

WILDLIFE AND COUNTRYSIDE ACT 1981
THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR THE COUNTY OF
LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL
(FOOTPATH FROM CLITHEROE STREET TO GUY STREET, PADIHAM, BURNLEY)
DEFINITIVE MAP MODIFICATION ORDER 2017

Order Making Authority Statement of Case

Background

1. On 21st April 2016, Padiham Town Council 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 footpath from Guy Street/Grove Lane, Padiham, Lancashire BB12 8PU to Clitheroe Street, Lancashire BB12 8DE.
2. The application was supported by maps of the site showing site location and route; a Burnley Borough Council Officer report concerning planning application (APP/2015/0189) and associated correspondence; names and addresses of local residents objecting to the closure of the route which had been open for 15 years; Ordnance Survey (OS) Map (1st Ed.) c. 1890 extract; OS Map 6"Ed. 1947 extract; and photographic evidence relating to Guy Street/Grove Lane and Clitheroe Street respectively.
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 together with their recommendation that the application should be accepted. (Document 20). The report was considered by the OMA's Regulatory Committee on 28th September 2016 where the decision was made to modify the DMS by recording a footpath along shown as A-B-C on the Order plan.
4. Notice of the OMA's decision to make an order, was sent to affected individuals on 9th November 2016 (Document 15).
5. A Definitive Map Modification Order was duly made on 27th September 2017 ("the Order") (Document 1). The Order was made because it

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appeared to the OMA that the DMS for Lancashire required modification in consequence of an event specified in Section 53(3)(c)(i) of the 1981 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 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 15 objections - one of which was subsequently withdrawn, and six letters of support (Document 4).
8. There remain objections which 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

9. The Order route is in the parish of Padiham in the district of Burnley and is shown on the Order Map between points A-B-C denoted by a broken bold black line.
10. A site inspection was carried out on 16 May 2016 following receipt of the application and the blocking of the route. Photographs of the route were taken at that time (Document 21).
11. The Order route commences at the northern end of Clitheroe Street, Padiham adjacent to the Kingdom Hall (point A on the Order map) from

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where access along the Order route is prevented by a locked pedestrian gate.

12. Beyond the gate, the Order route extends in a northerly direction ascending five stone steps and then crossing an area over which bins are now being stored along the eastern side of a private car park. The bins are located over and along the Order route, but it is possible to see that a stone flagged pathway exists along the length of the Order route to point B marking it out separate to the tarmac car park immediately to the west and bin storage area to the east.
13. At point B, the Order route ascends a further 5 stone steps through an access in a substantial wall. At the top of the steps, approx. 1m beyond the wall there is a further locked metal gate preventing access along the Order route. From point B, the Order route continues across a short flag/grass pathway to the tarmac footway of Guy Street at point C.
14. The total length of the Order route is 13 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. 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) of the 1981 Act: 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 footpath.
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 altered.

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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. 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 Order to be confirmed, the Inspector needs to be satisfied that, on the balance of probability, the evidence considered by the OMA, *when considered with all other evidence* there is sufficient evidence from which to infer a footpath was already dedicated on the Order route and the route marked A-B-C on the Order plan should be added to the DMS as a footpath.

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

Evidence

20. There is no map or documentary evidence supporting the existence of the Order route prior to 1995 although it is noted that a number of supporters of the Order (Document 4) refer to using a route from Guy

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Street to Clitheroe Street prior to the physical construction of a paved through route in 1995.

21. In 1995, it appears that the developers converting Guy Mill (Victoria Mill) and the associated outbuildings agreed to the request from Burnley Borough Council for a pedestrian link to be constructed from Clitheroe Street to Guy Street along the Order route. The Planning Permission Decision Notice issued on 30 November 1995 (Document 29) refers (Note 6) to the fact that the Borough Council were keen to see a pedestrian link between Guy Street and Clitheroe Street and the link was consequently shown on plans prepared following the granting of planning permission (Document 30).
22. There is no reference to this link being private and the fact that there is discussion about it being provided with ramped access, grant funding being available towards its construction, and it ultimately being adopted suggests that it was intended to create a public route (Document 31).
23. Planning permission was granted at the end of 1995 (Document 29) and work to redevelop the site commenced in 1996. The exact date that the path was constructed is not known although by 2000 it is shown on an aerial photograph (Document 30) and in 2009 Google Street View images (Document 31) clearly show the path and that it appeared to have been in existence for several years.
24. Further photographic evidence – including Google Street View photographs taken in 2011 (Document 33) confirm that a route was capable of being used until it was blocked by locked gates in 2015.
25. Letters submitted in support of the Order (Document 4) confirm use of the route by the public since it was constructed.

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Summary

26. The OMA case is that the Order route is already a public footpath in law.
27. The OMA considers there is enough evidence of the owner's intention to dedicate a footpath to the public in 1996 and that there has been clear acceptance by the public such that dedication can on balance be inferred at common law.
28. Kiely Developments Ltd which owned the site in 1995-96 and who constructed the footpath are no longer in existence.
29. However, information about what this pathway was intended to be is on balance shown in their planning application plans and their discussions with the Borough Council. The plan approved as part of the planning permission shows the Order route as a pedestrian walkway and the documents indicate that it was intended as a pedestrian link with no indication that it was not intended for public use. The documents themselves would arguably not be sufficient but in this case, but the Order route was physically constructed on site by the owner. Moreover, the Order route has then been used by the public. In the circumstances, therefore, the OMA has concluded that dedication and acceptance can be inferred.

Conclusion

30. On the balance of probabilities and taking all the evidence into account, the OMA considers that the higher statutory test for dedication of a public right of way between points A to C is satisfied and the Order can be promoted to confirmation.
31. The OMA further states that the criteria for a modification of the DMS under section 53 of the 1981 Act are satisfied. The OMA decided that the Order should be promoted to confirmation because the higher test

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for confirmation referred to above in para 16 is met. The objections received do not give any grounds for the OMA to reverse its decision on promoting the Order to confirmation.

32. The OMA therefore respectfully requests that the Planning Inspector confirms the Order.