

## **Order Making Authority Statement of Case**

### **Background**

1. On 20<sup>th</sup> 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 adding to it a public bridleway from Haunders Lane at Mill Hill, Much Hoole to the junction of FP3 and the original road in Much Hoole. The application was supported by map and documentary evidence including: Hennet's Map of Lancashire 1829, extract of the 6 inch Ordnance Survey ("OS") map published 1848, 25 inch OS sheet LXVIII.14 published 1896, 1911 and 1931, 1 inch OS map published 1896, Bartholomew's ½ inch map published 1904, 1:25000 OS maps published 1955 and 1968, 1 inch OS 7<sup>th</sup> Series Map of Preston published 1961, Finance Act 1910 Map ref IR 133/5/79 and Tithe Map of Much Hoole 1841.
2. Officers from Lancashire County Council (hereinafter referred to as the OMA) investigated whether they considered that the public rights applied for existed over the application route and prepared a report detailing their investigation and their recommendation that the application should be accepted with modification to recognise historical carriageway rights (Document 21). The report was considered by the OMA's Regulatory Committee on 15<sup>th</sup> September 2021 where the decision was made to modify the Definitive Map and Statement by recording a restricted byway from the junction with Haunders Lane in a generally northerly direction along an unsurfaced farm track to the junction with a public footpath recorded as 7-8-FP3 and then along the route of the recorded footpath to pass through Marsh Farm and then continuing along the farm access road (still recorded as 7-8-FP3) to Hannings Farm and the junction with Haunders Lane.
3. 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 17 December 2021 (Document 15).
4. A Definitive Map Modification Order was duly made on 8<sup>th</sup> December 2021 ("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 restricted byway 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 restricted byway.

LANCASHIRE COUNTY COUNCIL DEFINITIVE MAP & STATEMENT OF PUBLIC RIGHTS OF WAY  
RESTRICTED BYWAY FROM HAUNDERS LANE, MUCH HOOLE  
DEFINITIVE MAP MODIFICATION ORDER 2021

5. 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 (Doc)
6. During the specified period for objections and representations to the Order, the OMA received one objection (Document 4).
7. 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**

8. The application route commences at the northern end of the unclassified county road (UCR) referenced U3142, known as Mill Hill Farm at point A on the Order plan adjacent to a field boundary/ditch to the west.
9. The U3142 leading to point A is an unsurfaced compacted earth track used predominantly by farm machinery to access adjacent fields. At point A there is no discernible difference between the U3142 and the start of the Order route.
10. Beyond point A the Order route continues as a substantial track through to point B where Footpath 3 in the parish of Much Hoole joins the track from the east. Signs indicating the presence of ground nesting birds and the requirement to keep to marked footpaths were located at this point.
11. Beyond point B the route continues as a substantial farm track through to where the track ends and the route continues around a ninety degree bend along the edge of an arable field in an easterly direction for approximately 40 metres to where the route then turns ninety degrees again to continue in a north north westerly direction along the field edge through point C and continues as a 3-3.5 metre wide grass track north then west between farm buildings to the entrance to Marsh Farm (point D). From point D the route continues north along a compacted earth/stone surfaced track through to Hannings Farm (point E) where the application route ends at the unmarked junction with the road recorded as U1314 Haunders Lane.
12. The total length of the route is 0.81 kilometres.

### **Legal Issues**

13. The provisions of the Wildlife and Countryside Act 1981 set out tests which must be addressed in deciding whether the DMS should be modified. If it appears 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 restricted byway 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 restricted byway.

14. The provisions of the Wildlife and Countryside Act 1981 set out the tests which must be addressed in deciding that the map should be altered. S53 permits both upgrading and downgrading of highways and deletions from the map. 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 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.
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* there is sufficient evidence from which to infer a vehicular highway was already dedicated on this route many decades ago and the route marked A-B on the Order plan should be added to the DMS as a restricted byway and that the route marked B-E on the Order plan should be upgraded from a footpath to restricted byway on the DMS.
17. It is the view of the OMA that route subsists as a restricted byway 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. The full length of the application route is shown on the small-scale Old Series Cassini map which is significant as these maps were reproduced from the OS First Edition 1 inch maps and suggests that a substantial through route existed along the application route by the mid-1800s which would appear to have been capable of being used although it does not indicate whether such use was public or private.

LANCASHIRE COUNTY COUNCIL DEFINITIVE MAP & STATEMENT OF PUBLIC RIGHTS OF WAY  
RESTRICTED BYWAY FROM HAUNDERS LANE, MUCH HOOLE  
DEFINITIVE MAP MODIFICATION ORDER 2021

20. The route is consistently shown on all OS maps examined – including those at a small-scale. In the early 1900s, it was shown excluded from the Finance Act taxation process consistent with the view that it was a public highway – most probably vehicular and is shown on all three editions of Bartholomew's maps as a minor through route whilst Haunders Lane (a public vehicular route) was not shown. The maps/documents in question include the following:

- (i) Extract of the 6 inch OS map published 1848
- (ii) 25 inch OS map LXVIII.14 published 1896
- (iii) 25 inch OS map LXVIII.14 published 1911
- (iv) 25 inch OS map LXVIII.14 published 1931
- (v) 1 inch OS map published 1896
- (vi) Bartholomew's ½ inch map published 1904
- (vii) 1:25000 OS maps published 1955 and 1968
- (viii) 1 inch OS 7th Series Map of Preston published 1961
- (ix) Finance Act 1910 Map ref IR 133/5/79 and
- (x) Tithe Map of Much Hoole 1841.

21. It should be noted that the route passes through farmland and was partly unenclosed yet remained largely unaltered and when Marsh Farm was built adjacent to the route at point F the route remained unaltered with the buildings positioned along either side of the route but not interfering with it in any way.

22. It is the view of the OMA that whilst it would appear that the route would be predominantly used for agricultural purposes both in the past and in more recent times it is a through route and does provide access to and past a number of properties and connect to public vehicular highways. Whilst it is perhaps not an obvious through route for the public connecting to places of interest, it does appear that it is a route of some antiquity and that it was considered to be and used in the past as a public through route.

### **The Natural Environment and Rural Communities Act 2006**

23. This Act effected a blanket extinguishment of unrecorded public rights for mechanically propelled vehicles (MPVs) with certain exceptions. Prior to this carriageway rights did not discriminate between vehicles which were mechanically propelled, such as cars and motorbikes, and those which were not, such as bicycles, wheelbarrows, horse-drawn carriages, donkey carts, etc. The OMA concluded that the evidence showed that, on the balance of probability, public

carriageway rights exist on the Order route. The OMA then considered whether the Natural Environment and Rural Communities Act 2006 had extinguished public rights for (MPVs).

24. Section A-B was not recorded as a public right of way on the DMS and section B-E was, at the time of the Act, recorded as a public footpath. The OMA have no evidence that any of the exemptions apply. Therefore, the OMA consider that the appropriate status for the Order route to be recorded on the DMS is restricted byway, with public rights with non-mechanically propelled vehicles, horses and on foot.

### **Summary**

25. Whilst there is no express dedication in this matter, the OMA considers, on balance, that there is sufficient evidence from which to have dedication inferred at common law from all the circumstances.

26. The OMA considers that the various map and documentary evidence does, on balance, indicate that the route was dedicated to public use and used by the public.

27. From the information gathered, the OMA considers that there is sufficient evidence on balance that the route was a historical public route available as a vehicular highway which at present is recorded on the DMS as a footpath in respect of points B-E and unrecorded in respect of points A-B.

28. The fact that part of the application route is not presently recorded as any publicly maintainable highway does not mean that it does not carry public rights of way and the fact that only footpath rights were recorded between points B and E does not preclude the existence of other higher rights.

29. There is no evidence that a legal stopping up of any part of the route has ever taken place.

30. The OMA contends 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.

31. The OMA considers that there is sufficient evidence of an old vehicular highway between point A-E and that the Natural Environment and Rural Communities Act 2006 will have extinguished MPV rights leaving the route to be appropriately recorded as a restricted byway.

32. It is satisfied the map and other documentary evidence is in itself considered sufficient that the route was a historical public highway and that an inference of dedication can on balance be made.

### **Conclusion**

LANCASHIRE COUNTY COUNCIL DEFINITIVE MAP & STATEMENT OF PUBLIC RIGHTS OF WAY  
RESTRICTED BYWAY FROM HAUNDERS LANE, MUCH HOOLE  
DEFINITIVE MAP MODIFICATION ORDER 2021

33. The OMA submits that restricted byway rights subsist 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.
34. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in para 14 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.