

Statement of Case of the Order Making Authority

Background

On 20th August 2020, the British Horse Society (the Applicant) 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 the footpath along Moss Lane in the parish of Overton to a bridleway (the Application). The Application was supported by number of historical documents which depicted the application route in a manner which would suggest that the footpath should in fact be recorded with public rights for other classes of user.

Officers from Lancashire County Council (hereinafter referred to as "the OMA") investigated whether higher public rights existed over the application route (the Investigation) by reviewing all available historical documents and prepared a report including their recommendations (Document 21). This report was considered by the OMA's Regulatory Committee on 17 November 2021 where the decision was made to accept the Application subject to carriageway rights also being recorded (Document 15) and to make an order to modify the DMS by recording a restricted byway and to promote the order to confirmation as it was satisfied that the higher test could be met.

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 May 2022 (Document 15).

A Definitive Map Modification Order was duly made on 18th May 2022 (the "Order") (Document 1). The Order was made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(ii) of the 1981 Act 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 shown in the map and statement as a highway of a particular description, namely footpath, ought to be there shown as a highway of a different description, namely a restricted byway.

Notice of the making of the Order was served to affected individuals and prescribed organisations, erected on site and published in the local press in accordance with paragraph 3 of Schedule 15 of the 1981 Act On 23 June 2022 (Document 6).

During the specified period for objections and representations to the Order, the OMA received 4 objections to the making of the Order (Document 4) from the Clerk to Overton Parish Council (the First Objector) of 3 Cotton Tree Barn Second Terrace Sunderland Point Morecambe LA3 3HT, Derek Bargh (the Second Objector) of Bradlow Heaton Bottom Road Heaton with Oxcliffe LA3 3EU, David Birkett (the Third Objector) of North Farm 5 Main Street Overton Morecambe LA3 3HD and Mr Jeff

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Bargh of 2 Old Woodhouse, Heaton with Oxcliffe, Morecambe, LA3 3EU (the Fourth Objector).

The Objections have 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

The Order Route, known as Moss Lane, runs from Downeyfield Road immediately to the east of Downeyfield Bridge (at point A on the Order Map) in a generally south south easterly direction to Middleton Road immediately east of Middlepool Bridge (point B). The entire route is shown between points A and B on the Order Map with a dashed green line.

The length of the Order route is 0.88km and the width varies between 5 metres and 12 metres.

Legal Issues

The provisions of the Wildlife and Countryside Act 1981 set out tests which must be addressed in deciding whether the DMS should be modified. The OMA should make an Order 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)(ii) namely the discovery by the OMA of evidence which (when considered with all other relevant evidence available to them) shows 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.

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.

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

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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.

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 A-B on the Order plan should be upgraded from a footpath to restricted byway on the DMS.

It is established law that if it is shown that a highway existed then highway rights continue to exist even if a route has since become disused or obstructed unless a legal order stopping up or diverting the rights has been made. Section 53 of the Wildlife and Countryside Act 1981 makes it clear that considerations such as suitability, the security of properties and the wishes of adjacent landowners cannot be considered.

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.

Evidence

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.

In this particular case, the application was for the route recorded as Footpath 1 in the Parish of Overton to be upgraded to bridleway but the investigation carried out resulted in the Order being made to record the route as a restricted byway.

Having assessed the available evidence, the OMA concluded that the evidence showed that the Order route existed as a substantial through route and that a public carriageway had been established along the Order Route A-B by the late 1700s-early 1800s. This was evidenced by its inclusion on three key early commercial maps - Yates' Map of 1786, Greenwood's Map of 1818 and Hennet's Map of 1830 all of which consistently showed the Order Route as a cross road.

Furthermore, the full length of the Order Route was recorded as a public road owned by the Surveyors of the Highway on the Overton Tithe Map produced in 1844. In addition, on the Middleton Tithe Map 1844 the northern section of the Order Route was also listed in the Apportionment as owned by the Surveyors of the Highways and described as a 'lane' and the Heaton with Oxcliffe Tithe Map, prepared several years earlier in 1841, showed the start of the route at point A labelled "from Overton" suggesting that the Order Route was considered to be a public vehicular route from Overton.

The Order Route is clearly shown on the First Edition 6 inch Ordnance Survey (OS) map published in 1848 and is labelled as part of Moss Lane but by the late 1800s it is

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reasonable to conclude from the map evidence available, that the use of the Order Route had declined in favour of using the route along Downeyfield Road and Middleton Road and whilst the recording of the route as a public footpath in the 1950s appeared to be consistent with the use made of the route at that time it does not reflect the historical use of the route as a public road.

The OMA has concluded that the carriageway rights were established by the early - mid-19th Century and subsequent falling out of use 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

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).

The Order Route was recorded as a public footpath on the DMS at the time of the Act. 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

The OMA submits that an examination of the historical evidence can only lead to a conclusion that the Order Route has been a part of the public vehicular highway network for a period between the mid 1700's to at least 1830.

As explained above is established law that if it is shown that a highway existed then highway rights continue to exist even if a route has since become disused or obstructed unless a legal order stopping up or diverting the rights has been made.

It is the OMA's case that as the Order Route can be demonstrated, by reference to historical evidence, to have been subject to full vehicular access rights and no orders extinguishing those right can be found the Order must be confirmed.

The OMA submits that the Natural Environment and Rural Communities Act 2006 has extinguished public in relation to any rights that may have existed in relation to Mechanically Propelled Vehicles over the Order Route. The Order Route was, at the time of the Natural Environment and Rural Communities Act 2006 recorded as a public footpath and was not on the List of Streets (maintained at public expenses). The OMA is not aware that any other of the other exemptions contained in the Natural Environment and Rural Communities Act 2006 apply.

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It is the OMA's case that as public carriageway rights are shown to exist over the Order Route the appropriate to be recorded on the DMS is Restricted Byway, with public rights with non-mechanically propelled vehicles, horses or on foot.

Section 53 of the Wildlife and Countryside Act 1981 makes it clear that considerations such as suitability, the security of properties and the wishes of adjacent landowners cannot be considered. The OMA's position on issues raised in this regard is dealt with in the Statement of Responses to Objections made.

Conclusion

The OMA submits that public 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.

The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above is met. For the reasons stated in the OMA's 'Comments on Objections', the objections received to the Order 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 without modification.