

Order Making Authority Statement of Case

Background

1 On 20th May 2020, the British Horse Society submitted an application to Lancashire County Council (the relevant surveying authority) for an order under section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") modifying the Definitive Map and Statement of Public Rights of Way ("DMS") by upgrading to a bridleway the way known as footpath Much Hoole FP2 from Haunders Lane to Liverpool Road, Much Hoole.

2 The applicants supplied extracts of the following maps/documents in support of the application including: 1st Edition 6-inch Ordnance Survey ("OS") map published 1848, Hennes's Map published 1830, 2nd Edition 1 inch OS map published 1896, 1st Edition 25 inch OS map published 1893, Bartholomew's half inch map published 1920, OS 1:25,000 scale map published 1955, Tithe Map and Award for Much Hoole 1841.

3 Officers from Lancashire County Council, the order making authority, (hereinafter referred to as the OMA) investigated whether they considered the public rights of way as applied for existed over the application route and prepared a report detailing their investigation and their recommendations (Document 21). The route applied for was shown on the Committee plan by a black dashed line between points A-B-C-E-F and was recorded on the Definitive Map as a public footpath (7-8-FP2). However, during the course of the investigation carried out by the County Council, it was discovered that the historical route known as Watery Lane between Haunders Lane and Liverpool Road only followed the route recorded as Footpath 7-8-FP2 between point A to point B on the Committee plan and that the rest of the historical route ran immediately north of the footpath between point B and point C and immediately south of the footpath between point C and point G.

The report was considered by the OMA's Regulatory Committee on 25th January 2023 where the decision was made to accept the application in part and to modify the DMS by upgrading part of Footpath 7-8-FP2 to bridleway on

section A-B as shown on the Committee Plan (also A-B on the Order map), and by adding to it a public bridleway from Footpath 7-8-FP2 (point B) through to Liverpool Road along the route marked green on the Committee plan (shown between points B-C-G on the Committee plan and points B-C-D on the Order map – n.b. the points are not the same on both maps) and described in the report as the historical route, and that being satisfied that the test for confirmation could be met the Order be promoted to confirmation.

4 Notice of the OMA's decision to make an order, including a statement of reasons for making the Order, was sent to affected individuals on 28th February 2023 (Document 6).

5 A Definitive Map Modification Order was duly made on 29th March 2023 ("the Order") (Document 1). The Order was made under Section 53(3)(b) and 53(3)(c)(i) and (ii) namely the discovery by the Surveying Authority of evidence which (when considered with all other relevant evidence available to them) 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, namely a bridleway and that a highway shown in the map and statement as a highway of a particular description, namely a public footpath, ought to be there described as a highway of a different description namely a bridleway.

6 Notice of the Making of the Order was served on affected individuals and prescribed organisations, erected on site and published in the local press in accordance with paragraph 7 of Schedule 15 of the 1981 Act (Document 6)

7 During the specified period for objections and representations to the Order, the OMA received two objections (Document 4).

8 The objection has not been withdrawn so the Order is opposed and cannot be confirmed by the OMA. Consequently, the OMA is submitting the order to the Planning Inspectorate for a determination on confirmation.

The Order Route (as shown by a solid green line between points A-B-C-D on the Order map)

9. The Order route commences from the junction with Haunders Lane and Footpath 7-8-FP2 (point A on the Order map, Document 1) running in a generally easterly direction along an enclosed stone surfaced track to where

the track ends (point B) and the route continues running immediately to the south of a hedge over a strip of land which consists largely of a watercourse between the hedge line and field edge footpath (Footpath 7-8-FP2). The route is crossed by Footpath 7-8-FP2 (point C) and continues in a broadly east south easterly direction along the watercourse through to Liverpool Road (A59) (point D).

10. With the exception of the route marked on the Order map between point A and point B (the bounded stone surfaced track carrying the footpath 7-8-FP2), the Order route is currently largely unusable as it is recorded within the old boundaries of the historical route known as Watery Lane within which the watercourse is located.

11. The total length of the Order route is 1.04 kilometres and the width of the route varies between 2.5 metres and 10 metres.

Legal issues

13. The provisions of the Wildlife and Countryside Act 1981 ("the 1981 Act" set out tests which must be addressed in deciding whether the DMS should be modified. The OMA made the Order because it appeared to the OMA that the DMS require modification in consequence of the occurrence of an event specified in S53(3)(b) and S53(3)(c)(i) and (ii) namely the discovery by the OMA of evidence which (when considered with all other relevant evidence available to them) 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 DMS relates, namely a bridleway and that a highway shown in the DMS as a highway of a particular description, namely a public footpath, ought to be there described as a highway of a different description namely a bridleway.

14. The statutory test at S53(3)(b) refers to the expiration of a period of time and use by the public such that a presumption of dedication of a public highway is raised. The statutory test at S53(3)(c)(i) comprises two separate questions, one of which must be answered in the affirmative before an Order is made under that subsection. There has to be evidence discovered. The claimed right of way has to be found, on balance, to subsist (Test A) or able to be reasonably alleged to subsist. (Test B). This second Test B is easier to satisfy, but it should be noted it is the 'higher' Test A which needs to be satisfied in

deciding whether to confirm the Order even though Test B was sufficient to make the Order to add a bridleway between points B-D.

15. In the case of *Todd and another v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Evans-Lombe J made it clear that the confirming authority (whether the local authority confirming an unopposed order or the Secretary of State confirming an opposed order) must be satisfied on the balance of probabilities that the right of way subsists. This means that when considering the confirmation of an order, the Secretary of State is only able to consider whether on the balance of probabilities the right of way subsists.

16. Accordingly, for the Order to be confirmed, the Inspector needs to be satisfied that, on the balance of probability, the evidence considered by the OMA, *when considered with all other evidence*, is sufficient evidence from which to infer a bridleway was already dedicated on this route many decades ago and the route marked A-B-C-D on the Order plan should be upgraded/added as a bridleway on the DMS.

17. It is the view of the OMA that said Order route subsists as a bridleway and should be recorded as such on the Definitive Map and Statement (Document 19).

Evidence

18. As with most cases investigated, there is no single piece of map or documentary evidence which stands alone to confirm the public legal status of the route.

19. There are three key documents suggesting that in the mid-1800s a route ran from Haunders Lane through to Liverpool Road alongside and partially consistent with the application route and which was named 'Watery Lane'. This was considered to be a vehicular route which could have been used by the public. Hennessey's Map of 1830 (Document 23) shows Watery Lane as a cross road consistent with how other routes with public vehicular access are shown.

20. Just over 10 years later, the route is shown on the Tithe Map for Much Hoole (Document 24) as a bounded through-route which appears to be capable of being used and which was described in the Tithe Award as a road

and listed at the end of the Award with other routes known to have public vehicular rights.

21. The First Edition OS 6" inch map (Document 26) clearly names the route as Watery Lane which is again shown as a fenced through-route and the significance of the name is clear as within the boundaries of the lane is a watercourse which flows from Liverpool Road (point D) through to part way between point A and point B. Neither Hennet's Map, the Tithe Map nor the 1st Edition 6"-inch OS map showed any lines across the route which could have limited access.

22. Later maps examined show subtle, but significant, alterations. From the late 1800s, it appears that use of the route described in the Tithe Map as a road declined, most probably because of the presence of the watercourse. Throughout its history (from the mid-1800s onward) the route between point A and point B is consistently shown as a wide bounded route which would be open to all forms of traffic.

23. From the late 1800s however, travelling from point B eastwards Watery Lane was no longer separated from the adjacent farmland for the entire length. The original Watery Lane route from point B onwards and over the following years appears to have completely fallen out of use. This is consistent with the name, Watery Lane; the consistent depiction of a watercourse along the route; the shallow fall of the lane; the 'winter footpath' alongside and the sunken nature of the lane now and is the sort of road which was presumably viable in the 18th Century but as traffic increased became unsustainable and unusable.

24. It is the OMA's case that the evidence is sufficient to show that the route was historically dedicated as a public bridleway but that the nature of the route (running within the confines of a fenced strip containing a watercourse) may have meant that use was more likely to be on horseback or with pack horse rather than wheeled carts.

Summary

25. Looking at whether dedication can be inferred on balance at common law, the OMA considers that the various map and documentary evidence presented does, on balance, indicate that the route was dedicated to public use and used by the public.

27. There is no evidence that a legal stopping up of any part of the route has ever taken place. The OMA draws attention to the fact that lack of use in more recent decades would not remove any existing public rights. The legal maxim "Once a highway always a highway" would apply as unless stopped up by proper legal process a highway remains where it was dedicated, even if no longer used.

Conclusion

28. The OMA submits that a bridleway subsists along the Order Route. The OMA further contends that the criteria for a modification of the DMS under section 53 of the 1981 Act are satisfied.

29. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to in paragraphs 14-16 is met. The objection received does not give any grounds for the OMA to reverse its decision on promoting the Order to confirmation. The OMA therefore respectfully requests that the Planning Inspector confirms the Order without modification.