

Order Making Authority Statement of Case

Background

1. On 21st 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 footpaths known as footpaths FP29 & FP 30 in Much Hoole from Liverpool Road to Smithy Lane.
2. The application was supported by map and documentary evidence including: Hennet's Map of Lancashire 1829; 6 inch OS map published 1848; 1 inch OS map published 1896; 25 inch OS map published in 1893, 1911 and 1931; 1 inch OS map published 1961; Finance Act Map 1910; Tithe Map and Award 1841; modern digital mapping showing the recorded route of 7-8-FP30 and 7-8-FP29 and photographs of the route taken April/May 2020.
3. 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 partly on a different line (Document 21). The report was considered by the OMA's Regulatory Committee on 15th September 2021 where the decision was made to modify the Definitive Map and Statement by recording a restricted byway from a junction with Liverpool Road (A59) in a generally easterly direction to the south of the residential properties on Brooklawns and continuing east to a point at the south east corner of the boundary of the property known as Greenfield. The way then continues through the boundary hedge and along the eastern edge of the property known as Greenfield to the access road, the way continues east to the junction with Northern Avenue.
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 2nd December 2021 (Document 15).

5. A Definitive Map Modification Order was duly made on 19th January 2022 ("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 ought to be there described as a highway of a different description, namely a public footpath when it ought be a restricted byway.
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 four objections (Document 4). One objection was later withdrawn. Since the Order is opposed, it 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 Order Route commences from a junction with Liverpool Road (A59) (point A on the Order Map) in a generally easterly direction to the south of the residential properties on Brooklawns and continues east to a point at the south east corner of the boundary of the property known as Greenfield at point B.
9. The way then continues through the boundary hedge and along the eastern edge of the property known as Greenfield to the access road to the property at point C. From point C the way continues east to the junction with Northern Avenue at point E.
10. The route is shown on the Order Map between points A-B-C-D-E as a broken green line but due to an error in the description of the route contained in Part 1 of the Order the route is described in its entirety (and correctly) as running from Liverpool Road to Northern Avenue but is referred to as being as between points A-B-C-D on the Order Map.

11. The total length of the route is 0.45 km and the width of the route varies between 2.5m and 11m.

Legal Issues

12. 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.

13. 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 additions to 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.

14. 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.

15. 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 that, as mechanically propelled vehicular rights have been extinguished by the Natural Environment and Rural Communities Act 2006, the route marked B-C on the Order plan should be added to the DMS as a restricted byway and that the route marked A-B and C-D-E on the Order plan should be upgraded from a footpath to restricted byway on the DMS.
16. 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

17. 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.
18. In this particular case, the application was for the route recorded as Footpath 30 and part of Footpath 29 to be upgraded to bridleway but the investigation carried out resulted in the order being made to record a route which varied from the application route between points B-C on the Order map as a restricted byway.
19. Having assessed the available evidence, the OMA concluded that the evidence showed a public carriageway had been established along the Order route A-B-C-D-E by the mid-19th Century as evidenced by its inclusion on Hennessey's map published in 1830, the Tithe Map and Award for Much Hoole 1841 and the Ordnance Survey maps (First Edition 6" and 1" Cassini reproduction) and then over the next 100 years, the use and availability of the Order route appeared to have reduced with part of the route now blocked.
20. The OMA has concluded that the carriageway rights were established by mid-19th Century and subsequent falling out of use and subsequent obstruction of part of the route has not removed these. However, the effects of the Natural Environment and Rural Communities Act 2006 is to extinguish public rights for mechanically propelled vehicles.

The Natural Environment and Rural Communities Act 2006

21. 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).
22. Sections B-C was not recorded as a public right of way on the DMS and sections A-B and C-E were, 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

23. Whilst there is no express dedication in this matter, the OMA considers that there is sufficient evidence from which to infer dedication at common law from all the circumstances. There is good, evidence of this being a pre-1890 vehicular highway which then lost width and boundaries, appears gated and began to be inconsistently recorded ending up recorded as a footpath apart for one short section where the footpath was recorded as being along a boundary instead of on the west side.
24. The OMA also considers that the various map and documentary evidence does indicate that the route was dedicated to public use and used by the public.
25. 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 A-B and D-E and unrecorded in respect of points B-C.

26. The fact that part of the application route is not presently recorded as any highway does not mean that it does not carry public rights of way and the fact that only footpath rights were recorded between points A-B and D-E does not preclude the existence of other higher rights.
27. There is no evidence that a legal stopping up of any part of the route has ever taken place.
28. As indicated above, the OMA concluded 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.
29. The OMA considers that there is sufficient evidence of an old vehicular highway between points 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.
30. 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

31. 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.
32. 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 objections received do 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 with a modification to clarify the description of the Order Route in Part 1 of the Order so that it correctly corresponds to the lettering on the Order Map with reference to the fact that the Order route runs between points labelled A-B-C-D-E on the Order Map.

33. The OMA submit that with reference to the proposed modification required the use of incorrect lettering within part 1 of the Order did not mislead or prejudice anyone with an interest in it.

34. The OMA are therefore asking for a modification to the Order as follows:

DESCRIPTION OF PATH OR WAY TO BE ADDED AND UPGRADED

Restricted Byway from a junction with Liverpool Road (A59) (point A on the Order Map) in a generally easterly direction to the south of the residential properties on Brooklawns and continuing east to a point at the south east corner of the boundary of the property known as Greenfield at point B. The way then continues through the boundary hedge and along the eastern edge of the property known as Greenfield to the access road to the property at point C. From point C the way continues east to the junction with Northern Avenue at point 'E'.

The route is shown on the Order Map between points A-B-C-D-E as a broken green line.