

## **Order Making Authority Statement of Case**

### **Background**

1. On 27<sup>th</sup> May 2015, Ailsa Gibson for and on behalf the North Lancashire Bridleways Society 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 bridleway from Thwaite Brow Lane, Bolton-le-Sands to the path junction with A6, Crag Bank, Carnforth.
2. The application was supported by map and other documentary evidence including:
  - (a) a statement from the Applicant and in respect of the Application route; a map showing the general area of the Application; a description of the application route; a map showing the route of the bridleway applied for; a map showing the route of bridleway applied for overlaid on the Definitive Map; Current digital mapping of the area; a map showing the route of the bridleway applied for overlaid on a current Ordnance Survey ("OS") map and recent photographs of the route.
  - (b) Documentary Evidence including a summary table of historical map evidence considered; Yates' Map of Lancashire, 1786; Hennet's County Map, 1829; Tithe Maps of Carnforth and Bolton-le-Sands 1846; OS First Edition Map 25 inch map, 1891; OS 6-inch Map Lancashire Sheet XXIV, 1848; OS 6-inch Map Lancashire Sheet XXIV.SE, 1919; OS 6-inch Map Lancashire Sheet XXIV.SE, 1933; OS One-Inch to the mile, England and Wales, Revised New Series, 1898; and OS One-inch to the mile, 7th Series, 1952-1961, 1955.
  - (c) User evidence was also submitted.
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 (Document 64). The report was considered by the OMA's Regulatory Committee on 24<sup>th</sup> February 2016 where it was resolved that the application for a public bridleway along part of Thwaite Brow Lane and

Mount Pleasant Lane be accepted in part only; that part of the application route remain recorded on the List of Streets (i.e should not be recorded as bridleway) as it fell within the highway width of the A6 Lancaster Road and a that a further section, near the junction with Highfield Road, also remain recorded as vehicular highway recorded on the List of Streets (i.e. not to be recorded as bridleway). Neither of the sections in question had the characteristics to be able to be recorded as Bridleways on the DMS. Furthermore, that the part between the junction of Thwaite Brow Lane with Whin Grove and the junction of Mount Pleasant Lane with Highfield Road be recorded as Byway Open to All Traffic (BOAT).

4. Committee resolved that Order(s) be made pursuant to Section 53 (2)(b) and Section 53 (3)(b) and Section 53 (c)(i) and (ii) of the Wildlife and Countryside Act 1981.
5. The first Order, referred to as the Mount Pleasant Order, is to upgrade Carnforth Footpath 9 (part), Carnforth Footpath 10 and Bolton-le-Sands Footpath 19 to bridleway; and to add a public bridleway between from the junction of the A6, Lancaster Road crossing Thwaite End Bridge to Carnforth Footpath 28. This Order is the subject of a separate Statement of Case.
6. The second Order, referred to as the Thwaite Brow Order, is for the addition of a byway open to all traffic from the junction of Mount Pleasant Lane and Highfield Lane to a junction with Whin Grove and Thwaite Brow Lane (U3529) and to alter the particulars on the Definitive Statement and it is this Order that is the subject of this Statement of Case.
7. It was further resolved that being satisfied that the tests for confirmation can be met, the Orders be promoted to confirmation.
8. Notices of the OMA's decision to make the Orders, including a statement of reasons for making the Orders, were sent to affected individuals on 6<sup>th</sup> April 2016 (Document 65).
9. The Orders were duly made on 4<sup>th</sup> July 2018 ("the Orders") (Document 1). The Thwaite Brow Order was made under Section 53(3)(b) and 53(3)(c)(i) of the Act 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 byway open to all traffic.

10. 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).
11. During the specified period for objections and representations to the Orders, the OMA received six objections in response to the Thwaite Brow Lane Order (Document 4).
12. The objections have not been withdrawn. 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.
13. This Statement of Case refers solely to the Thwaite Brow Order.
14. The Order route (commonly known as Thwaite Brow Lane) commences from the junction with Mount Pleasant Lane and Highfield Lane (point A on the Order Map) and passes in a generally westerly direction along a bounded track passing through Crawstone Wood and then north from point B on the Order Map along an unbounded track through Thwaite Brow Wood to a junction with Whin Grove and Thwaite Brow Lane (U3529) (point C on the Order Map); a total distance of 0.48 kilometres and at a width varying between 2.5 and 4 metres.

### **Legal Issues**

15. The provisions of the Wildlife and Countryside Act 1981 set out tests which must be addressed in deciding whether the DMS should be modified. 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 discovery by the OMA of evidence which (when considered with all other relevant evidence available to them) shows that rights of way which is not shown in the map and statement subsist or is reasonably alleged to subsist over land in the area to which the DMS relates, namely a byway open to all traffic.
16. The provisions of the Wildlife and Countryside Act 1981 set out the tests which must be addressed in deciding that the map should be modified. S53

permits both upgrading and downgrading of highways and deletions from 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.

17. 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.

18. Accordingly, for the Thwaite Brow Order to be confirmed, the Inspector needs to be satisfied, on the balance of probability, that from the evidence considered by the OMA, *when considered with all other evidence*, there is sufficient evidence from which to infer that a vehicular highway has been dedicated on the Order route and that the route should be recorded on the DMS as a byway open to all traffic.

19. It is the view of the OMA that the Order route subsists as a byway open to all traffic and should be recorded as such on the DMS (Document 19).

### **Historical, Map and Documentary Evidence**

20. 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.

21. The Order route is shown consistently from 1830 onwards on a range of privately produced commercial and Ordnance Survey maps published at different scales and is shown consistent with how other public vehicular routes are shown shaded and unnumbered on the Tithe Map in 1846.

22. It is shown on the small-scale First Edition 1 inch Ordnance Survey map as a road and on the First Edition 6 inch map surveyed in 1845 and published in 1848 and is shown between points A-B with a thickened line along the southern boundary on the 1st Edition 25" Ordnance Survey map surveyed in 1890 and published in 1891.
23. The route is excluded from the Finance Act map between points A-B in the early 1900s and whilst included in a plot owned by Bolton-le-Sands Parish Council between points B-C it is recorded that a deduction was made for public rights of way or user across that plot.
24. The full length of the route is clearly recorded as a publicly maintainable road on the 1929 Handover Map and is still recorded on the County Council's List of Streets as a publicly maintainable route.
25. It is therefore concluded that because it was, at the relevant time, recorded on the List of Streets maintainable at Public Expense the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") has not extinguished public mechanically propelled vehicle rights.
26. The effect of the 2006 Act is to extinguish mechanically propelled vehicle rights where none of the exceptions or exemptions apply. In this case the full length of the Order route (shown between points A-C on the Order Map) has consistently been recorded on the List of Streets Maintainable at Public Expense, including over the relevant period for the 2006 Act, and therefore under S67(2)(b) of the 2006 Act this Order route is exempt from the extinguishment of mechanically propelled vehicle rights.

### **User Evidence**

27. The applicant submitted user evidence in support of their application as mentioned in paragraph 2 of the Statement.
28. The user evidence forms relevant to use of Thwaite Brow Lane (the Order route) (Document 66) were considered by the OMA and are detailed within the report presented to the County Council's Regulatory Committee (Document 64). The user evidence related to use of the route on foot, horseback, on bicycles and with horse drawn vehicles.

29. The OMA submit that the Order route is a historical public carriageway and that the user evidence is modern use of a route that was dedicated to the public several hundred years ago. However, should the Inspector be of the view that public rights were established at a later date then the user evidence submitted supports dedication of the route prior to 2013.

## **Summary**

30. The Order route is not currently recorded on the DMS but is recorded on the List of Streets as a publicly maintainable route.

31. There has been no express dedication in this matter. The OMA considers, on balance, that there is sufficient evidence from which to have its dedication inferred at common law from all the circumstances.

32. Looking at whether dedication can be inferred on balance at common law, the OMA concluded that evidence from the maps and other documentary evidence, coupled with the evidence on site, indicated on balance how the route should be recorded. The analysis of the map and documentary evidence provides strong evidence that this is a historical public vehicular route and that on balance that a highway open to the public in all vehicles including carts and carriages has already been dedicated to public use.

33. Looking at the strength of the documentary evidence, it is considered sufficient to conclude that the route was dedicated to the public as carriageway many decades ago indicating byway open to all traffic status.

34. The effect of the 2006 Act is to extinguish mechanically propelled vehicle rights where none of the exceptions or exemptions apply. In this case the Order route has consistently been recorded on the List of Streets Maintainable at Public Expense, including over the relevant period for the 2006 Act, and therefore under S67(2)(b) of the 2006 Act this Order route is exempt from the extinguishment of mechanically propelled vehicle rights.

35. The OMA considers that the various map and documentary evidence does, on its own, indicate that the Order should be confirmed.

36. Furthermore, it is suggested that in the absence of there being sufficient map and documentary evidence from which to infer public rights, there is sufficient user evidence to find bridleway status has been dedicated.
37. There is no evidence that a legal stopping up of any part of the route has ever taken place.
38. The OMA states that any lack of use – particularly with MPVs 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.
39. The OMA submits that a byway open to all traffic subsists along the Order route. The OMA further states that the criteria for modifications of the DMS under section 53 of the 1981 Act are satisfied.
40. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above is 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.