

THE LANCASHIRE COUNTY COUNCIL
FOOTPATH AT AYREFIELD ROAD AND AYREFIELD HOUSE, UP HOLLAND
DEFINITIVE MAP MODIFICATION ORDER 2019

Lancashire County Council's (the Order Making Authority – 'OMA') Comments on Objections

Two duly made objections to the Order have been received by the OMA.

Copies of the objections are contained within the List of Documents (Document 4) and are summarised below.

Mr Michael Grant of Ayrefield House, Ayrefield Road, Roby Mill, Wigan WN8 0QP

The points of objection are summarised in bold italics below with the OMA's response after each as follows:

Why is it proposed to put a route through a private garden?

The Order has been made to record a public footpath along the route A-B-C-D because the OMA (Order Making Authority) consider that there is sufficient evidence to show that this route already exists as a public footpath in law, but that it had not been legally recorded as one. As such, the OMA do not propose to create a 'new' route through the land now described as a private garden (between points B-C-D on the Order Map) but are seeking to record public rights that already exist.

Why is there only one pond shown on the Order Map and why is it proposed to locate the route through a pond which will render the route unpassable for a large part of the year?

It is noted by the OMA that the Ordnance Survey (OS) base map used to prepare the Order Map only shows one pond. However, map evidence suggests that there have not always been two ponds. The First Edition 25-inch OS map surveyed in 1892 and published in 1895 only shows one pond and clearly shows the Order route between points B-C-D partly enclosed to a width similar to that of Ayrefield Lane and partly an open track.

The map and documentary evidence considered by the OMA in conjunction with the user evidence detailing use of the Order route suggests that the Order route did not go through a pond and the fact that the second pond is not shown on the Order Map does not affect the validity of the Order itself.

The OMA are not seeking to create a 'new' route through the pond referred to by the objector and should the Order route now be impassable at times due to the more recently created, enlarged or altered pond, then this will need to be addressed should the Order be confirmed.

The objector believes that there has never been a footpath through the garden with uninvited public access

Consideration of the confirmation of this Order must be based on evidence rather than preference or belief of supporters or objectors. The OMA is aware that the objector purchased Ayrefield House jointly with Mr Andrew Grant in 2013. Assuming that prior to purchase, the objector was unaware of the history of the Order route and lived somewhere that did not have views of the Order route, the objector only has first-hand knowledge of the public's use (or not) of the Order route from 2013 onwards. No evidence has been submitted by the objector to support an argument that the route had not been dedicated as a public footpath prior to 2013.

Unreliability of the user evidence

The OMA made the Order based on the information available to it and considers that the historical map and documentary evidence is sufficient on its own to show that the route had already been dedicated as a public footpath.

It is the OMA's view that the modern user evidence submitted as part of the application to record the route as a public footpath supports the view that the route already had public rights.

Should there be any doubts with regards to this assertion then it is open to the Inspector to consider the modern user evidence in its own right and since making the Order additional members of the public have provided further user evidence in relation to the Order route (Documents 47 through 51).

Whilst it is recognised that there are many different reasons for making, supporting or opposing the Order, the OMA has no reason to believe that any of the evidence provided either before or following the making of the Order has been fabricated or exaggerated.

No statements have been provided to the OMA either before or after the making of the Order asserting that the Order route was not used by the public prior to the objector purchasing the property in 2013 and the OMA consider that the necessary legal tests to make and confirm an Order to record the Order route as a public footpath on the basis of deemed dedication of a historical route or statutory dedication of a route used by the public have been met.

Mr Andrew Grant of Ayrefield House, Ayrefield Road, Roby Mill, Wigan WN8 0QP

The objector provided a two-page letter containing three objections supported by a further 12 page document listing numbered points in relation to each of the objections:

Objection 1 – 1 - 11 numbered points

Objection 2 – 1-85 individually numbered points

Objection 3 – 1 – 9 individually numbered points

In addition, 10 no. exhibits were also included.

The OMA do not consider it necessary to address every individual point separately and have grouped some together in the response provided below.

Objection 1 (with reference to numbered points 1-11)

The correct statutory procedure has not been followed in issuing the Modification Order and the County Council has erred in law in accepting the application and making a Definitive Map Modification Order.

Having reviewed the application prior to the Order being made, the County Council, as Order Making Authority ("OMA"), identified an initial error made by the applicant in serving notice of the application. The applicant served notice on Andrew Grant and David Grant as joint owners whereas it was identified, following Land Registry checks, that Andrew Grant owned the land together with Michael Grant. This error was rectified by the applicant and Michael Grant was served with notice of the application on 18 September 2018.

In addition, following the Land Registry checks carried out by the OMA, the applicant also served notice on the owners of Ayrefield Hall on 18 July 2018.

Further, because some of the land affected by the application was not registered (and ownership unknown) notices addressed to landowners/occupiers were also erected on site by the applicant on 31 August 2018.

The OMA therefore confirm that the requirements to serve notice to be found in Schedule 14, subparagraphs 2(1) & (2) have been met by the applicant, albeit over the course of a few months and the application is considered to have been duly notified.

With regards to the 'Certificate of Service' requested by the objector, it is not uncommon for the initial certificate provided by an applicant to be followed by a request from the OMA for the applicant to serve notice on additional landowners/occupiers and/or for them to be directed to erect site notices on unregistered land. Provided evidence that this has been done has been obtained from the applicant we can be confident that the notification has been completed. It is not necessary to submit a second, updated 'Certificate of Service', in order to make the application or the notification of the application valid although the absence of a valid certificate means certain other events may not be triggered.

In practice, the relevance of meeting the criteria for the notification of an application to be considered to have been duly certified is only of significance where the applicant seeks to rely on their particular rights as applicant, such as the right of appeal where the OMA decides not to make the Order.

Furthermore, fulfilment of the requirements of Schedule 14, or indeed an application, is not necessary where the OMA discovers evidence, whether prompted by an application or otherwise, which triggers a duty to investigate all

relevant evidence and to make an Order where the evidence, on balance, shows a public right of way to subsist.

Regardless of whether or not there was a duly made application, it was the correct decision to make the Order because on the balance of probabilities taking into account all evidence available to the decision makers a public footpath subsists along the Order route.

Having reviewed the objections made, and considered the additional information provided by the objectors and other interested parties, the OMA are still of the view that the statutory tests for the confirmation of the Order are met and that the Order should be confirmed.

Objection 2 (with reference to numbered points 1 – 85)

The decision to make the Order was made without all relevant information and having taken all the relevant information into account the decision should have been not to make an Order. The objector makes a number of specific points relating specifically to the information included in the Regulatory Committee report dated 30 January 2019 (Document 21) and expands upon his objection in an enclosure appended to it.

As part of the OMA's duty a thorough, unbiased investigation is made of all available evidence by experienced officers who look at a series of maps and documents and any other information made available to them.

The objector makes specific reference in the enclosure submitted with his objection letter to the information provided in the Regulatory Committee report dated 30 January 2019 under a number of cross-referenced headings. Comments on the points raised by the objector are addressed below headed in the same way:

'Background' – objector's provision of historical landownership information - points 1 to 7

The history of the ownership of the land, provided by the objector, is accepted at face value as useful context but does not provide any additional information that would alter the OMA's original decision to make the Order or the view that the Order should be confirmed.

'Background' - no information from landowners was included in the report to Committee – point 9

The OMA writes to all known landowners, consultees and other interested parties giving them the opportunity to submit information at the start of the process.

Such an opportunity was given to the objector although his responses, and the replies provided by the OMA, primarily addressed landownership and the objector's concerns over the application process.

Although it is preferable for information to be provided by affected parties at this early stage in the process (i.e. before the decision is made to accept or reject an application) it is not the only opportunity for information to be submitted. It does, however, greatly assist the OMA in coming to a decision as to whether or not an Order is to be made. If information has been submitted by landowners or interested parties, the relevant (in terms of the legislation) parts of this information is included in the report and considered as part of the decision-making process.

The information that has now been provided by the objector has been carefully considered by the OMA but does not alter the OMA's view that the statutory tests for making and confirming the Order have been met and that the Order should be promoted to confirmation.

'Description of the route' site description and the signage – points 10 to 36

It is the normal practice of the OMA to include details of a site inspection in the report presented to the Regulatory Committee. The site inspection can be an important part of the investigation allowing the Investigating Officer to see the route in context of the surrounding area and connecting routes.

The site inspection is taken in the context that it shows the Order route at the time of inspection and not necessarily as it may have looked in the past – or how it may have looked prior to use of the route being challenged.

Site inspections can however assist to verify whether the application route could have been used in the past on the alignment claimed, provide evidence of historical features or assist in understanding where users were going to and from.

In this case, it is use of the route pre-dating 2014 that is relevant to whether the route has been dedicated as a public footpath.

Photographs of the Order route were taken by the OMA in 2014 following complaints from the public that the route had been obstructed by felled trees close to point D and that signs had been erected at point B. The original report to the OMA Committee assumed that the obstruction and signs were on the route of Footpath Up Holland 2 and effectively brought to the attention of both users of the route and the OMA, that the Order route between points B-C-D was not recorded as a public footpath.

The photographs referred to in the committee report were shown to Committee Members as part of a PowerPoint presentation.

References to these photographs, the signage and obstruction by the felled trees (first reported to Lancashire County Council in 2014) were included in the report because although the application to record the route as a footpath was submitted in 2018, they were identified as being relevant to the question of when the public status of the route was brought into question (which forms part of the statutory test for dedication of a public right of way under the Highways Act 1980 Section 31). It does not appear to be a matter of dispute, and is indeed

confirmed in part by the objector, that this was the situation in 2014. The OMA's advice to the objector is correct in that it prevents dedication being presumed or inferred from use by the public from that time, but it does not have retrospective effect except in limited circumstances.

Point 16 refers to the property search carried out in 2013 prior to the objector purchasing land crossed by the Order route. This correctly advised that there was no public right of way over the Order route recorded on the Definitive Map but that Footpath Up Holland 2 was shown as ending at the boundary of Ayrefield House (point D on the Order Map). It is important to note, as the objector does in point 16, that the search did not show that there were no public rights of way, only that there were none recorded on the Definitive Map. This is not evidence that the Order route did not exist as a public footpath at that time. The OMA would not necessarily have been aware of the existence of unrecorded public rights when the status of the route was queried and the objector comments that the vendor did not confirm '*either way*' the existence of the path.

Points 13 & 14 refer to signage at point B stating that the Order route was a private footpath. The objector states that the larger sign was installed by himself in 2014, but that the smaller signs had been in existence 'for a number of years'.

There appears to be some discrepancy with regards to the signage. The OMA are still under the belief that the challenge to the status of the route dates from 2014 when the OMA inspected the route following reports about the erection of signage and a tree obstructing the route. A photograph taken in 2014 shows what appears to be a newly erected stile at point B and a small 'Private Footpath' sign which appears to have been recently erected (it is neither faded or weathered and the nails holding it in place are not weathered). Furthermore, the complaint from a local resident about the small 'Private Footpath' sign was in July 2014.

The larger signs were in place when the route was re-inspected in 2018 and at some point between 2014 and 2018 it appears that the stile at point B was replaced by a pedestrian gate and the larger sign erected.

In Point 18 the objector explains that when the land was purchased in 2013, the vendor had been unable to confirm '*either way*' the existence of the path. Taking this to be correct, then it appears unlikely that the small 'Private Footpath' notices existed at point B prior to the sale of the land in 2013 which accords with their new appearance in 2014. The OMA remain of the view that the relevant effective challenge to the public status of the route was in 2014.

Points 20-23 relate to why the larger signs currently in place were erected at points B and D and points 25-35 explains what work was carried out, following the purchase of the property, to clean out and re-instate two ponds and to fell a number of trees. Whilst this is useful information in explaining what has happened on site since 2013-2014, it is not relevant to whether or not the Order

route was already a public footpath in law prior to that time and whether the Order should be confirmed.

Point 36 points out that the landowner received no complaints about the route being blocked because of the felled trees or any other reason. However, such complaints would not usually be made direct to the landowner but to the OMA who did in fact receive a complaint about the trees, the stile in place of the gate, the 'private footpath' signs and the public footpath sign being turned round (to point back down Ayrefield road). The OMA did not pursue it with the landowner at the time because it was discovered that this section of footpath was unrecorded and it was first necessary to establish its legal status.

Objector's comments on the 'Map and Documentary Evidence' section of the Regulatory Committee report – points 37 -60

The OMA consider that whilst there is no one single piece of map or documentary evidence which on its own is sufficient to confirm the existence of a public footpath along the full length A-B-C-D there is a body of evidence spanning a period of over 200 years which, when taken as a whole, builds up a picture of the origin, history and likely use of the route as part of a longer route and from which it can be inferred that public rights, at least on foot, exist.

The OMA look at a series of maps to try to determine when a route, or part of it, came into existence and also the likely the status of a route.

In point 40 of the objection it is submitted suggests that the road to the south-east from Ayrefield House petered out and therefore Hennet's Map does show cul de sac to private residences contrary to what was stated in the Committee Report. The main point made by the OMA in relation to Hennet's Map of 1830 is that the Order route A-B physically existed as a substantial route at that time that appeared capable of being used by the public. The route B-C may have existed as a lesser route as footpaths were rarely shown on such small-scale early commercial maps and the OMA looked at all available maps to start to build up a picture of the likely use of a route, even where construction was initially to provide a specific purpose i.e. to a private house, farmland or a coal mine for example.

An examination of the Ordnance Survey 1st Edition 6 inch sheet surveyed in 1845-6, only 15 years after Hennet, shows that the road actually continued from where Hennet stops showing it near Dean Lock (not named on Hennet) south then west to Whitley Road via Ayrefield Wood/Walthew Green or via Lower Dean (2 routes) and south via Dean Wood to Jackson's Lane (near Orrell House) illustrating the need to look at all available evidence to see how land was mapped and how routes developed.

Point 42 suggests that the OMA Committee report refers to the absence of a gate to prove public rights. This is a misrepresentation of what the report says; the quote was taken from the observation entry which simply describes what the map shows, not from the comments entry which draws conclusions from those observations. The relevance of the observations is that they build a

picture of the use of this route over time. Taken in isolation, the existence or otherwise of a gate across a route is neither evidence for nor against the existence of a public right of way.

Points 43-45 argue that the repositioning of the tracks further from the residence could have been to provide privacy from agricultural access rather than public use. This is true and the report does not speculate which it was from that alone although the guide post on the 1st Edition OS 25 inch map, and another a little further north on the 2nd Edition 25" sheet, would not be necessary if the route was only used for agricultural access.

In point 46 the objector refers to the deduction of £10 made as part of the Finance Act Valuation for the land crossed by the Order route B-C-D suggesting that this reduction related to the existence of a private easement and did not imply public rights. The OMA do not dispute this and this information was clearly set out in the Committee report where it was also stated that from the information available (in 1910) the owner of the land B-C-D did not acknowledge the existence of public rights. This is not, however 'conclusive' evidence regarding the existence or otherwise of public rights either before or after the 1910 valuation or indeed at the time that the valuation was actually carried out.

Point 59 argues that the depiction of the Order route on the OS maps should be interpreted as being a private road not a public footpath. The OMA would argue that this is not a simple either/or situation but that frequently private vehicular or equestrian access was, and still is, shared with a public footpath. It makes sense that often the route on the ground most accessible for private access is also the most accessible for public use.

Point 60 suggests that there is inconsistent information from different council departments. It is true that inconsistent information about the 'adopted' highway status has been given, but it was the purpose of the Committee report to present and, where possible, to explain that information, not hide it. However, it is important to understand the distinction between the Highways Service's records which are concerned with public maintenance liability for (primarily but not exclusively) vehicular ways and the Public Rights of Way records which are primarily concerned with rights rather than maintenance liability. This leads to an often apparent, and sometimes actual, disconnect. The evidence relating to A-B is different to that relating to the remainder of the Order route linking to the route recorded as Footpath Up Holland 2. The OMA consider that the map and documentary evidence, together with the user evidence, shows that on balance a public footpath exists and that it should be recorded on the Definitive Map and Statement.

Objector's comments on 'Other Information' included in the Regulatory Committee report – points 61 - 80

In point 61 the objector questions the OMA's comments in the report that the Order route, as described in walking leaflets published by the parish council,

was a public right of way, stating that the towpath was not a public right of way. However, the OMA would clarify that this is not what the report says – it describes the route, and refers to the Parish Council's view, that they included the route in the walk leaflet because they believed it to be a 'public route'. That is normally understood to include not only public rights of way but also other public access such as where the land or path is managed by a body with a statutory, commercial or charitable purpose to provide public access or where there is a permissive agreement in place or other long-term *de facto* access. Since the Transport Act 1968, which initiated the Inland Waterways Amenity Advisory Council, British Waterways (who were responsible for the canal network at the time of the leaflet's publication) sought to make towpaths, not only canals, accessible and visitors were encouraged as walkers not only boat users.

Points 64-71 refer to the alleged behaviour by a Mr Hilton. Whilst the reported behaviour may be unacceptable it does not mean that the person concerned has no knowledge of the path or is unable to provide evidence concerning it.

References are made in points 72, 73 & 75 to features in existence after 2013. As the public rights were challenged no later than 2013 or 14, the existence of anything after the date of that challenge does not assist in determining the public rights prior to that.

Comments were also made in points 62-78 regarding the validity of the user evidence. It is the OMA's view that the user evidence supports use of the Order route and confirms that the Order route shown on the map and documentary evidence was capable of being used on foot and was actually in use by the public. As far as the OMA is aware, there is no reason to believe that the user evidence submitted has been fabricated and/or exaggerated and since the making (and advertising) of the Order a further six individuals have submitted user evidence in support of the Order. However, should the objections not be withdrawn and if considered necessary, this evidence can be tested and considered by the Planning Inspector.

In point 79 the objector explains that he has had discussions with people who previously worked at Ayrefield House and that the route was not maintained or intended for public use. The objector provided no further details of who these people were and no written statements. Whilst the OMA acknowledge that anyone making this statement may have some certainty that they personally never carried out, or were asked to carry out, work explicitly for the purpose of maintaining the route for the public, it is most unlikely that they could know that *at no point* was any such work done, particularly bearing in mind that the Convent occupied the property for about 100 years.

In point 80 the objector refers to a photograph included in Sales Documents of the Order route between point B and point C. Without seeing the photograph, it is difficult to comment but it should be noted that the OMA has not suggested that there was 'heavy usage' of the Order route, merely that the evidenced

public use together with the documentary evidence shows the existence of public rights on the balance of probabilities.

'Additional information, not included elsewhere' – points 81-83

The temporary closure of the footpath for removal of the asbestos roof in 2013, referred to in paragraphs 81-83, was discussed with the OMA at the time. The enquiry was made by a Ray Grant (it is not known whether he is related to the Grants who had just become owners of the property). The OMA replied that if the work could be undertaken over a short period of time or if a 'small local diversion' of 'a few metres' could be arranged no formal closure would be required. Details of the fees for a 6 month temporary closure were provided in case this was not possible. The fact that there was the enquiry made to the Highway Authority about closing the footpath suggests an awareness of the likely public status. However, the body of evidence suggests this is a public footpath dating back some years and information regarding action taken by the landowner to close the Order route between point B and point D since acquiring the property in 2013 is not relevant to whether it had already been dedicated as a public footpath prior to that time.

The objector argues that at no point did he receive complaints about the Order route being closed off or diverted when work was being carried out post-2013. The OMA would argue that in our experience it is rare that complaints about such matters are made to the landowners, especially where people can see that work in progress means there is a good reason for it or where they can use a convenient alternative. Reports of the public use of the route being prevented were however made to the OMA and to the Parish Council which prompted the application to record the route as a public footpath.

Objection 2 – 'Conclusion' written in the Regulatory Committee report – points 84 and 85

At the time that the Regulatory Committee report was prepared the investigation carried out by officers was neutral and looked at all available evidence to determine whether to make a recommendation to accept or reject the application and to make an order or not. The OMA did not make the assumption that the route under investigation (the Order route) was or was not a public right of way and the report to Committee presents evidence both for and against making an Order. Members of the Committee make the decision after considering the comprehensive report and having had the opportunity to question officers about it. Not all applications are accepted.

In this particular case officers of the OMA considered that there was good evidence on which to make the Order and to promote it to confirmation. The Regulatory Committee considered the matter and decided to follow the recommendation.

The issues raised in point 85 of the objection (the existence of a long and un gated access track to Ayrefield House) are not particularly important pieces of evidence. It is the totality of the evidence including the connection to the

footpath recorded as Up Holland 2 (at the point where the guidepost was marked on the 1890s Ordnance Survey map) which has led the OMA to the conclusion that a public right of way exists on the Order route.

The OMA, having carefully considered the totality of 'Objection 2', do not consider that any further evidence has come to light suggesting that the decision to accept the application and make an order was wrong or that the Order should not be promoted to confirmation.

Objection 3 – with referenced points 1-9)

The detail included within the Modification Order is not possible to be implemented or is unacceptably onerous or vague.

The issue of the width of the Order Route between point A and point B (3.5 – 7 metres) is raised in points 3 & 4. The width is not a matter of convenience or consideration of future management (which can in any case be taken care of by other mechanisms as the objection states), but the width over which the rights subsist. The presumption is that use has occurred over the full width of the track as the public have not been constrained to part of that width. The OMA is not aware of any evidence to rebut that presumption.

The description and alignment of the footpath across the 'open area' between B-C-D is questioned in points 5-7 including the fact that the line shown passes through the edge of the pond and the width is greater than that available to the east of the pond. The Order, as a matter of law, has to reflect the line and width shown by the evidence of dedication rather than reflect a more pragmatic outcome. The shape and size of the pond and whether it had sufficient water to be considered by the surveyor as a pond has varied over the years but the eastern edge has never been as far east as it currently is since the work carried out post-2013. The width in the Order reflects that shown on the maps historically. However, it should be noted that on looking again at this issue, the OMA has realised that it made an error in relation to the grid references and will be seeking a modification to the Order to reflect this.

Under the 'Other particulars' section of the Order, the width varying between 4.5 and 2.5 metres is incorrectly stated to start at Grid Reference SD 5265 0763 (which represents point C on the Order Map). This width in fact starts at point B which is SD 5257 0763. It will therefore be necessary to seek a correction of this error by requesting that the Planning Inspector modifies the Order to record the width of the Order Route as follows (the only change being requested is that underlined):

SD 5229 0758 to SD 5257 0763 – Width varies between 3.5 and 7 metres.

SD 5257 0763 to SD 5267 0760 – Width varies between 4.5 and 2.5 metres.

For the avoidance of doubt, these measurements equate to the Order route between points A-B on the Order Map being 3.5 to 7 metres wide and between points B-C-D being 4.5 to 2.5 metres wide.

In point 8 the objector argues that the description of the section of Footpath Up Holland 2 unaffected by the Order, i.e. south and east of point D, is less precise and refers to features which no longer exist. However, it is the view of the OMA that under the relevant legislation the Order can only modify the Definitive Statement in relation to the additional section of Footpath to be recorded. There is no provision (when considering the addition of A-D) for the rest of the Statement, describing the route south of point D, to be altered without further research and another Definitive Map Modification Order.

Point 9 refers to the impracticalities of the outcome if the Order is confirmed. Discussions have already taken place between the OMA and objector explaining the procedure whereby he could apply to divert the footpath out of the garden or around the pond if the Order was confirmed and he wished to consider re-routing the path rather than reinstating it along its original line.

Conclusion

The OMA submits that the objections received do not in any way undermine the evidence that the Order route is, on balance, already a public footpath in law, and respectfully requests that the Secretary of State confirms the Order subject to the request to modify the wording in part 2 of the Order (as detailed above and also in the OMA's Statement of Case.)