the frequency of use.
- 5.3** All witnesses claimed that the ways were used openly and without permission. It is claimed that the route was used regularly for recreational walking, for pleasure at viewing the wildlife in the area, for exercise such as jogging or sports training and for walking the dog(s). It is also claimed that use was with family and friends and in some cases used to cut through to shops on River Lane and as a shortcut to work. All witnesses had frequently seen other people using the way

- 5.4** Users recalled on their statements signs, gates and other features. A number of witnesses refer to a gate leading into the field which was at Point C, north side of the railway underpass. Other witnesses recalled a gap, a stile or gate next to this field gate. One witness said that the boundary of the field which ran from point C to the river, was a stone wall, some of which still remains. Reference is made to a kissing gate which was further along the field, however it has not been possible to locate where this may have been located (and it may be associated with the existing public footpath). One witness said “There was a gate as indicated top of cuckoos entry and riverside”. One witness recalled a cast iron marker post near to point C denoting railway owned land which seems to have been moved when the field was bought from British Rail.
- 5.5** No one could recall fencing or hedging or gaps or any other type of furniture on the north end of the field. In fact the claim route at the north end connects directly with a public footpath. One witness said at this end there previously had been a copse and a gap which was removed when a new sewer pipe was constructed in the vicinity.
- 5.6** Users noted that the field had been previously maintained; this took the form of cutting and baling hay, one witness saying “it used to be cut and baled before the Golf Club acquired it” (although some witnesses were not aware at what date the land changed ownership). It was also noted that cattle were left in the field to graze; two witnesses recalled this would have been the early 1970’s not later. Another witness recalled cattle had stopped grazing in the late 1980’s, and another witness recalled hearing cows sometime in 1980. One witness said the cattle got out onto the river bank at the River Lane end. Two witnesses remembered there being sheep on the field at different times of the year, one of whom dated the memory to approximately 1978.
- 5.7** One user said that they liked to go to the field when it is covered in snow another said they wouldn’t have gone on the path when it had snowed and commented that the field would get thick with snow when it drifted. In the wintertime some of the witnesses would only use the route at weekend and not in the evening because of daylight saving hours. One witness walked the route in the early 1980’s in the early morning all year round including in darkness
- 5.8** Of those who noted a width of usage the suggested width varies between 2’ and 3’ (approximately 1.5m).
- 5.9** Witnesses report some attempts to dissuade or obstruct users from walking the route. The witnesses have not been able to recall specific incidents and dates, which are described as “after the golf course bought the field” or the time between the 1990’s and sometime in 2000. There is confusion over the date when the field changed ownership so that relating events to ownership has not

been reliable. The actions described include the dumping of green waste. The areas of green waste are difficult to identify now because of overgrowth.

**5.10** The users also recall a ditch was dug in the period post the Golf Club acquiring the field. Some witnesses said the ditch was dug to stop people using the path. The ditch cut across the access from point C into the field. The ditch filled with water and was hard to cross but didn't stop people from using the route. The ditch can still be seen and it can be seen where the ditch has been part filled in and trodden. The ditch may have been an interruption to use, but the date of excavation hasn't been pinpointed. One witness thinks it may have been about 15 years ago ie 2000; the general consensus was that it was dug in the period post challenge of use in 1999.

**5.11** Witnesses refer to the flood defence works, some recalling that the riverbank used to be flatter than it currently is. A few witnesses state the river embankment had changed as a consequence of flood works carried out by the river authority. According to an officer of Natural Resources Wales, the original flood defences date to 1739 and maintenance work is undertaken by the Environment Agency at the Chester section. The maintenance may include topping up the banks (a prime height which is 7.2m) which may have taken place in the 1970-80's and also trial bores in the banks together with flailing and baling. There have been no major works in the relevant period.

**5.12** The use of witnesses by cycle is sporadic, and investigation suggests not reflective of consistent cycle use over the field path to raise a suggestion that higher rights had accrued.

**5.13** Some witnesses refer to playing in the fields when they were children or slightly older, others that they used other routes in the fields. Some witnesses have said they went into the field to collect stray golf balls or to berry pick. This evidence conflicts with the accrual of a public right of way, however, the consensus of the witness evidence is that use was mainly made of a cross field path which would be a more convenient or an alternative route from River Lane or the river bank to the railway bridge.

## **6. FURTHER INVESTIGATIONS**

**6.1** To verify the witness evidence submitted, further investigations were undertaken. Details of all other evidence taken into consideration is summarised in Appendix B.

**6.2** The Tithe Map is a good documentary source to identify the historic ownership of the field over which the footpath claim runs. Tithe maps were prepared as part of the process of commutation of the tithe to a monetary payment. The purpose of the mapping was not to record public highways, however, as the production of a map was

part of a statutory process under the Tithe Commutation Act of 1836, the evidence of public rights they contained must be given appropriate weight.

- 6.3** The relevant Tithe apportionment is of the township of Chester St Mary on the Hill and is dated 1842. The map shows the river coloured blue and the main road (Hough Green) was in part an unbound track running between the toll road at Overleigh lodge to the Saltney parish boundary and running through open space called "Hough Green". Shaws Field is hereditament number 29 and at that date was owned by the Chester Mayor and Citizens of Chester and occupied by the Guardians of the Poor. At this date Shaws Field was held in public ownership.
- 6.4** The mid nineteenth century brought the railway to this area. Railway plans had to be produced prior to a railway company seeking an Act of Parliament authorising the construction of the proposed railway as set out in the plans. The maps covered a corridor of land either side of the intended railway (limit of deviation) with plot numbers for separate parcels of land and public and private routes. These are indexed in a book of reference accompanying the plan which also identifies land use and reputed owners and occupiers. Many railway proposals were never constructed as there were a lot of different companies competing to meet the same demand. Those that did proceed were validated by statute however plans for schemes that did not proceed to construction are not necessarily any less reliable. The plans should not be considered as conclusive evidence; however they are generally regarded as strong or persuasive evidence of the existence of a public right of way, where one is described.
- 6.5** Maps and schedules were deposited in 1848 for branch rail lines from the Shrewsbury and Chester rail line to the River Dee. The branch line which was constructed, is shown on the plan, running through Shaws Field. The rail map and schedule lists the field as plots 14, 15 as "part of field". The ownership is listed as "The Shrewsbury and Chester Railway Company". There are numbered plots along the river front which are listed as both the railway company or "The Company of Proprietors of the undertaking for recovering and preserving the navigation of the River Dee". A footpath is shown which was added to the DM by Order in 2006 as FP269 Chester City. The plans are no evidence for the claim route but do add to the ownership history.
- 6.6** The Finance Act (1909-1910) 1910, repealed 1920, required the valuation of all land at 30 April 1909. Landowners would be taxed on the incremental value on the future sale (or other conveyance) of land. The valuation was also to be used as a basis for inheritance tax. Landowners were able to apply for a deduction for public rights of way crossing their land. Even where a public right of way was not claimed surveyors made fiscal discounts for rights that they considered to exist that may devalue the land. Where linear routes are shown on the maps prepared for the valuation this has been regarded as evidence that the route was a public highway, usually, but not always vehicular. The working copy map for the area includes Shaws Field as hereditament 10174. That plot number is listed in the book of reference as owned by

the Great Western Railway Company. There was no discount recorded against the hereditament but the plans add to the ownership history.

- 6.7** The documentary evidence establishes that at a date in the mid nineteenth century ownership of Shaws Field passed from public hands to the Chester and Shrewsbury Railway Company and successive organisations. Until the land was sold to the Brewer's Hall Estate Ltd in 1984.
- 6.8** An historic list of tenants or occupiers who were farming Shaws Field has not been identifiable.
- 6.9** Ordnance Survey (OS) mapping developed from the need to provide mapping for military purposes. The first surveys were published at one inch scale. In the mid nineteenth century, various instructions were issued to the OS on the scale of measuring. In Cheshire, mapping at a larger scale than the one inch series was available from 1870-5 at 1:2500 scale, followed by various revisions. OS maps are good evidence of the physical existence of routes, but not necessarily of status (unless there is a clear description in the Book of Reference). The Book of Reference recorded the acreage and the land use when the maps were first drawn up. They usually accompanied the first edition maps published at 1:2500 scale before c1878. It was up to the skills of the individual inspector to classify the land-use, and for this reason is not always a reliable piece of evidence. From 1938 a 'New Popular' edition began, incorporating the then new metric National Grid. Since the second edition, 1889, the OS 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. This is generally understood to refer also to first edition maps
- 6.10** The OS Map scale 25 inches, 1<sup>st</sup> edition (1875) shows a double pecked track leading from the railway underpass in a west direction to the sluice leading into the river. This route doesn't correlate exactly with the claimed route, but suggests the reputation of a route which may have been used for longer than the user evidence suggests. The OS map scale 25 inches, 2<sup>nd</sup> edition (1899) shows the field has been partly built over with straight boundaries and small buildings. The pecked track across the field is not shown on this map. On the OS map scale 25 inches 3<sup>rd</sup> edition (1909) the field has buildings and straight line boundaries and no track shown. The OS maps indicate whilst there may have been a track crossing Shaws Field, it was superseded by construction of buildings and boundaries crossing the field. The revised 1961 published map at 1:12500 shows that the boundary running west-east through the centre of the field is now a remnant where the western half has disappeared. There is no track indicated from adjacent to the railway underpass and field entrance at the east. At the western end it is not clear if the map has recorded straight line drain features or if they are boundary features such as a hedge or fence. One of these line cuts across the location of the claimed footpath and cuts across an embankment. This suggests a fence or hedge.

- 6.11** The Council holds sets of commercial aerial photographs which record a snapshot of the site between the years 1970 to 2010.
- 6.12** The 1970 aerial photograph is a black and white photograph with poor quality definition. The photograph doesn't indicate any lines of trodden paths across the field or a vehicular track at the eastern corner. The photograph is useful evidence in showing that there was a hedge and tree line around the field, with wide gaps in vegetation along the western boundary. The boundary line that had split the field and is shown on OS mapping is shown as a hedge and tree line.
- 6.13** The 1985 colour photograph is good evidence of features across the site. The photograph shows lines of vegetation changes showing as brown tracks across light green grass, indicating trodden paths. A vehicular entrance into the field in the eastern corner, Point A with a vehicular trackway can be seen following the line of the railway. The claim route is present but more clearly seen on the western end of the path whereas at the eastern end it is a path amongst a number of scored tracks indicating multiple paths. The photograph shows at the western side of the field there is a straight grey line running south to north between the rail line and a building to the north. The grey line equates with the existing fence line (metal security palisade fencing). The aerial photograph shows that the grey line, indicative of fencing, does not continue beyond the east boundary of the disused building and so does not enclose the north side of Shaws Field. Careful observation of this photograph shows a hedge and tree line around the field and no indication of a fence or gate.
- 6.14** The 1992/3 colour series has an indication of a trodden path along a similar configuration to the claim route. There is no marked vehicular track from the rail line underpass at Point C but a narrower, walking width track can be seen. A grey line for the fencing identified on the 1985 photograph at the River Lane end of the field can be seen. The building seen on the earlier photo has been removed but it is unclear if the grey fence line now continues past the site of the building.
- 6.15** The aerial photograph colour series of 2000/1 is deeply coloured and less clear so it is difficult to identify fence lines. Trodden paths are visible, shrubbery and trees have grown and the corner with FP269 (point C) is obscured by the foliage, but not so that it is impossible to see where the path from the rail line bridge and the field intersect. From this direction a path crosses the field along the direction of the claim. The grey fence line seen on the earlier photos is obscured by foliage.
- 6.16** An aerial photograph from 2005 series again shows a grey line for a metal fencing on the west side of the field arising at River Lane. The boundary alongside the rail line at Point C and along FP269 is full leaf foliage obscuring any possible detail. The cross field path is clearly visible. The junction of the claim path on the north side with FP271

is visible, no gates or fencing can be identified. This is corroborated by the photographic site images taken during the investigation of the 2005 PROW report.

- 6.17** A 2010 colour aerial photograph shows a track on the same alignment as the claim route, running from the overgrown corner by FP269 in a westerly direction towards the river bank FP271
- 6.18** The aerial photographs are strong evidence in showing a consistent trodden path from 1985 to 2010 between the two points of the claim. The witnesses claim that there had been green waste dumping suggests that it hadn't had a significant effect on the route of the claim path. The photographs have provided good evidence which indicates that whilst fencing had been erected at the River Lane end of the field between ownership boundaries, the fencing hadn't been continued round Shaws Field.
- 6.19** An officer undertook a site visit on 21 February 2019 and noted features visible from existing highways, such as fence breaks and gaps and gates. There is correlation of features on the photographs with the route that has been claimed.
- 6.20** Solicitors acting for the landowner have objected to the application. The solicitors state that the land was bought from the British Rail Board in 1984 (registered 1985). They state that in 2002/3 together with the "council" they installed fencing which was to prevent motorcycles accessing the land. Furthermore in 2016 the rail company installed fencing alongside the rail line, with their assumption this included the area through to Saltney Acres. The solicitors had no evidence to show that fencing was in place prior to this event.
- 6.21** The solicitors have consulted with the Golf Club recalling the late 1980's Golf Club grant of permission to the Environment Agency to build flood embankments.
- 6.22** As stated above the landowners had deposited in 1999 a statement and plan under section 31(6) of the Highway Act 1980 to prevent user arising.
- 6.23** Also in 1999 they applied for planning permission for change of use to a golf practice range which application was refused at Appeal. A second application was made in 2013. The application was successful. They claim that the planning permission permits them to make use of the field.
- 6.24** In 2005/6 the landowners defended a claim for multiple footpaths around the area of the golf course. A resulting Modification Order established the public footpaths which are currently recorded around the site.
- 6.25** At various times over the last 20 years, the solicitors state signage has been erected indicating the land was private property and to deter trespassers. In presenting the evidence, it is clear that there is unequivocal evidence that from a date in 1999, the

landowners had indicated to the public by signage the lack of intention to dedicate public rights of way, and had tried to prevent public rights arising across land they owned with a highways deposit. So that it is more than likely a claim for public rights made after this date would fail the tests. The landowners have been unable to provide evidence of actions to prevent user predating 1999.

**6.26** The area is in the non parished locality of Chester City so that there has been no second Council consulted. The Ward Councillors have made no direct comments on the application but have asked to be kept informed.

**6.27** Local User groups have been consulted and of those, the Cestrian Ramblers have written to say they support an addition but had no evidence to add.

## **7. Assessment**

**7.1** The line of the footpath which is claimed and shown on the attached plan is that shown on the most recent aerial photographs. The users however, recall that the route has modified over the years as a consequence of changes on the field itself. The line shown in successive aerial photographs, however, indicates the line has generally been the same and as shown on the latest aerial photograph. The character of the route is as a footpath.

**7.2** Users refer to a stile or gap adjacent to a field gate at point C on plan. A field gate post is still in situ, corroborating user statements, although the expected matching gate post is missing (because it's location is now behind the railway fencing). The aerial photograph of 1985 shows a vehicular track running alongside the rail line, also confirming entry into the field through a field gate width. The 1st edition OS map indicates a track leading into the field. The remains of the gate post combined with maps and aerial photographs shows there was a former track. The combined evidence confirms the description of users as the access into the field in the eastern field corner. This access is now truncated by the modern railway line metal fencing and there is now no evidence of the surface for a vehicular access but a part trodden pedestrian path exists next to the remnant gate post. Mostly this corner of the field is a mix of foliage and uneven terrain

**7.3** The field had during a period been divided by a boundary which would have seemed to prevent any user. However, from the 1961 OS map to 1970 aerial photograph and subsequent aerial photographs, this boundary can be seen to be a hedge and tree boundary which is only partly extant. So a hedge along part of the boundary would not have prevented egress in the 1960's through gaps in this hedge.

- 7.4** The OS maps early 20<sup>th</sup> century to 1961 publication shows field boundaries or rails cutting across the land parcel on the west side suggesting the user would be prevented from joining with the footpath running along the river embankments. The aerial photographs from 1970's to 2000 show hedge and tree boundaries, which develop long breaks in the line, and from the 1980's fencing which is in situ close to River Lane, but not between the existing footpaths and the footpath claimed. One witness recalled a stile at the River lane end of the path, however most witnesses were unable to recall any feature or boundary at this end of the path and that seems to be corroborated by the aerial photographic evidence.
- 7.5** Witnesses refer to cattle and sheep having been kept in the field, some cattle having got onto the embankments. It is reasonable to say that there had to be some fencing or hedging sufficient to retain the stock, the fencing, however, may have been located where it would not have affected the use of the claimed path. Witnesses recall stock were not put in the field after 1990.
- 7.6** The landowners have not been able to provide evidence of actions to prevent user prior to the period ending in 1999. Witness evidence refers to actions of the landowner which tried to stop the users using the path, which manifested in ad hoc deposits of green waste and a ditch being dug between the field and the existing footpath. A ditch cutting at Point C seems to have taken place after 1999, one witness thought about mid 2000's. The aerial photographic evidence suggests that the line of the path was not much affected.

## **8. Conclusion**

- 8.1** An application was duly made and registered in 2014 requesting that an order be made to add a footpath from FP 269 to FP271 Chester City to the DM. The issue to be decided is whether there is evidence to show that, on the balance of probabilities, public rights subsist or are reasonably alleged to subsist on the route now claimed.
- 8.2** Any changes to the DM must reflect public rights that already exist. It follows that changes to the DM must not be made simply because such a change would be desirable or instrumental in achieving another objective. Therefore, before an Order which changes the DM is made, it must be demonstrated that public rights have come in to being at some time in the past. This may be proved by historic and documentary evidence and, or by evidence of user in the recent past.
- 8.3** Historic documentary evidence has been examined to see whether the past history and use of the route point to it having public rights as a result of dedication in the near or distant past. Rights are not lost merely through

disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficient cogent evidence to justify a change to the DM.

- 8.4** The witness evidence submitted with the application together with the OS maps and aerial photographs is sufficient to show a reasonable allegation that the public enjoyed use of the way on foot and that they did so “as of right” uninterrupted over the 20 year period in question. Furthermore, the user evidence submitted discloses no basis upon which to assert that there was, during that period any evidence that there was no intention on behalf of the landowner to dedicate the way. The evidence of the witnesses is considered sufficient to raise a presumption of dedication in law, and it is considered that there is insufficient evidence of any acts or intention which would negate that presumption. The balance of probabilities is therefore weighted towards the presumption of public rights.
- 8.5** It is concluded therefore that on account of the expiry of the duration of a period of 20 years user, between 1979 to 1999, of the way by the public “as of right”, and in the absence of any evidence of a lack of intention to dedicate in that period, the requirements of section 53 (c) (i) of the 1981 Act are, on the balance of probabilities, satisfied and the requirements for the making and confirmation of the order sought would appear to have been met.
- 8.6** It is also argued that by the act or neglect of not securing fences and boundaries and not signing the field path prior to the 1999 date, to make it clear to the public that use by the public was not intended, that use by the public has de facto been dedicated under common law.
- 8.7** Accordingly, it is considered that the Definitive Map and Statement for Cheshire West and Chester Borough Council should be modified by the addition of a public path as shown between A-C and B-D on the plan MO/566A.

**9. Associated documents**

Application file CWAC 006/DMMO  
Appendix A witness evidence  
Appendix B documentary evidence.  
Appendix C Site visit photographs  
Appendix D report to Cheshire County Council Rights of Way Committee and minutes, 3 April 2006

APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)

name	use	frequency	2010	2005	2000	1995	1990	1985	1980	1975	1970	1965	1960	1955	1950	1945	1940	1935
			shading indicative of frequency of use															
witness 7	foot	daily	2010														1944	
witness 2	foot	4-5 x weekly	2014				1990											
witness 35	foot	daily	2011-2014															
witness 4	foot	daily	2014					1989										
witness 40	foot	2 x daily	2014				1991											
witness 26	foot	regularly ?	2014												?1954			
witness 22	foot	daily	2014		2000													
witness 23	foot	daily			2002?								1963					
witness 9	foot	daily	2014							1979	1970			1956				
witness 39	foot	x weekly	2014								1973							
witness 32	foot	3 x daily	2014						1983									
witness 16	foot	daily	2014						1980									
witness 28	foot	daily	2014							1979								
witness 10B	foot	weekly	2014					1989										
witness 11	foot	weekly					1990											1930
witness 12	foot	2 x weekly	2014				1990											
witness 24	foot	weekly												1958		1949		
witness 24	foot	weekly	2014			1999												
witness 15	foot	monthly	2014							1978								
witness 10A	foot	weekly	2014					1989										
witness 1	foot	weekly	2014										1960					
witness 33	foot	weekly	2014					1987										
witness 17	foot	regularly ?			2000													1928
witness 29	foot	x weekly	2014						1980									
witness 19	foot	weekly	2014						1982									
witness 21	foot	weekly	2014					1987										
witness 20	foot	weekly	2014						1980									
witness 5	foot	2 x weekly	2014			1997												
witness 31	foot	occasionally	2014		2000													
witness 24	foot	monthly				1998							1963					
witness 18	foot	occasionally	2014						1983									
witness 36	foot	occasionally	2014			1996												
witness 37	foot	monthly	2014			1998												
witness 27	foot	occasionally	2014										1960					
witness 35	foot	occasionally	2011				1990											
witness 34	foot	occasionally	2014	2008														
witness 6	foot	occasionally	2014				1990											
K Armstrong- Braun	foot	occasionally							1980-85									
witness 30	foot	occasionally	2014									1969						

APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)

witness 14	foot	occasionally	2014							1978							
witness 7	cycle	daily	2010														1945
witness 28	cycle	weekly			2000					1979							
witness 40	cycle	daily	2010		2000												
witness 13	cycle	?	2011						1981								
witness 30	cycle	?	?														
witness 13	cycle	?	2011						1989								
witness 3B	foot	?	2014				1993										
witness 13	foot	?	2014							1978							
witness 38	foot	?	2014		2002												
witness 3A	foot	?	2014				1993										
witness 25	foot	?	2014										1971				
witness 8	foot	?	2013				1992										

graded dark to light for decreasing usage  
 no frequency stated  
 cycle use  
 red line = 1999 signage erected by golf club  
 blue line = land purchased from British Rail

## **Appendix B**

## **Documentary Evidence**

### **1. Communications Received**

Application No. CWAC006/DMMO made by Eng K Armstrong-Braun, Saltney registered 30.07.2014; Appeal for direction documents; 10.08.2015: interview notes 30.04.2019

Landowner's and Occupiers communications; DTM Legal letter 01.05.2019 + encl and letter & encl 17.06.2019

Consultee: Cestrian Ramblers email 22.03.2019

### **2. Witness Evidence**

Witness 23 form 15.05.2014; Witness 19 form 20.05.2014; Witness 14 form 20.05.2014; Witness 13 form 20.05.2014 ;Witness 15 form 20.05.2014 ;Witness 30 form 10.06.2014; Witness 12 form 17.05.2014;Witness 25 form 03.06.2014; Witness 26 form 14.05.2014;Witness 35 form 30.06.2014; Witness 31 form 20.05.2014; Witness 18 form 19.05.2014; Witness 7 form 02.05.2014; Witness 3A & B form 28.04.2014; Witness 3 form 28.04.2014; Witness 29 form 03.05.2014; Witness 39 form 02.05.2014; Witness 4 form 22.04.2014 ; Witness 8 form 11.05.2014; Witness 27 form 19.06.2014; Witness 40 form 22.04.2014; Witness 38 form 01.07.2014; Witness 36 form 11.06.2014;Witness 5 form 26.04.2014 ;Witness 1 form 14.05.2014; Witness 11 form 13.05.2014; Witness 28 form 04.04.2014; Witness 34 form 11.06.2014;Witness 33 form 07.06.2014; Witness 2 form 13.05.2014 ; Witness 22B form 15.05.2014 ;Witness 10A form 02.05.2014; Witness 10B form 02.05.2014; Witness 17 form 20.05.2014; Witness 32 form 24.04.2014 ;Witness 6 form 29.04.2014 ; Witness 20 form 20.05.2014; Witness 37 form 14.06.2014;Witness 9 form 04.05.2014; Witness 16 form 22.05.2014; Witness 21 form 15.05.2014; Witness 24 form 24.03.2014;

### **3. Other Evidence taken into consideration**

Notes and photographs of site visit made by A Mayer, 21.02.2019 and 12.03.2019

### **4. Documentary Evidence**

Land Registry; property register CH 240014

#### **Cheshire West and Chester archive**

Ordnance Survey Maps 25" 1, 2, 3<sup>rd</sup> (1898; 1898; 1909) Edition

Aerial photographs 1940 – 2010

Planning Application : Notice of Planning Permission 13/04890/COU, 7.03.2014

Section 31(6) Deposits CWAC 95 superseded by CWAC

Cheshire County Council (CCC): Rights of Way Committee agenda report and minutes for 3.04.2006

#### **Cheshire Record Office**

QDP 30 (plan and book of reference) Shrewsbury Rail line 1834

Online Cheshire Tithe Maps

Ordnance Survey Post War 1961 1250 sheet SJ 3965

**Appendix C**  
Site visit photographs



Public Footpath 271 Chester City facing east: Below, junction with claim



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



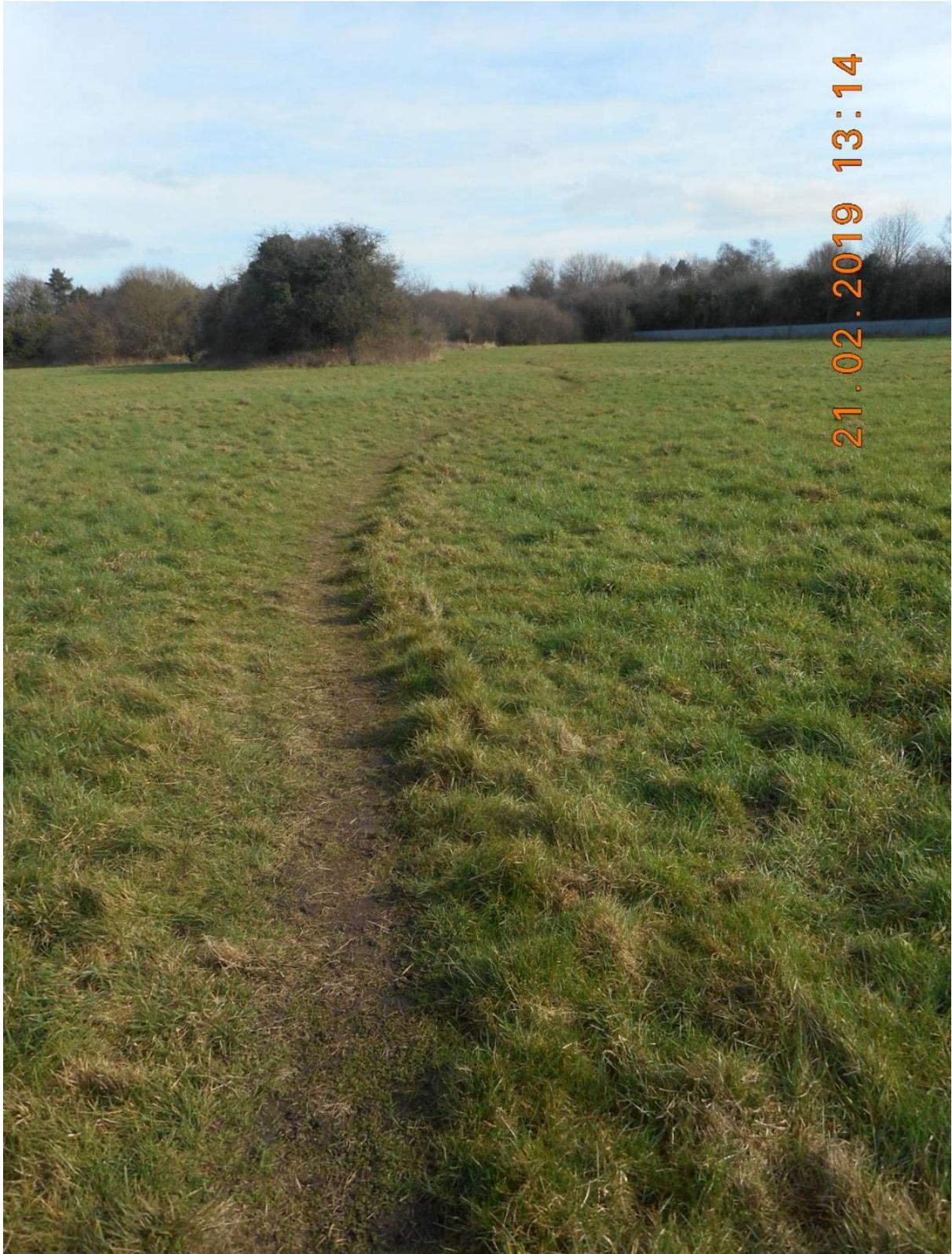
From FP271 crossing field



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



Path crossing scrub area leading towards FP269



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)

From the scrub area to Fp269



Line of ditch referred to in the report:



APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



FP269 leading from railway bridge



FP269 looking along vehicular track alongside railway line

APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



Below, FP269 looking towards railway track, claim on righthand side



Remnant fieldgate post covered in ivy referred to in report

APPENDIX  
WITNESS EVIDENCE (PRINTS AT A3)



Field gate post on right, railway line on lefthand side