

## Cheshire West and Chester Borough Council

### Officer Delegated Report

<b>Application Number</b>	CWAC012/DMMO
<b>Description</b>	Wildlife and Countryside Act 1981 – Section 53 Application for a Definitive Map Modification Order Varying the particulars of Footpath 19 Beeston to show a length of it as being on a different alignment
<b>Location</b>	Public footpath No 19 Beeston, Moss Lane, Beeston
<b>Applicant Name</b>	A S and C P Porter, Ivy Cottage, Moss Lane, Beeston CW6 9SU
<b>Wards</b>	Tattenhall Ward
<b>Ward Members</b>	Councillor Mike Jones
<b>Case Officer</b>	Adele Mayer, Public Rights of Way Officer adele.mayer@cheshirewestandchester.gov.uk
<b>Date</b>	28 April 2017

### Recommendation:-

- (1) That the application to modify the Definitive Map and Statement be refused on the grounds that there is insufficient evidence to show that the particulars for FP19 Beeston need modifying.
- (2) That an Order be made under section 53(2) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a Footpath as shown between Points C and B on drawing No. MO/561 (“The Plan”) and that the requisite notice of the making of an Order be given.
- (3) That the Place Area Manager be authorised to take any action considered necessary in respect of the confirmation of the Order hereby authorised to be made.

## **Background**

1. Public Footpath 19 ("FP19") in the parish of Beeston is described in the Definitive Statement of Public Rights of Way for Cheshire West and Chester as commencing "from the Class III county road c810 in a westerly direction to rejoin the Class III road in Beeston Village." The footpath is shown on the Definitive Map ("DM") as shown on an extract at Appendix A and the length in question is shown by a purple line between points A and B on Plan MO 561 ("The Plan").
2. On 19 July 2016 an application to vary the particulars of FP 19 in the parish of Beeston as it is shown on the DM was registered. The applicant claimed to have new evidence that the public footpath was recorded incorrectly and should be shown at a different location. The allegation is that the DM shows a footpath running over the access drive to Ivy Cottage but should instead show a footpath on the east side of the boundary line in the adjoining field.
3. The evidence submitted in support of the application included a letter from a former resident of Ivy Cottage; a landowner evidence form; copy of a local Ramblers footpath report dated 27.11.1994; copy Google photograph; copy statement from an architect and two user evidence statements.

## **The Legal Tests**

4. Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") imposes a duty on the Council to keep the DM under continuous review and by order make any modifications to it that are requisite in consequence of the occurrence of certain events.
5. The application was made on the basis provided for in Section 53(3)(c)(iii) of the 1981 Act, namely "the discovery by the authority of evidence which (when considered with all other relevant evidence available them shows that... any other particulars contained in the map and statement require modification."

6. Guidance has been issued by the Planning Inspectorate advising on the conclusive status of the DM. The guidance states that section 56 (1) (e) of the 1981 Act indicates that the purpose of the two documents is different in that the map is conclusive evidence of the existence and status of the right of way shown and the statement is conclusive evidence as to the position and width and any limitations or conditions.

“A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent...the map is conclusive evidence, as at any date, as to a highway shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position and width thereof at that date, and any particulars so contained as to the limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions...”.

7. The application submitted acknowledges that a public right of way does exist, the request is to modify the location of the footpath. Any new evidence must show, either, that prior to the DM the footpath was located at a different position to that recorded on the DM and should have been recorded to reflect that location, or that since the DM (“relevant date” 1 November 1955) the footpath was legally diverted and the change should be shown on the DM.
8. The available evidence must be evaluated and weighed and a conclusion reached as to whether on the balance of the probabilities the DM needs to be modified. Any other issues such as safety, suitability, desirability or the effects on property or the environment are not relevant to the decision.
9. It is also relevant to look at the legal impact of the claim that is made that public rights should be recorded at a different location. The applicant has included documentary and user evidence to show a right of way runs through the adjacent field. Section 53 (3)(c)(i) provides that a route should be added to the DM where the discovery of evidence by the Council, when considered with all other relevant evidence available shows “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 is a public path”.

10. There are two ways in which a claim can be demonstrated that raises a presumption or inference that the way has been dedicated for the purposes of Section 53(3)(c)(i). Firstly, this can be achieved by meeting the requirements set out in Section 31 of the Highways Act 1980 (“the 1980 Act”).
11. If it could be demonstrated that where a way has been enjoyed by the public as of right and without interruption for a full period of 20 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 public enjoyment of a way must be “as of right”, in other words without force, secrecy or permission; “nec vi, nec clam, nec precario”.
12. 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 (to demonstrate the contrary intention) will typically be of steps undertaken by the landowner during the period of time in question to prevent use by the public or to disabuse the public of the notion that their user of the way was “as of right”.
13. Section 31(6) of the 1980 Act prescribes a mechanism by which a landowner may provide (by way of depositing statements and maps followed by subsequent declarations) sufficient evidence to negative an intention to dedicate ways over the landowner’s land as a highway for the purpose of defeating deemed dedication of such ways as highways. The maps and statements provide one of the strongest proofs available of the existence of the rights of way shown on them.
14. 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.

15. The rules relating to presumed dedication under common law dedication differ slightly from the rules under Section 31. The differences are however only material when presumed dedication under Section 31 cannot be demonstrated. If, for example, reliance was placed 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. For a common law case then the claim has to meet a slightly higher test (albeit for a shorter period), in that overall the circumstances have to show that the landowner has acquiesced to the use.

### **Definitive Map and Statement**

16. The National Parks and Access to the Countryside Act 1949 required Surveying Authorities to draw up a Definitive Map and Statement of Public Rights of Way. In Cheshire the County Council (CCC) was the Surveying Authority and asked all parishes to provide a map and schedule showing all public rights of way ("the parish survey"). The parish maps were checked by CCC officers and Draft Maps for each parish were published. Representations and objections to the Draft Map were dealt with by CCC and then a Provisional Map was published. Representations and objections to the Provisional Map were dealt with by the Courts, following which Hearings the Definitive Map and Statement was finalised and published. The Surveying Authority had to keep the map and statement under review, the responsibility being commuted by the 1981 Act to one of a continuous review.

17. There are no records to show that there was an objection or challenge to the description of FP19 on the Draft or the Provisional DM.

### **Investigation**

18. There is a concurrent application CWAC011/DMMO to record further particulars for FP19 on the DM in relation to its width at Ivy Cottage. That application is discussed in a separate report which also relates to the challenge to the alignment of the path on the DM and considers the evidence in support of that challenge.

19. The applicants state on their landowner evidence forms that they bought Ivy Cottage in 2007 and although the DM showed the footpath going through the property it was “clearly marked by the council as going through the adjacent field”. “The hedge separating the house and the field is on our land and we believe was planted to separate the cottage from the footpath. The Statement [Parish Survey] says the “lane” was 20’ wide but our drive is only 13’ wide indicating that the hedge was planted after the map was drawn. Also there is no documentation to support any movement of the path”.
  
20. There is no apparent reason why a challenge made against the DM could not have been submitted in 2007 on the basis of the location of the footpath furniture in the adjacent field at the time of purchase of Ivy Cottage. The DM records where the public rights should be made available and overrides what may be provided on the ground. The process under section 53 of the 1981 Act provides the mechanism whereby anyone may challenge the legal record.
  
21. No actual evidence has been submitted to prove that the boundary hedge for Ivy Cottage was re-planted so that the footpath would run on the field side of a hedge. The claim is unproven.
  
22. The “statement” is a reference to the parish survey of 1955, the preliminary survey for the publication of the DM. 20’ equates to approximately 6 metres. The survey does not state at what point the measurement is taken and this does not support the contention that the width of the path was 20’ at the Ivy Cottage drive junction with Moss lane .However the width of the footpath has been concluded in the previous report referred to above [para 18] as variable, between 3.30 metres at its narrowest and 5.6 metres at the widest.
  
23. Other evidence submitted included a Ramblers report dated 27 November 1994. The report comments on FP19 “Presumably the path has been taken out of garden into adjacent field by diversion order. Details Please!” There are no other documents on file that would clarify why the matter was not resolved at the time, by either asserting the line of the footpath as shown on the DM or by the legal diversion process. There is no evidence that the footpath has been legally diverted.

24. In addition to the above evidence, a supporting letter was attached from a former tenant of Ivy Cottage, Mr Leslie Fowles. He occupied the cottage from 1985 until 2007. The owners prior to that period had been the Tollemache Estate. In his letter Mr Fowles states “the position of the footpath is the same now as it was then. The styles were renewed twenty or so years ago”. Mr Fowles took the time to visit the site and to point out features on the ground. His testimony included observations that when he moved into the property the current hedge (separating the cottage drive from the field) was overgrown and he had to cut this back and claims to have found the remains of a stile in the hedge (within the first part of the hedge running up the drive). It was suggested by Mr Porter that the footpath may have run through into the field at the corner of the hedge and may have returned through the hedge to run along the remains of an old “lane”. It was said that “rangers” came along in about 1986 and put the stile in “round the corner”.
25. The witness evidence suggests that the hedge boundary was a mature hedge and was retained on the same line during his ownership. Furthermore, it is evidence that furniture was placed on the incorrect line of the footpath during this period, it was not there at the start of this period.
26. Mr Porter included a “planning statement” with the application. The statement, includes a comment about the footpath that “a public right of way historically ran through the site” had formed part of the application for planning permission to build a garage in 2007. The statement goes on to state “many years ago garden was reduced in width and a hedge was planted along the edge of the public footpath to protect their privacy and as such the public right of way will be unaffected by the proposal”.
27. The details of the planning application are not included with the application. The council file shows that a planning application related to Ivy Cottage was made under reference (Chester City Council) 07/02086/FUL and a retrospective application under reference 08/01163/FUL. The CCC were consulted upon the first application and responded with a plan to show the alignment of the footpath and advisory notes regarding obstruction of the public footpath. The planning statement is without citation or substantiating documentation with regard to a hedge that was removed

and line of hedge that was planted. The statement is insufficient evidence to prove the boundary lines had changed.

28. In addition to the documents submitted in support of the claim, a check of the register of Highway deposits made under section 31(6) of the 1980 Act was made. The register shows that a deposit made by the Rt Hon Lord Tollemache (register ref CWAC125) was registered on 15 May 2008 (extract at Appendix B). The deposit plan depicts the estate land in a shade of yellow, on a base mapping 1:11000 Ordnance Survey landline. The key to the whole maps states that lines depicted in red/pink are "paths as per Definitive Map" and red broken lines are "permissive foot path" and broken green line depicts "Bridle path". The relevant extract only shows red/pink lines.
  
29. Ivy Cottage is excluded from the extent of the estate but the adjacent fields were included. An unbroken red line is clearly shown running through the adjacent field and then connecting with the continuation of FP 19 as shown by a broken black line between points C and B on the Plan. The deposit in effect shows an intention of the landowner to dedicate a public footpath running through the adjacent field. The evidence is indisputable.
  
30. The estate deposited plan shows a footpath that ran from Moss Lane (C810) at OSGR SJ 55476 58344 to re-join FP19 at OSGR SJ 55393 58390 the continuation of FP19 in the adjacent field.
  
31. For the purposes of making an Order and in the absence of any other evidence, the 1980 Act provides some statutory guidance for the width of a footpath, although it relates to the re-instatement of paths after ploughing and cropping. Section 137A of the 1980 Act requires that a footpath that crosses a field where a crop other than grass is growing, the occupier must ensure that a width of not less than 1 metre is kept defined. For a field edge path (which this is) the requirement is for a width of 1.5 metres to be kept clear. It is suggested that an Order should record a width of 1.5 metres.



32. The witness evidence submitted and discussed refers to a stile at the junction with Moss Lane as indicated by point C on the Plan.

### **Consultation**

33. Beeston Parish Council have made no comments

34. The Ward Councillor has responded and stated his belief that the footpath ran through the garden of Ivy Cottage.

35. Mr Jenkins, the owner of the adjacent field has responded to the evidence that had been submitted in support of the claim. He disputes any ignorance of the legal line of the footpath because there had been information made available that showed the line of the footpath on the DM. Mr Jenkins also queried the claim that the boundary had changed and quoted the field acreage and boundary lines that had been depicted without variance on the Tithe Map and OS maps. He referred to an aerial photograph of 1969 which showed that there was a "footpath" between two hedges as reported on the parish survey. He also recalls from memory knowing of a grass lane between two hedges as shown on the photograph.

36. Mr Jenkins referred to the Path that had been signed through his field as a permissive path. He further adds that the path in his field had not always followed the same alignment.

37. Agents for the former landowner, Strutt and Parker, have responded to an enquiry regarding the deposit of the map and statement under section 31(6) of the 1980 Act. The enquiry was regarding the accuracy of the plan that had been submitted, querying if it was the intention to show a footpath running through the field adjacent to Ivy Cottage. The agents have stated "The Estate has no wish to retrospectively withdraw or amend the section 31(6) deposit statement and plan dated 14<sup>th</sup> January 2008".

38. Two members of the Cestrian Ramblers group have sent in user evidence forms, stating that they had used a footpath from Moss Lane, from 2008 and 2016, occasionally. The path they had used ran from Moss Lane on the east side of a boundary hedge described on one of the forms as “it just goes from the finger post at the road to the field with the cottage and gardens to one side”.

## **Conclusion**

39. The DM is conclusive evidence of the status and location of public rights of way and there has been no cogent evidence that would prove conclusive of an error in showing on the DM the location of Public Footpath 19.

40. It is concluded therefore that on the balance of probabilities of the evidence the requirements of Section 53(3)(c)(iii) of the 1981 Act are not satisfied and that an error on the DM has not been proven to subsist and therefore the requirements for the making and confirmation of a Modification Order to move the alignment of FP19 as shown on the DM would appear not to have been met.

41. The right of appeal against a refusal to make an order to which the application relates is provided by para 4 of Schedule 14 of the 1981 Act and notice of an appeal against the decision should be served on the Secretary of State and the authority within 28 days of notice of the authority’s decision.

42. There is, however, evidence to show that in 2008 the landowner at the time, Tollemache Estate dedicated a second footpath where no footpath was shown on the DM. The agents have confirmed that the statement and plan were as intended. Further evidence shows that the public have used and accepted the footpath in the field.

43. It is concluded therefore that on the balance of probabilities of the evidence the requirements of section 53 (3)(c)(i) of the Act are satisfied and the requirements for the making and confirmation of an order to add a footpath to the DM would appear to have been met.

44. Accordingly, it is considered that the Definitive Map and Statement for Cheshire West and Chester should be modified by the addition of a Public Footpath between the adopted highway Moss Lane (C810) and Public Footpath 19 Beeston as shown between C and B on the Plan.

### **Associated documents**

Application File No. CWAC012/DMMO  
Application report CWAC011/DMMO  
Plan MO/561

#### Communications Received

Letter to Mr L Fowles 7.11.2016; Letter to Rt Hon Lord Tollemache Estates 7.11.2016;  
Letter from Mr Jenkins 8.12.2016; Letter and user evidence forms Cestrian Ramblers  
14.11.2016

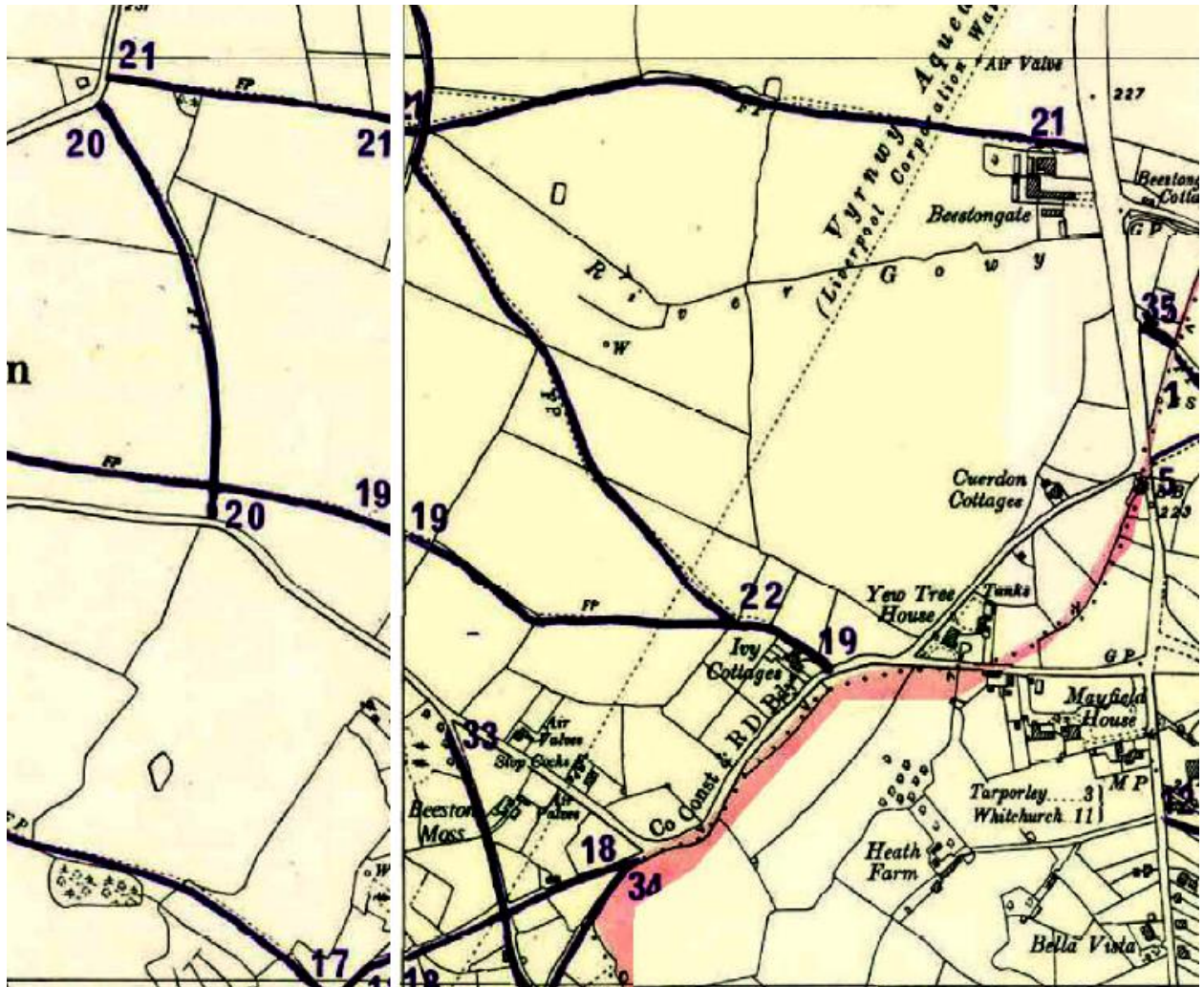
#### Other Evidence taken into consideration

Planning Inspectorate Advice Note 5 “Definitive Map and Statement – precedence”

Register of Highway Statement and Plans under section 31(6) Highways Act 1980,  
Deposit Number CWAC 125

Notes and photographs of site visit made by A Mayer, 3 November 2016

Appendix A  
Extract copy of DM



**Appendix B**





**Appendix C**  
Site Photographs









