

Planning Inspectorate Reference:

(PRoW File Reference: 804-454)

(Legal Services File Reference: 5.28760)

STATEMENT OF CASE OF LANCASHIRE COUNTY COUNCIL

Wildlife and Countryside Act 1981

The Lancashire County Council Definitive Map and Statement of Public

Rights of Way Definitive Map Modification

(No.11) Order 2007

Addition of Public Footpath from Kellet Lane to Ranglet Road,

Walton-le-Dale, South Ribble District

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The Lancashire County Council Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No.11) Order 2007

Statement of Case of Lancashire County Council

1. INTRODUCTION

- 1.1 This is the Statement of Case of Lancashire County Council in the capacity of being the Order Making Authority (“the OMA”) for the County of Lancashire in respect of **The Lancashire County Council Definitive Map and Statement of Public Rights of Way Definitive Map Modification (No.11) Order 2007** regarding the claimed public footpath from Kellet Lane to Ranglet Road, Walton-le-Dale, South Ribble District (“the Order”) which was made on 5th December 2007 and advertised on page 33 of the ‘Evening Post’ on 13th December 2007.
- 1.2 This Statement of Case is the written statement required by the Secretary of State for Levelling Up, Housing and Communities providing full particulars of the case which the OMA proposes to put forward and includes copies of any supporting documents which are referred to or submitted as evidence together with a list of those documents.
- 1.3 A copy of the sealed Order and associated maps is provided as **Document 1** in the bundle submitted by the OMA.

2. BACKGROUND

- 2.1 The land was farmland in the 1960s and was later selected by the New Towns Commission for industrial development.
- 2.2 In order to prepare the land for this new development the Central Lancashire Development Corporation (“CLDC”) applied to the Secretary of State for the Environment to extinguish various public footpaths in the area under the provisions of section 23 of the New Towns Act 1965.
- 2.3 A copy of the Borough of South Ribble (Central Lancashire New Town Development Corporation: Walton Summit, Preston) Rights of Way Order, 1976

which was made by the Secretary of State for the Environment on 30th March 1976 (“the 1976 Order”) showing the footpaths to be retained, the footpaths to be closed and the new footpaths to be created in the vicinity is provided as **Document 32** in the bundle submitted by the OMA.

- 2.4 The 1976 Order extinguishes several public footpaths across a large area of land, although none of these follow the route which is the subject of this Order or linked to the Order route.
- 2.5 Although the 1976 Order did not actually create any new public footpaths the fact that the associated plan clearly shows the route of new footpaths – including the Order route – which were to be created evidences the intention for new routes to be created across the land.
- 2.6 Given the intention to create new footpaths, when the Oder route was constructed it is not surprising that it was used.
- 2.7 The roads within the new development were adopted as publicly maintainable highways and the development was transferred to the New Towns Commission by CLDC in December 1985.
- 2.8 On 30th June 2006 a notice appeared at some point along the Order route stating that it was a private route not open to public and that it would be closed on 31st August 2006. This prompted users to take action though their local councillor.
- 2.9 On 29th August 2006 Councillor Thomas E. Sharratt (then an elected member/councillor for Lancashire County Council) submitted an application under section 53(2)(b) of the Wildlife and Countryside Act 1981 to the OMA to modify the Definitive Map and Statement of Public Rights of Way by adding to it a public footpath running from Kellet Lane to Ranglet Road, Bamber Bridge in the South Ribble District of Lancashire.
- 2.10 The Owner at the time of the application was Peter B Ellis and Raymond J Evans as the trustees of the Total Cellar Systems Limited Directors Retirement and Death Benefit Scheme. The company itself (Total Cellar Systems Limited) raised objections. However, the land was then sold or transferred to Anthony

Oxley and Geoffery Howley who retained their objections through their own solicitors.

- 2.11 Enquiries were made to English Partnerships (formerly the Commission for New Towns) regarding the route in question. English Partnerships advised that, although they were unable to locate any documentary evidence, its planners confirmed that it was always the intention for the route in question to be a public footpath.

3. THE ORDER ROUTE

- 3.1 The claimed footpath runs from a point at GR SD 5794 2504 on Kellet Lane (U10725), Kellet Lane Bamber Bridge, Borough of South Ribble, passing through a metal giggle-gaggle and running in a general north westerly direction for a distance of approximately 52 metres, the footpath being 2 metres wide for the whole of its length and running along a tarmac surface to join Ranglet Road, Bamber Bridge, Borough of South Ribble at GR SD 5791 2508.
- 3.2 The application was considered by the OMA's Regulatory Committee on 10th October 2007 when the Committee received a report from officers.
- 3.3 A copy of the Report is provided as **Document 20** in the bundle submitted by the OMA.
- 3.4 The Committee resolved that the application be accepted.
- 3.5 A Definitive Map Modification Order was subsequently made on 5th December 2007 and advertised on page 33 of the 'Evening Post' on 13th December 2007.
- 3.6 The Order made was to modify the Definitive Map and Statement of Public Rights of Way in consequence of the occurrence of an event specified at Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, 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 on the Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the Map relates.

4. OBJECTION

- 4.1 The Order attracted only one (1) objection from the owner of the land over which the Order route passes.
- 4.2 The objector states:
- (1) the Order route was never expressly dedicated by way of express dedication; and
 - (2) no right of way is shown on OS mapping prior to the construction of the Walton Summit Estate; and
 - (3) there is insufficient user evidence to confirm a twenty (20) year usage period.
- 4.3 The objector states the route was closed on Christmas Day and Boxing Day each year.
- 4.4 The Objector states the route was also closed to the public for periods when contractors working for utility companies (i.e. statutory undertakers) closed the path to enable works to be carried out.
- 4.5 These claims appear to have been made in order to give rise to an argument there was no intention to dedicate. This would mean the statutory test under section 31 of the Highways Act 1980 would not be met (i.e. there is sufficient evidence to show that there was no intention to dedicate in the twenty (20) year period).
- 4.6 The OMA's view is that in order to evidence an intention not to dedicate there must be a much more substantive and positive action than that being argued by the objector/landowner (or the predecessor thereof). Furthermore, the OMA has no evidence that these events caused any interruption to any actual use by the public.
- 4.7 As the Order route is located in a more commercial area, the OMA argues that the 'closure days' mentioned are more unlikely to attract the attention of the public or to form an actual interruption to use by the public. Therefore, it is argued, the objector (as the landowner) did not carry out an effective act to negate dedication. The statutory test is based on evidence, and there does not appear to be any evidence of an intention not to dedicate nor of actual interruption to public use.

- 4.8 Reliance upon a third-party statutory undertaker closing the route (for the purposes of carrying out maintenance works) as being evidence of an intention not to dedicate does not, in the view of the OMA, suffice for the purposes of section 31 of the Highways Act 1980. Moreover, it has not been evidenced that these temporary closures actually prevented the use of the path.
- 4.9 At the outset, there is no evidence to substantiate the Objector's claims regarding the closure of the routes by utility contractors and, moreover, that it amounted to an intention on the part of the landowner to negate dedication. This adds weight to the claim that the route has been in continuous use for twenty (20) years or more.
- 4.10 Regardless of the existence of documentation suggesting an express dedication, such a deliberate act it is not the only mechanism by which the route in question (or any other public right of way) can be dedicated. There are statutory provisions which allow for dedication providing the relevant criteria are met, as well as other routes to dedication which are mentioned in detail within the statement of grounds.
- 4.11 The objector also raises an issue that the Order route is different to the one shown on old OS mapping. This does not, in itself, mean the Order route cannot be deemed to have been dedicated by way of the statutory provisions of the Highways Act 1980 or by the common law.
- 4.12 The path was built as part of the Walton Summit Estate by the CLDC. Ownership of that development was later vested into the Commission for New Towns by way of an Order made in December 1985. There is documentary evidence from English Partnerships (formerly Commission for New Towns) stating that the Order route was always intended to be a footpath, although no record of any formal dedication could be found or any plans to show the route's intended purpose. However, those comments come from an individual who worked with the CLDC and was involved in the planning process. Furthermore, sufficient time has passed since the Order of 1985 to reach the required twenty (20) year period of use by the public, albeit the path is likely to have been built before date and already be in use.

Landowner's comments on the user evidence

- 4.13 The OMA considers it is unnecessary to individually break down the Objector's comments on each of the user evidence forms since the Objector only speculates the *potential* route taken by each of the users and claims that some of the users could not have possibly used the route and giving their reasons thereto. However, these are merely speculative and unsubstantiated comments attempting to give possible routes the users *could* have taken or that were unlikely to be taken. It is not what the users have submitted in evidence. The test is for twenty (20) years of continuous use together with a lack of intention to not dedicate, or in the alternative, a dedication by inference through the original owner. The user evidence is supported by each of the user's signature with a statement of truth and should be taken to be a truthful account and any challenges to that should be done by the proper means. It should be noted that the users sought the assistance of a local councillor so as to prevent the closure of the route, suggesting that the route was indeed, well used.
- 4.14 It should be noted that the original landowners at the time the Order was made (Trustees of Total Cellar Systems Limited Directors Retirement and Death Benefit Scheme) have since sold the land in question. The new landowners are Anthony E Oxley and Geoffrey D. Howley who have maintained the original objections raised.

Supporting User Evidence

- 4.15 There were a total of eight (8) users who provided user evidence forms. However, one user (Mr Warton) has since died but his user form remains part of the bundle for consideration. Another user (Mr. Hunter) has stated he can no longer support the application due to old age. Again he did not object to his user evidence form being used as part of the application. The remaining users, who previously provided their details in user evidence forms, failed to reply to the OMA's more recent letters.
- 4.16 In the user evidence forms, Mr Warton states that he has been using the route since 1940. However, the OMA argues this was likely to be a similar route to the one claimed and that Mr Warton used the route in question upon

construction. Mr Hunter has provided a New Town map showing the footpath routes and on which the route is marked.

- 4.17 There is a range other user evidence, including user evidence forms and letters, which the Planning Inspectorate is invited to review and consider.

Conclusion

- 4.18 The OMA are of the view that the user evidence forms combined with the correspondence from English Partnerships is sufficient evidence to prove that the Order route is indeed a public right of way and was intended as such at the time it was constructed.
- 4.19 In the alternative or in addition, the OMA contends that the route has been used continuously for more than twenty (20) years (i.e. for 20 years prior to 30th June 2006 – being the date when the landowner placed a notice on the route stating it would be closed).
- 4.20 The notice and closure (by obstruction of the path) raised issues in the local community and led to a local councillor applying for the route to be recorded on the Definitive Map and Statement as a public right of way. That in itself shows that the route was regularly used and the notice triggered action from its users and therefore any alleged closure prior to that which the landowner suggests, would have likely to have triggered action at that time. The metal railings as mentioned within the committee report of 2007 indicate that they were installed to protect pedestrians.
- 4.21 The nature of the evidence which may be taken into account and the weight to be given to that evidence when determining whether or not a way has been dedicated as a highway is set out in section 32 of the Highways Act 1980.
- 4.22 The path follows a similar format to other paths within the Walton Summit Estate development linking the various units and roads.
- 4.23 The issue is not whether the route is necessary or safe – it is whether or not it is a public right of way by law, either by express dedication, deemed dedication by intention (inference), dedication through twenty (20) years of use or by dedication at common law.

- 4.24 The OMA contend that it was always the intention for the path to be a right of way for the benefit of the general public, as stated within the letter from English Partnerships, but in any event, it has been in continuous "as of right" use for more than 20 years as evidenced by its users.
- 4.25 A copy of the letter from English Partnerships is provided as **Document 9** in the bundle submitted by the OMA.
- 4.26 The objection has not been withdrawn. Accordingly, the Order cannot be confirmed by the OMA (as an unopposed order) and must be submitted for consideration and determination by the Secretary of State for Levelling Up, Housing and Communities.

5. PROCEDURE

- 5.1 In view of the Secretary of State's guidance booklet, it is not envisaged that an inquiry shall be necessary.
- 5.2 There is only one (1) objector and while some reliance is placed on user evidence supporting this Definitive Map Modification Order, those users will not be able to attend through either ill health or have since deceased.
- 5.3 Therefore the OMA respectfully suggests that the matter is dealt with by way of written representations.

6. TEST FOR CONFIRMATION

- 6.1 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.
- 6.2 In this matter there is no express dedication and so the Secretary of State is invited to consider whether dedication can be deemed under section 31 Highways Act 1980 or inferred at common law from all the circumstances including the use of the route. That said, a letter from English Partnerships gives

some indication as to the intent and purposes of the route and while there is no evidence of the actual dedication, it is strong evidence of the landowner's intention. Finally, the issues of amenity and anti-social behaviour cannot, under the term of the legislation, be taken into account when considering this matter.

7. EVIDENCE OF DEDICATION AS A FOOTPATH

Deeming dedication under s31 Highways Act 1980

- 7.1 Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty (20) years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it...
- 7.2 The period of twenty (20) years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

Bringing into question

- 7.3 The route has to have been brought into question such that users are aware that their right to use the path is challenged. In **R v SSETR ex parte Dorset County Council 1999** Lord Dyson stated that "*Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway.*"
- 7.4 It is submitted that the erection of a notice on the route on 30th June 2006 stating that the route was to be closed on 31st August 2006 was sufficient to bring the route into question and therefore the twenty (20) year period is to be calculated retrospectively from this date for deemed dedication.

The Public

- 7.5 The use of the route has to be in use by the general public, and not to members of the public who belong to a certain group or class. It is submitted that the users giving their evidence in this matter do constitute "the public". They are not

a group of employees or family members and although they are local they can be said to be “the public”.

Sufficiency for 20 years

- 7.6 Use has to be more than just trivial and sporadic and it is submitted that the use in this matter has been sufficient to satisfy section 31 of the Highways Act 1980.
- 7.7 The use has been more than trivial and sporadic during the period 1986-2006 (and perhaps further back). The judgements in **R (Lewis) v Redcar and Cleveland Borough Council and Anor [2010] UKSC 11** confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. Total Cellar Systems acknowledge in one of its letters that it "*did not mind the route being used*" provided that there was no damage being caused, showing that the owner was aware of public use.

Without interruption

- 7.8 It is submitted there was no evidence of interruption to use in the twenty (20) years. Although the landowner claims the footpath was closed on Christmas Day and Boxing Day it is unlikely the path would have seen use on those days, particularly given its ‘commercial environment’. No user mentioned it in their evidence, and it is not known whether this alleged closure was effective in preventing use by the public nor how it was arranged. Similarly the works by the utility companies were not noted by users giving evidence and there is no evidence as whether the works actually interrupted use by the public.

As of right

- 7.9 The use has not been with permission or by force or in secrecy and it follows that the use has been open and apparent. There is no evidence of any signs purporting to make the route permissive in any way other than the one referred to previously, and the owner of the land actually referred to the route as a public footpath.

No evidence of a lack of intention to dedicate

- 7.10 The landowner claims to have closed the route in question on two (2) days of the year – Christmas day and Boxing Day. That aside, it is also claimed the route was closed by utilities contractors but doesn’t specify for what period. It

is submitted that there is insufficient evidence to show a lack of intention to dedicate. The reasonable person would expect a closure for more than just two (2) days of the year, not just on those days on which realistically, it was unlikely to be used. Further, there is no photographic evidence or otherwise to prove this – only the landowner retrospectively claiming to have done so. It follows that there is no or insufficient evidence of a lack of intention to dedicate. On the occasion where the owners did decide to take action in an attempt to close the route, it resulted in action from the local public, strengthening the OMA's submission there was never any prior intention of a lack of dedication.

Inferring Dedication at Common Law

7.11 In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant. For the reasons given by **Scott LJ in Jones v Bates 1938** this is a heavy burden. Further case law on inferring that the owner dedicated from all the circumstances is found in such cases as **Fairey v Southampton CC 1956**, **Mann v Brodie 1885** and **Poole v Huskinson 1843**.

7.12 Halsbury states –

“Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; At common law, the question of dedication is one of fact to be determined from the evidence.

User by the public is no more than evidence, and is not conclusive evidence and any presumption raised by that user may be rebutted.

Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.

Inference of dedication from all the circumstances

- 7.13 Most owners are capable in law of dedicating footpath on their land and dedication by owners can be seen in this matter.
- 7.14 There is clear evidence of ownership of the route and land by the Central Lancashire Development Corporation as part of a new town development, which was later transferred to the Commission for New Towns. While the current owners have challenged the existence of the footpath, English Partnerships have confirmed in their correspondence the route was intended as a passage for public use.
- 7.15 Evidence of intention to dedicate a route for the public on foot from Kellet Lane to Ranglet Road is submitted as follows –
- (a) A letter from English Partnerships (the successor to the Commission for New Towns).
 - (b) The existence of a metal giggle-gaggle on either side of the route prior to reaching the road, so as to protect its users.
 - (c) The existence of other similar paths and routes across the new town development.
- 7.16 Evidence of use of the path is one of the features pointing to an intention to dedicate by the owners. If an owner saw several people crossing his land he would have the opportunity to challenge them. No such challenges have been made in this case with the landowners choosing to clean up rather than block off usage of the path. The use in this matter has been by the public, is sufficient and “as of right” which is still required for inferring dedication at common law.

Usage following the erection of a fence across the path's entire width.

- 7.17 A fence has been constructed along the path's entire width following the making of the Order, probably by the landowner. That fence has been broken, creating a path through. Although it is difficult to negotiate it does evidence the path's regular use. In contrast to the one objection, there have been multiple letters received in support of this modification to the Definitive Map.

8. CONCLUSION

- 8.1 The OMA submits that either:
- (a) through inference of dedication at the time the estate was constructed; or

(b) by way of a dedication deemed to have occurred because twenty (20) years of continuous use followed without any interruption

that a public right of way (being a footpath) subsists along the Order route.

8.2 The OMA therefore respectfully requests the Order be confirmed without any modifications.