

**THE LANCASHIRE COUNTY COUNCIL DEFINITIVE MAP AND STATEMENT
OF PUBLIC RIGHTS OF WAY (DEFINITIVE MAP MODIFICATION)(NO. 4)
ORDER 2011**

Comments on Objection Received

The Objection

One objection was received to the Order made to delete part of Footpath 129 Chipping. The objection was received from Mr Alan Kind, 45 The Fairway, Gosforth, Newcastle Upon Tyne.

Mr Kind sent two letters detailing his objection. The first was dated 28 March 2012 and the objection is summarized in bold italics below:

There is insufficient positive evidence to support the proposed deletion but if you can provide sufficient positive evidence then I will revisit this part of my objection. If the section of path proposed to be deleted was shown on the definitive map in error the southern end of the remaining portion appears to make a junction with the metalled highway Fish House Lane at Old Hive and the proposed modification to the definitive statement does not record this point of termination.

The OMA responded to Mr Kind by letter on 20th April 2012 following receipt of his objection providing Mr Kind with a copy of the Regulatory Committee Report detailing the background and evidence in relation to this matter (Document 20) and explaining that a second Order (The Lancashire County Council Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No. 5) Order 2011 had also been made but due to an error by the OMA the two Orders had not been advertised at the same time.

Mr Kind sent a further response in a letter dated 30th April 2012 objecting to the Order and stating:

'This case is a, "positional correction," rather than deletion. That being so the deletion and addition elements should have been combined within one modification order. R oao Leicestershire County Council v SOS for EFRA 20 January 2003 [2003] EWHC 171 deals with this.'

Response to the Objections

The Definitive Map Modification Order that seeks to delete part of footpath 129 was made because the Order Making Authority (OMA) considered that there was evidence which indicated on the balance of probabilities that the Definitive Map and Statement (DMS) had recorded part of footpath 129 incorrectly as they had discovered evidence which (when considered with all other relevant evidence available to them) shows that there is no right of way (being a public footpath) over land shown on the map and statement as a highway of any description.

R oao Leicestershire County Council v SOS for EFRA 20 January 2003 [2003] EWHC 171 (Admin) deals with the case in which deletion and addition of a footpath should be dealt with via one modification order

It is acknowledged that in that case the Court, in dealing with a similar application, stated at paragraph [32]:

“What is under consideration here is not any addition to the statement of particulars, but a modification to the map itself and an indication on that map of a different route for the right of way. Accordingly...the claimants...had to consider not only subsection (3)(c)(iii) but also subsection (3)(c)(i)...”

Furthermore the Court went on to say:

“section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong, which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right, that a change should take place. The presumption is against change, rather than the other way around.”

The effect of this statement is to make clear that the lesser standard of proof available in cases that require an assessment of s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the “1981 Act”) will not apply and the standard balance of probability test set out in s.53(3)(c)(iii) of the 1981 Act will apply to determine whether the alternative alignment of the route should be substituted for the definitive map version.

It is also worth noting that the conclusive evidential effect of the DMS means that it is not for the Council to demonstrate that the map is correct, but for the objector to make out that the DMS is incorrect.

The evidence would need to clearly show that a mistake was made when the right of way was first recorded. In other words, evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. In s.53(3)(c) "evidence" is not to be restricted to new evidence or evidence not previously considered, but to be given its ordinary meaning. As modification depends on the “discovery” of evidence one cannot simply re-examine the same evidence considered when the definitive map was drawn up, rather the “new” evidence has to be in the context of the evidence previously given

On consideration of the objection the OMA subsequently made a new combined order which had the effect of modifying the DMS in the manner requested by the objector. As such the OMA are of the view that the part of footpath 129 that was sought to be deleted by the First Order is no longer shown on the DMS and as such the objection is no longer relevant within the meaning of Paragraph 7(2A) of Schedule 15 to the 1981 Act.