

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

#### **Background**

1. On 22<sup>nd</sup> November 2007, Mr Peter Milward of 8 Hammerton Hall Close, Lancaster, LA1 2JX 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 Vale Road to Slyne Road, Lancaster to the rear and side of Melbourne Social Club.
2. The application was supported by two maps, 8 completed user evidence forms, photographs taken from a local newspaper and a letter sent to an employee of Lancashire County Council.
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 20).
4. The report was considered by the OMA's Regulatory Committee on 23<sup>rd</sup> September 2009 where it was resolved that the application be accepted in part and that on balance there was sufficient evidence in respect of the section shown on the Committee plan between points A-B-C-D to consider that it could be reasonably alleged that a footpath had deemed to have been dedicated under Section 31 of the Highways Act 1980 but that the application for the section between points D-E be not accepted due to the fact that it was already recorded as an adopted highway.
5. Committee resolved that an Order be made pursuant to Section 53 (2)(b) and Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981.
6. It was further resolved that being satisfied that the tests for confirmation could be met, that the Order be promoted to confirmation.

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7. Notices of the OMA's decision to accept the application in part and to make the Order was sent to affected individuals on 1<sup>st</sup> October 2009 (Document 15).
8. The Order was duly made on 12 May 2010 ("the Order") (Document 1) in consequence of the occurrence of an event specified in Section 53(3)(c)(i) namely the discovery by the Surveying Authority 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.
9. 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).
10. During the specified period for objections and representations to the Orders, the OMA received two objections to the Order. One was from a local resident whose property abuts the Order route and the other was from the Melbourne Social Club & Institute who owned the land crossed by the Order route (Document 4).
11. The objections have not been withdrawn although it is noted that the land crossed by the Order route is no longer owned by the objector (Documents 29 and 30) and the Melbourne Social Club & Institute no longer in exists.
12. The Order is opposed and cannot be confirmed by the OMA. Consequently, the OMA is submitting the Orders to the Planning Inspectorate for a determination on confirmation.

**The Order route**

13. The Order route is shown on the Order Map by a bold broken line and is marked between points A-B-C-D.
14. Photographs of the Order route presented to the OMA's Regulatory Committee in 2009 have been submitted to the Inspectorate (Document 21).

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15. The Order route commences at a point on Slyne Road (A6) between 59 Slyne Road and the former Melbourne Social Club. It runs in a westerly direction at a width of 2.5 metres along a tarmac surface for 16 metres to a point where the width is restricted by a set of steps to 2.3 metres. The route then continues in a westerly direction 3 metres wide for a further 24 metres and then continues in a southerly direction for approximately 12 metres to meet the adopted highway U18476 which continues through to Vale Road: a total distance (A-B-C-D) of approximately 52 metres.

### **Legal Issues**

16. 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.

17. The relevant statutory provision in relation to the dedication of a public right of way is Section 31 of the Highways Act 1980 (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.

18. 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.

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

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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.

20. It is the view of the OMA that the Order route subsists as a footpath and should be recorded as such on the DMS (Document 15).

### **Evidence**

21. The application was submitted primarily on the basis of user evidence pre-dating the obstruction of the Order route in 2007.

22. Whilst there is no map and documentary evidence from which dedication of the route can clearly be inferred it is clear that it may have been possible to pass along the Order route since at least 1910 (OS 25 inch Map XXX.7 revised 1910 and published 1913).

23. Melbourne Social Club and Institute was named on the 1:2500 OS map revised in 1955 and published 1956 but although the various OS maps examined show that the Order route appeared clear of buildings and capable of being used access may have been restricted at point A and point D there are no documents whereby the route can be shown to have been expressly dedicated to the public.

24. The applicant submitted 8 user evidence forms in support of their application. The information provided in the forms was considered by the County Council's Regulatory Committee and is detailed within the report presented to them (Document 19).

25. The user evidence forms indicated knowledge of the Order route prior to 2007 for 30-39 years (1 user) and 20-29 years (7 users). The forms indicated use of the Order route on foot for over 30 years prior to 2007 (1 user), between 20 -29 years (4 users), between 10-19 years (2 users) and 1-9 years (1 user).

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26. The Order route had mainly been used to commute to and from school and as such its usage frequency clustered around the school opening time and term times and users referred to seeing other people also using the Order route on foot.
27. In addition the Applicant referred to having done a head count in November 2007 "of the people who would normally use this safe way to school and came to a total of 46 children and 30 parents each way" and submitted extracts from a newspaper article (Document 20) which was published in a local newspaper after the Order route was blocked in which it was explained that children, parents and grandparents had used the Order route as a safe route to school for decades.

### **Summary**

28. The OMA considers, on balance, that there is sufficient evidence from to infer dedication at common law from all the circumstances or for the criteria in S31 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.
29. Evidence of use on foot goes back to the 1970s, the predominant use commuting on a return journey from Vale Road to Slyne Road to the Skerton St. Luke's Church of England Voluntary Aided Primary School during term time. Other use of Order route for recreational and pleasure purposes, shopping at a local store and fishing at the canal. Although the evidence of use presented in this matter is only from a few people higher levels of use is indicated by the reference to use by others and the information from the Applicant.
30. The OMA consider that on balance that there is sufficient evidence of public use of 20 years user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public of this so that the criteria of Section 31 Highways Act 1980 can be satisfied and that dedication of this section as a footpath can be deemed to have occurred

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following twenty years use 1987-2007 up to the gate being locked in 2007,  
calling the route into question.

31.The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above is met. The objection received does not give any grounds for the OMA to reverse its decision on promoting the Orders to confirmation. The OMA therefore respectfully requests that the Planning Inspector confirms the Order.