

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR THE COUNTY OF
LANCASHIRE**

**THE LANCASHIRE COUNTY COUNCIL (DARK LANE, EARBY)
DEFINITIVE MAP MODIFICATION ORDER 2018**

Order Making Authority Statement of Case

Background

1. On 30th November 2009, Betty Brayshay on behalf of the Trawden Forest & Border Bridleway Association 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 recording a public bridleway, along part of Birch Hall Lane, Footpath Earby 38 and Dark Lane to County boundary.
2. The application was supported by map and documentary evidence including: Extract of the Revised Definitive Map (First Review); Extract of the Thornton Inclosure Award Map 1825 and transcript of the Inclosure Award; Area Highways Map; Ordnance Survey (OS) Map dated 1839; OS Map dated 1913; OS Map dated 1940; Public Rights of Way Schedule 1949; OS Map dated 1954; OS Map dated 1956; OS Map dated 1971; Notes on Dark Lane by H Tattersall; Multi Map 2005; Photographs of the route; and Evidence Forms.
3. Additional evidence was submitted at a later date: OS Map dated 1940; Jeffrey's Map 177; John Tuke Map 1787; Greenwoods Map 1834; OS Map 1840 reprinted by David Charles; Hobson Map 1844; 6 inch OS map published 1845; 6 inch OS map published 1892; H Speight Map published 1900; 1 inch OS Map published 1912; and Scarborough's Map of Yorkshire, 1913.
4. 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 together with their recommendation that the application should be accepted in part (Document 21). The report was considered by the OMA's Regulatory Committee on 15th November 2017 where the decision was made to modify the DMS by recording a bridleway along the route now shown as A-B on the Order Map. The Committee

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however declined to modify the DMS to show the remainder of the application route as a bridleway because it was a tarmac road recorded as an unclassified publicly maintainable highway on the List of Streets.

5. 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 21st December 2017 (Document 64).
6. A Definitive Map Modification Order was duly made on 28th March 2018 ("the Order") (Document 1). The Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 because it appeared to the OMA that the DMS of Public Rights of Way for the County of Lancashire required modification in consequence of the occurrence of an event specified in Section 53(3)(c)(i) namely the discovery by the 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 bridleway.
7. 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 (Doc).
8. During the specified period for objections and representations to the Order, the OMA received five objections (Document 4).
9. 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

10. The Order route known as Dark Lane runs from the end of Birch Hall Lane (U40026) and junction of Footpaths 32 and 38 Earby at point A on the Order Map, along an enclosed track varying between 3 and 4 metres wide

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in a generally easterly direction for approximately 240 metres to the County boundary at point B.

Legal Issues

11. The provisions of the 1981 Act 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)(c)(i) 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 bridleway.
12. The provisions of the 1981 Act 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 deletions as well as additions to the map. 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.
13. 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.
14. Accordingly, for the Order to be confirmed, the Inspector needs to be satisfied that, on the balance of probability, the evidence considered by

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the OMA, *when considered with all other evidence* there is sufficient evidence from which to infer a bridleway was already dedicated on the Order route and the route marked A-B on the Order plan should be added to the DMS as a bridleway on the DMS.

Evidence

15. 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 and it is therefore necessary to look at the evidence as a whole over a long period of time.
16. The map evidence supports the view that the Order route between points A-B is known historically (and still today) as Dark Lane and the site evidence clearly supports the view that it is a very old (sunken) route. It is not currently accessible due to fencing and overgrowth but if cleared of overgrowth would be wide enough for horses and small carts to use.
17. There is a significant body of both map and documentary evidence supporting the physical existence of the route since at least the early 1800s and a degree of conjecture that it had existed for a long time prior to that. The route did not appear to be a significant or primary route from Earby, if travelling east and routes to the north and south of the Order route are shown consistently on the early commercial maps suggesting that they, and not the Order route, provided the main public vehicular routes east to west. This may, in part have been due to the fact that the continuation of the through route beyond point B crossed open moorland and was less convenient for use by the public.
18. The Order route is clearly shown on an 1825 map produced as part of the Inclosure process but was not created as part of the Inclosure process. Its inclusion on the map of the township, in the same manner as other routes which now have public vehicular status suggests however, that it existed and was capable of being used on horseback and possibly by horse and cart at that time. In addition, the route is clearly shown as a substantial

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through route on the reprint of the First Edition (Old Series) Ordnance Survey 1 inch map surveyed circa 1840 and published by David Charles.

19. The full length of the Order route is clearly shown on all editions of the OS mapping from 1840 through to the current day as part of a longer route, connecting public vehicular highways and providing access to a number of properties and is consistently named on the maps (Dark Lane) suggesting that it would have been capable of being used by the public on horseback and possibly with horse and cart. In addition, details included in the Ordnance Survey Object Names Book obtained from The National Archives describe the Order route (and the continuation of the bounded section east) as a lane with details checked by a representative from Earby Urban District Council.
20. The Order route is shown in the same way as the public highway network on an auction plan dated 1857 with land on either side of the route being sold – but not the Order route itself. The Order route is then shown on a series of commercially produced small scale maps produced in the late 19th and early 20th Century suggesting possibly that the route had become better used during that period.
21. The whole of the Order route was excluded from the numbered hereditaments on the Finance Act plans which is good (but not conclusive) evidence of a route considered to carry public vehicular rights and ties in with the fact that the route was maintained by Earby RDC as a 'road' in the 1920s and that a boundary stone was placed within it (at point B). The route beyond point B is also excluded up to the point where the bounded route met a gateway and continued as an unenclosed route across the open moor.
22. When the Definitive Map was prepared in the 1950s, the Order route was not recorded suggesting that Earby District Council either considered the route to be private or that it was a public vehicular route which would not be recorded on the DMS. There are references in the Definitive Statements to footpaths meeting Dark Lane (FPs 30 and 31 Earby) or running parallel to Dark Lane (FP 32 Earby) suggesting that Dark Lane was

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considered to be a road of some sort and consistent with the information identified which provided details of Dark Lane being maintained by Earby Urban District Council as a road.

23. Details of use by six individuals was submitted as part of the application with information regarding use of the route dating back to the early twentieth century. 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. However, the information provided gives a valuable insight into local use of the route one hundred years ago and the reasons why use declined and the sunken lane became overgrown.

Summary

24. Whilst there is no express dedication in this matter, the OMA considers, on balance, that there is sufficient evidence from which to have dedication inferred at common law from all the circumstances.

25. The OMA considers that the various map and documentary evidence does, on balance, indicate that the route was dedicated to public use and used by the public and that it was a historical public route available as a bridleway since at least the early 1800s.

26. The OMA affirms 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.

27. The OMA considers that there is sufficient evidence of a bridleway.

28. 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.

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Conclusion

29. The OMA submits that public bridleway 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.
30. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in paras 11-14 is met. The objection received does 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.