

**THE LANCASHIRE COUNTY COUNCIL  
ADDITION OF FOOTPATH FROM HODDER STREET, ACCRINGTON  
DEFINITIVE MAP MODIFICATION ORDER 2022**

**Statement of Case**

**Background**

1. On 13<sup>th</sup> October 2021, Ms Cathy Smith 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") to modify the Definitive Map and Statement of Public Rights of Way ("DMS") by adding a footpath from Hodder Street (adjacent to No. 48) to a footpath from Arden Hall Playing Fields (Footpath 11-1-FP49).
2. The application was supported by map and documentary evidence including: a graph showing footpath usage captured on 15<sup>th</sup> September 2021; letter detailing use of the footpath by Hyndburn Borough Council Grounds Maintenance employee; copy of photograph from approximately 1984 showing access to the footpath from Hodder Street; 2x examples of the path marked on National Walking Online App. (Alltrials and Outdoor Active); Aerial Google Earth image of footpath; copy of crime statistics for area confirming the presence of the footpath does not attract anti-social behaviour; photograph of the application path showing no signs in place as a 'permissive path' or other, nor any barriers; Ordnance Survey map showing path clearly marked as a route; petition signed by 506 people who wish for access to be protected and a total of 53 completed user evidence forms detailing use of the route.
3. 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 and recommendation that the application should be accepted (Document 21). The report was considered by the OMA's Regulatory Committee on 22<sup>nd</sup> June 2022 where the decision was made to make an Order in accordance with the application and subsequent investigation but requested that the matter be brought back to them once the Notice of Making had been served and the notice period

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elapsed, to decide whether a higher status than footpath should be recorded.

4. Notice of the OMA's decision to make an Order was sent to affected individuals on 2<sup>nd</sup> August 2022 (Document 15).
5. A Definitive Map Modification Order was duly made on 21<sup>st</sup> September 2022 ("the Order") (Document 1). The Order was made under Section 53(2)(b) because it appears to that authority that the Definitive Map and Statement of Public Rights of Way for the County of Lancashire required modification in consequence of the occurrence of an event specified in Sections 53(3)(b) and 53(3)(c)(i) 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 in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, namely a public footpath.
6. 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 (Document 6).
7. During the specified period for objections and representations to the Order, the OMA received one objection (Document 4).
8. The making of the Order and the statutory objection period gave everyone the opportunity to make further comment. The OMA received no information suggesting that rights of a higher status than footpath should be recorded and the matter was returned to the OMA's Regulatory Committee on 25 September 2024 where it was decided that the OMA support the confirmation of the Order to record a public footpath when the Order was submitted to the Secretary of State for Environment, Food and Rural Affairs (Document 35).
9. The objection to the Order has not been withdrawn, so the Order is opposed and cannot be confirmed by the OMA. Consequently, the OMA

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is now submitting the Order to the Planning Inspectorate for a determination on confirmation.

### **The Order Route**

10. The Order route is in Accrington, in the District of Hyndburn and is shown on the Order Map between points A-B as a bold broken line.
11. The Order route extends from a point on Hodder Street, Accrington, opposite 85 Hodder Street (point A on the Order Map) and runs in an approximate south east direction along a rough track close to 48 Hodder Street to meet a public footpath (11-1-FP49) at point B on the Order Map; a total distance of 25 metres.
12. The width of the route varies between 4.5 and 6.5 metres.
13. Photographs of the Order route are included in the OMA's submission (Documents 27 through 34).

### **Legal Issues**

14. For the Order to be confirmed, the Inspector needs to be satisfied that, on the balance of probability, the evidence discovered by the OMA, when considered with all other relevant evidence, is sufficient to show that a public footpath that is not shown on the DMS subsists along the Order Route and that the DMS requires modification.
15. 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)(b) and S53(3)(c)(i) namely the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path *and* 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 footpath.

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16. The relevant statutory provision in relation to the dedication of a public right of way is Section 31 of the Highways Act 1981 (the "1980 Act"). Section 31 provides that where a way has been actually enjoyed by the public, 'as of right' and without interruption, for a period of twenty years prior to its status being brought into question, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate a public right of way.
17. Should the test for deemed dedication under section 31 not be met, consideration should be given to whether a dedication of highway can be inferred at common law. This requires consideration of three issues – (i) whether the landowner had the capacity to dedicate a highway; (ii) whether there was an express or implied dedication by the landowner and (iii) whether there has been acceptance of the dedication by the public. Evidence of use of a way by the public may support an inference of dedication and may also show acceptance of the dedication by the public. The evidence in support of the dedication of a right of way under common law may relate to a different period to that identified for the purpose of statutory dedication.
18. 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.
19. 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,

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the Secretary of State is only able to consider whether on the balance of probabilities the right of way subsists.

**Evidence**

20. The OMA considered on balance, whether there was sufficient evidence from which to have the Order route's dedication inferred at common law from all the circumstances or for the criteria in section 31 Highways Act 1980 for a deemed dedication to be satisfied based on sufficient twenty years "as of right" use to have taken place ending with this use being called into question.
21. Ownership of most of the land crossed by the Order route changed in 1997 (Land Registry title LA806323) (Documents 36 and 37) and was subsequently registered under the joint ownership of Mr Thomas Cornthwaite and Mrs Susan Cornthwaite (now deceased). The current landowner does not reside on or near the land crossed by the Order route and has objected to the Order.
22. The previous owner of that part of the land is understood to have been a Mr Herbert Smith but no further information has been found about Mr Smith.
23. The remaining section of land is in the registered ownership of Westdale Lancashire Limited (LAN180441) (Documents 38 and 39) who have owned that part of the land since 2016. Ownership prior to that time is unknown.
24. The OMA assert in the first instance that the Order route has been dedicated as a public footpath under common law prior to 1997. Inference at common law requires sufficient evidence on balance of an intention to dedicate which can come from acquiescence in use by the public over several years and a landowner taking no action.
25. Fifty three user evidence statements were submitted as part of the application ([Doc](#)). The user evidence forms collectively provide evidence of use going back as far as 1949 and up to 2021 when the application to record the right of way was made.

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26. An analysis of the user evidence was carried out prior to the making of the Order and is included in the OMA's report to the Regulatory Committee (Document 21).
27. Looking specifically at the period predating the sale of land crossed by the Order route in 1997, 15 users provided evidence of use including over 20 years use which included the years 1976 to 1997 with a further 21 users also documenting use of between 1 and 19 years between 1976 and 1997.
28. No evidence was found or referred to of any action being taken by landowners during that period.
29. The map and documentary evidence predating 1997 is limited but supports the user evidence submitted. The Order route appeared to be capable of being used in the 1960s with a visible trod leading from Hodder Street past a large garage to open ground (Document 27) the Ordnance Survey plan used to prepare Land Registry title LA5447369 (Sheet SD 7628) dated 1985 (Document 26) shows unrestricted access from Hodder Street between the garage and boundary of 48 Hodder Street.
30. In addition, a photograph submitted by the applicant dated circa 1984 shows the gap between the fence and building and the garden wall of 48 Hodder Street at point A on the Order Map indicating that access was available at that time (Document 21 Page 229).
31. With regard to the statutory test of presumed dedication, and specifically the date that the public's use of the Order route was brought into question, the user evidence is detailed in the report and the information provided from the present owners who have owned the land crossed by the route since 1997.
32. The actions said to be taken by the owners since 1997 and their effect on users are not clear regarding dates and effect – particularly as a total of 43 user evidence forms submitted detail use of the Order route A-B for a

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twenty year period 2001 to October 2021 (when the application was submitted).

33. To be an effective challenge to a statutory dedication a landowner must show sufficient evidence of a lack of intention to dedicate which needs to be brought to the attention of the users of the Order route such that a reasonable user would be able to understand that the landowner was intending to disabuse him of the notion that the land was a public highway.
34. It is difficult to assess whether use was as of right and without interruption ending in a calling into question when user evidence is silent as to any real difficulties and yet owners' actions are referred to. Some actions by the landowner were corroborated by the owner of 48 Hodder Street but the main issue appeared to be fly tipping and action taken to try to prevent it, together with the fact that they stated they had had to deal with noise for the past number of years resulting from people using the land as a cut through (Document 9 page 20).
35. Forty three user evidence statements documented use of the Order route between 2001 and 2021 with a further 9 forms indicating use of the route during that time. If the Inspector considers that public rights were still to be dedicated post 1997 then the OMA submit that statutory dedication of the route can be inferred over the 20 year period 2001 to 2021 when public rights were called into question by the submission of the application.
36. Aerial photographs available to view on Google Earth Pro throughout the 20 year period (Documents 27 through 29, 31, 33, and 34) confirm that the Order route existed and appeared to be capable of being used – as confirmed by the user evidence.
37. In addition, Google Street View images from 2009 and 2011 (Documents 30 and 31) both clearly show the Order route as being open and accessible with no fences or signs evident.

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38. The objector's daughter-in-law drew attention to the fact that the site was secured when it was originally purchased by Mr and Mrs Cornthwaite in 1997 and the building on the site was demolished. She provided photographs of temporary fencing and boulders erected across the route between 1997-1999 explaining that over time this was damaged. She referred also to further undated attempts to secure the site with cut branches from trees and sandstone boulders.
39. There is clearly some conflict between the evidence that the site was secured and the user evidence during the period when the garage was removed (1997-1999) but from 2001 to 2021 the OMA consider that the landowners did not demonstrate to the public sufficient evidence of a lack of intention to dedicate.
40. A Planning application for housing submitted in 2012 by the landowner did not acknowledge the existence of a public right of way across the site but the Design and Access Statement clearly acknowledged use by dog walkers (Document 40) indicating that the landowner was aware of use at that time. There is also reference to fly tipping which appeared to be a continuing concern which appeared to have resulted in various actions being taken over the years to prevent vehicular access to the site.
41. In March 2014 there is evidence that Hyndburn Borough Council tarmacked the Order route as part of work being carried out to improve the public footpath across their land to Plantation Street (Document 9, page 6). It appears that this work was done because it appeared to the Borough Council that the Order route was a continuation of the footpath through to Hodder Street. The landowner objected on the basis that the work had been done on land in his ownership and without his permission. It is documented that the tarmac was removed at his request.
42. The tarmacking of the route – which could clearly be seen as a well-trodden track in 2011 (Google Street View) – suggests that Hyndburn Borough Council, when carrying out the work had made an assumption that the route – as it existed – was part of the existing public footpath. In doing so this again supports the evidence of users who were walking the path at



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that time. Whilst the landowner sought removal of the tarmac on the basis that the work had been done without his permission there is no evidence that the public were stopped from using the route on foot or that any lack of intention to dedicate a route as a public footpath was communicated to the public.

### **Summary**

43. The OMA made the Order because they consider that the evidence shows that a footpath already exists in law along the Order route. There is no dedication agreement, but there is a substantial amount of user evidence, supporting map evidence of the availability of a route and evidence of a trodden path on both aerial and ground-based photographs.
44. The OMA has considered both inference of dedication at common law from all the circumstances pre 1997 and deemed dedication under S31 Highways Act between 2001 and 2021.
45. Inference at common law requires sufficient evidence on balance of an intention to dedicate which can come from acquiescence in use by the public over several years and a landowner taking no action.
46. A deemed dedication under S31 requires 20 years use to be called into question, that use be without interruption and there be insufficient evidence of an owner's intention to dedicate a highway route.
47. The OMA considers on balance that it finds sufficient evidence to be able to reasonably allege an inference of dedication by the previous owner of a footpath under common law and that the Order route already existed as a public footpath in 1997.
48. If the Inspector has any doubts with regards to the evidence of a pre-1997 dedication, then a deemed dedication under S31 should be considered.
49. It is the OMA case that, on balance, there is sufficient evidence for an Order to be promoted to confirmation.

### **Conclusion**

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50.The OMA submits that public footpath rights subsist along the Order route. The OMA further states that the criteria for a modification of the DMS under section 53 of the 1981 Act are satisfied.

51.The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in paragraph 18 is met.

52.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.