

THE LANCASHIRE COUNTY COUNCIL
(RESTRICTED BYWAY FROM CLERK HILL ROAD TO MOOR LANE, WISWELL, RIBBLE VALLEY)
DEFINITIVE MAP MODIFICATION ORDER 2017

**Statement of Case on which the Order Making Authority considers that the
Order should be confirmed**

Background

1. On the 25th May 2015, a member of the public 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"). The effect of the Order would be to modify the Definitive Map and Statement of Public Rights of Way ("DMS") by adding a bridleway from Clerk Hill Road to Manor Road at Steep Cote Farm, Wiswell (shown between points A-B-C-D-E-F-G-H-I on the Order Map) and upgrading to a bridleway of part of Public Footpath No. 8 Wiswell (points I-J-K on the Order Map). The 'evidence discovered' (a necessary condition in S53(3)(c) of the 1981 Act) included map and documentary evidence and letters and user evidence forms ("UEFs") from 21 individuals and a list of names of people who had used the route in the past (Document 20).
2. Two earlier applications made under the provisions of the 1981 Act were submitted to the Order Making Authority ("OMA") in 1985 and considered by in 1987. The first application was to add the current Order route to the DMS as a public bridleway. A second application, submitted at the same time, was for the addition of a public footpath at Wiswell Moor Quarry between three points on the Order route (C-D-F). The OMA's then Public Rights of Way Sub-committee resolved not to accept the first application (relating to the current Order route) on the grounds that the route was already recorded by the OMA as a highway on the List of Streets as Unclassified County Road 4/84. The second application made was accepted and a public footpath (Footpath 23 Wiswell) was subsequently recorded on the DMS and is shown on the current Order plan linking to the Order route between points C-D-F. Use of this footpath is totally reliant on access along the Order route. However, sometime between 1987 and 2006, for reasons unknown, the Order route disappeared from the OMA's List of Streets of highways maintainable at the public expense. Consequent to this, a further application was made. Officers of the OMA duly investigated the 2015 application and prepared a report including their recommendations (Document 22). The report was considered by the OMA's Regulatory Committee on 16th November 2016, where the decision was made to accept the application with modification to recognise historical carriageway rights and to make an Order to modify the DMS by the addition of a restricted byway and upgrading of an existing footpath to restricted byway status and to promote the Order to confirmation as it was satisfied that the higher test could be met (Document 1).
3. Notice of the OMA's decision to make an Order was sent to affected individuals on 13th March 2017 (Document 15).
4. A Definitive Map Modification Order was duly made on 4th October 2017 (the "Order") (Document 1). The Order was made under Section 53(2)(b) of the 1981 Act because it appeared to the OMA that the DMS required modification in consequence of the occurrence of an event specified in Section 53(3)(b) and 53(3)(c)(i) and 53(3)(c)(ii) namely the expiration of any period such that the

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enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a restricted byway, 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, being a restricted byway and also shows that a highway shown in the map and statement as a highway of a particular description, namely a public footpath ought to be there shown as a highway of a different description, namely a restricted byway.

5. Notice of 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 3 of Schedule 15 of the 1981 Act (Document 6).
6. During the specified period for objections and representations to the Order, the OMA received 2 objections (Document 4). The objections have not been withdrawn so the Order cannot be confirmed by the OMA and consequently the OMA is now submitting the Order to the Planning Inspectorate for a determination on confirmation. A further objection was received (from the Byways & Bridleways Trust) after the specified period for objections.

The Order Route

7. The Order route is shown by a bold green dashed line on the Order plan between points A-B-C-D-E-F-G-H-I-J-K. The route is described below with reference to how it appeared when a site inspection was carried out by the OMA in 2015.
8. The Order route commences at a point on the parish boundary on Clerk Hill Lane (also recorded as Bridleway 21 Sabden) and annotated as point A on the Order plan. It crosses a tarmac area heading in a north westerly direction to a wooden gate at point B.
9. It then continues in a north westerly direction along a stone surfaced track bounded to the west by a stone wall and fenced from the adjacent field to the east. At point C, the route turns to follow the stone surfaced track in a more north easterly direction whilst the route of Footpath 23 Wiswell continues steeply uphill remaining adjacent to the stone wall. The route follows the clearly defined track uphill through the quarry site (now dormant) through a series of bends and passing through point D (where it crosses the route of Footpath 23) and continuing uphill to point E where it is joined by Footpath 11.
10. From point E, it continues along a well-defined track in a generally westerly direction to a gate at point F where it is joined by Footpath 23 east of the gateway and Footpath 9 west of the gateway.
11. From point F, the route continues in a generally west south westerly direction in a straight line to the north of a stone wall behind which there is a substantial area of woodland. The surface of the route has grassed over but is quite firm and there appears to be a firm base. The route is fenced off from the rough pasture north of

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it to a width of between 4 and 5 metres until close to point G when the fencing on the north side of the route ends and at point G the route is crossed by a wooden field gate.

12. Beyond the gate at point G, the route continues in a straight line, following the stone wall along a grassy track.
13. At point H, the route turns to continue in a generally north westerly direction still following a substantial stone wall along the western side and largely open to pasture on the eastern side. It passes between the remains of an old quarry and the wall and gradually descends downhill towards point I.
14. At point I, the route is joined by Footpath 8 which follows the Order route to pass through a metal gate at point J. Beyond point J, the route is roughly tarmacked as it continues a short distance to the unmarked junction with Moor Lane at point K. The total length of the route is 1.14 kilometres.

Legal issues

15. The provisions of the 1981 Act set out tests which must be addressed in deciding whether the DMS should be modified. The OMA made the Order because it appeared to the OMA that the DMS required 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.
16. 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 of a public highway 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 even though Test B was sufficient to make the Order.
17. In the case of *Todd and another v Secretary of State for Environment, Food 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.

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18. 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, is sufficient evidence from which to infer public carriageway rights have been dedicated on the Order route and the route marked A-B-C-D-E-F-G-H-I-J-K on the Order Map should be upgraded/added on the DMS as a restricted byway (mechanically propelled vehicle rights having been extinguished by the Natural Environment and Rural Communities Act 2006 ("2006 Act").

Historical documentary evidence

19. 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.
20. The Order route did not exist until 1780 when a way consistent with it (with the exception of the section C-D-E through the quarry) was created as a private carriageway as part of the inclosure process.
21. Whilst the Order route may have originated as a private carriage way by the 1890s, the full length of the Order route existed on the current alignment and appears to have remained unaltered since that time. Although gated in a number of places, the route appears to have been wide enough to be used by horses and vehicles since its construction in the late 1700s and on the modern day alignment since at least the late 1800s.
22. Finance Act records from the early 1900s suggest that it was considered to be public carriageway at that time.
23. The 1929 handover records show it as part of a longer route linking (and including) Moor Lane and Clerk Hill Lane for which the OMA were responsible for the maintenance after this was handed over from the rural districts in 1929. These maps only showed routes which were numbered in the form 4/84 (where 4=district code and 84=number within that district) as part of the vehicular highways network and the other roads so recorded are now accepted as maintainable as public vehicular roads so it is reasonable to assert a public right of way in vehicles subsisted by 1929 over the Order route.
24. A query raised at the time the Draft Map was prepared in the 1950s as to whether to include the Order route on the Draft Map was rejected because the route was an unclassified county road, which was supported by the then landowners. The status of unclassified road is not generally conclusive of vehicular rights but it is strongly suggestive of carriageway status in this context where the other roads on the handover maps are acknowledged to be vehicular and had it not been vehicular it would have had to be recorded on the DMS.
25. The route was not included on the DMS – even though footpaths 9 and 11 Wiswell were both recorded as terminating at different points along it adding further weight to the fact that on balance the Order route had a higher public status than a bridleway.

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26. The Order route was still recorded as an unclassified road in 1980 when an application to record it as a public bridleway was made and the OMA rejected the application on the grounds that the route was already recorded as a highway on the List of Streets as Unclassified County Road 4/84. The only reason that makes sense for rejecting the application on those grounds were that the Order route's unclassified road status meant that it was a vehicular road.
27. Sometime between 1987 and 2006, for reasons unknown, the Order route disappeared from the OMA's List of Streets of highways maintainable at the public expense resulting in an investigation into the existence of public rights and the making of this Order.

The Natural Environment and Rural Communities Act 2006

28. The Order route was recorded as an unclassified county road from 1929 until sometime after 1987, but before 2006. The effect of the 2006 Act is to extinguish public rights for mechanically propelled vehicles ("MPV") from carriageways which were not recorded on the List of Streets (subject to other conditions which are not relevant in this case). R(Winchester College) V Hampshire County Council [2007] EWHC 2786 (Admin) makes it clear that only where a way *is* on the List of Streets (not simply *should have been* on that List), would exempt the way from the extinguishment of these rights. Accordingly, since the Order route was no longer recorded on the List of Streets, the correct status in is restricted byway and not byway open to all traffic ("BOAT"). Part of the Order route is recorded on the DMS as footpath which also would have resulted in the extinguishment of public MPV rights by the 2006 Act.
29. The effects of the 2006 Act and the omission of the route from the List of Streets around the relevant date in 2006 are such that public MPV rights have been extinguished and restricted byway is the correct status.

User evidence

30. The OMA submit that the Order route is a historical public vehicular route and that inferred dedication can on balance be satisfied. Public rights were called into question in 1985 (when the bridleway application was made) and whilst user evidence was submitted in support of the 2015 application, it is the OMA's case that the Order route was already dedicated as a public vehicular route and that the user evidence supports the view that the route already had public rights.

Summary

31. The OMA consider that the map and documentary evidence is sufficient to conclude that the route is a historical public vehicular road and that dedication can be inferred. It is therefore the view of the OMA that said order route subsists as a restricted byway and should be recorded as such on the DMS (Document 15).

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Conclusion

32. Looking at whether dedication can be inferred on balance at common law, the OMA considers that the map and documentary evidence presented does indicate that the route was dedicated to public use and used by the public as a carriageway.
33. There is no evidence that a legal stopping up of any part of the route has ever taken place. 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.
34. The effect of the 2006 Act was to extinguish public MPV rights leaving only public restricted byway rights (and any private rights created by the 2006 Act).
35. Accordingly, the OMA submits that a restricted byway subsists 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.
36. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to in paragraphs 15 to 18 are 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 without modification.