

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

**THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014**

Order Making Authority Statement of Case

Background

1. On 30 July 2009, Mr Joseph Howard of 9 Victoria Parade, Ashton, Preston PR9 1DS applied 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 adding a public footpath from Sandyforth Lane, Broughton to Lightfoot Lane, Fulwood.
2. The application was supported by historical documentary evidence and evidence of recollections of the footpath from long-term residents.
3. A year later, on 4 July 2010, a further application was submitted by Mr P W Swift and Mrs E Swift of Sunny Bank, 144 Lightfoot Lane, Fulwood, Preston PR4 0AE to delete part of Footpath 3 Broughton.
4. The application was supported by a copy of the Broughton Parish Survey Map, a map showing the route applied to be deleted and evidence of use (on foot) of the route proposed to be added – as applied for by Mr Howard the previous year.
5. Although submitted by different applicants, both applications related to a route between Sandyforth Lane, Broughton and Lightfoot Lane, Fulwood and were intrinsically linked. For that reason, they were investigated together and a single report produced.
6. Officers from Lancashire County Council (hereinafter referred to as "the OMA") investigated whether they considered that the public

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

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DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

rights applied for existed over the application route and whether the public rights proposed to be deleted had been recorded in error and prepared a report detailing their investigation together with their recommendation that the applications should be accepted. (Document 19a). The report was considered by the OMA's Regulatory Committee on 30th October 2013 where the decision was made to modify the DMS by making an order adding a footpath shown as A-E-F-G on the Order Map and deleting the footpath shown as A-B-C-D on the said Map.

7. Notice of the OMA's decision to make an order, including a statement of reasons for making the Order, was sent to affected individuals on 3rd January 2014 (Document 15a).
8. A Definitive Map Modification Order was duly made on 26th February 2014 ('the First Order') (Document 1a). The First Order was made because it appeared to the OMA that the DMS for Lancashire required modification in consequence of an event specified in Section 53(3)(c)(iii) and 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 there is no public right of way over the land shown in the map and statement as a highway of any description , or any other particulars contained in the map and statement require modification; and 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.
9. Notice of the Making of the First 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 6a).

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

10. During the specified period for objections and representations to the First Order, the OMA received one objection (Document 4a).
11. The objection has not been withdrawn so the First Order is opposed and cannot be confirmed by the OMA.
12. Subsequently however, the OMA had cause to consider the Regulations of 1993 governing the making of orders which prescribe what notations are to be used on a definitive map but also states that these same notations should be used on Order Maps. This provision was not appreciated by many authorities and notations which were technically incorrect had become standard.
13. The (First) Order Map showing the Footpath to be deleted contains the incorrect notation to depict a footpath to be deleted. The notation which should have been used on the Order Map to show both the public footpath to be added and deleted is either a purple line, a continuous line with short bars at intervals or a broken black line with short intervals. The Order Map, however, shows the public footpath which is to be deleted as a solid black line instead, and as such this does not comply with the Regulations.
14. Planning Advice Note 22 entitled "Use of correct notation on definitive map modification orders and public path orders" dated December 2011 (and revised in 2013) advised that '...an order is considered fatally flawed if the wrong notation or non-standard notation is used to depict the routes affected by the order. We will therefore reject any order containing incorrect notation.'
15. It is not possible for the OMA to make modifications to an Order once it has been made and advertised without it being referred to the Planning Inspectorate. In addition, in this particular case, the

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

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DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014**

First Order was objected to and would need to be referred to the Planning Inspectorate anyway.

16. A further report was therefore submitted to the OMA's Regulatory Committee on 17th December 2014 (Document 19b) where it was agreed that the Order made on 26th February 2014 should be submitted to the Planning Inspectorate for non-confirmation or rejection due to the Order Map containing the incorrect notation to depict the Order route and that a further Order ('the Second Order') be made using the correct notation on the plan and that being satisfied that the higher test for confirmation can be met the Second Order be promoted to confirmation, if necessary at a public inquiry.
17. Both Orders were titled the same and both made were made in 2014 but will be referred to throughout this document as 'The First Order' and 'The Second Order' to differentiate between them.
18. The Second Order referred to above was duly made on 30th December 2014 and advertised.
19. Notice of the Making of the Second 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 6b).
20. During the specified period for objections and representations to the Second Order, the OMA received one objection (Document 4b). This objection was submitted by the same individual that objected to the First Order.
21. The objection has not been withdrawn so the Second Order is opposed and cannot be confirmed by the OMA. Consequently, the

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

**THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014**

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

Order Route to be deleted

22.The Order route to be deleted is shown on the Order Map as a bold black dashed line between points A-B-C-D.

23.The route comprises the full unrecorded width of part of Public Footpath no. 3 Broughton from the south side of a stile at Sandyforth Lane at Grid Reference SD 5144 3368 (point A) running in a south easterly direction across rugby pitches to a boundary hedge at SD 5153 3360 (point B) and continuing across the north east corner of a field to the eastern boundary hedge of that field at SD 5154 3360 (point C) to continue along the boundary hedge to the parish boundary at SD 5161 3348 (point D); a total distance of 265 metres.

Order route to be added

24.The Order route to be added is shown on the Order Map by a continuous purple line between points A-E-F-G.

25.It runs from the south side of stile by Sandyforth Lane at Grid Reference SD 5144 3368 (point A) and runs in a generally south easterly direction across rugby pitches to a boundary hedge at SD 5154 3361 (point E) from where it continues in a generally south south easterly direction along the east side of a boundary hedge crossing the parish boundary at SD 5162 3348 (point F) to continue in a south south easterly direction east of the boundary with Lightfoot House Cottage and The Cottage to the south west corner of the field turning west to terminate at SD 5164 3344 (point G) where it meets the footway of Lightfoot Lane.

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

**THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014**

Legal Issues

26. The OMA is requesting that the First Order be not confirmed as it is fatally flawed.
27. Subsequent information contained in this statement therefore addresses, in the main, the determination of the Second Order.
28. 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)(iii) and S53(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 there is no public right of way over the land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification; and 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.
29. 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 additions, upgrades, downgrades of highways and deletions from the map.
30. 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. With regards to the addition of a footpath 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.

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

31. 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.
32. 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-E-F-G on the Order plan should be added to the DMS as a footpath.
33. For deleting a way from the map the test in S53(3)(c)(iii) is that there is no public right of way over land shown in the Definitive Map and Statement as a highway; this is judged on the balance of probabilities but bearing in mind that there is an initial presumption that the Definitive Map and Statement is correct.
34. With regards to the deletion of a right of way shown on the DMS, In *Trevelyan v Secretary of State for the Environment, Transport and the regions (CA)* [2001] EWCA Civ 266, [2001] 1 WLR 1264 (BBE), the Court of Appeal held that where a right of way is marked on the Definitive Map there is an initial presumption that it exists. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus evidence which made it reasonably arguable that the right of way existed was available when it was put on the Map. The standard of proof required to justify a finding that no such right of way exists is on

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

the balance of probabilities and evidence of some substance is required to outweigh the initial presumption.

35. When considering cases where the removal of rights from the DMS is proposed by an order, paragraph 4.33 of the DEFRA Rights of Way Circular 1/095 advises that "The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements." The requirements are that (a) the evidence must be new; (b) the evidence must be of sufficient substance to displace the presumption that the DMS is correct; and (c) the evidence must be cogent. Once prepared, and unless and until subsequently revised, the DMS is regarded as the conclusive record of the existence, at the relevant date of the DMS, of the public rights of way it shows. Therefore, the deletion of a right of way from this record requires sufficient evidence to show that no right of way existed as at the relevant date of the definitive map on which the way was first shown.

36. The section of Footpath 3 Broughton under consideration here was first recorded on the DMS with a relevant date of 1st September 1966. The central issue is therefore whether or not it was included in error at that time.

37. It is the view of the OMA that Order route shown as A-E-F-G on the Order map subsists as a footpath and should be recorded as such on the DMS (Document 18) and that Footpath 3 Broughton as shown on the Order Map between points A-B-C-D was recorded on the DMS on 1st September 1966 in error and should therefore be deleted.

Evidence

The Order route to be (A-B-C-D)

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

38. There is no evidence to suggest that the Order route to be deleted ever existed on the alignment recorded on the DMS from any of the OS maps inspected as part of this investigation (Documents 22 - 28).
39. Aerial photographs from the 1940s and 1960s (Documents 29 and 30) provide no evidence to suggest that the Order route to be deleted existed on the alignment recorded on the DMS.
40. The Draft DMS (dated 1st January 1953), the Provisional DMS (published in 1960) and the First DMS (published in 1962) all indicate that the route recorded as Footpath 3 Broughton was to the east of a field boundary along the route to be added A-E-F-G.
41. The first-time the route to be deleted was documented was when the Revised Definitive Map of Public Rights of Way (First Review) was published on 25th April 1975 with a relevant date of 1st September 1966 (Document 18).
42. The OMA found no evidence of an order diverting Footpath 3 Broughton to the alignment depicted on the Definitive Map (First Review).
43. The OMA contends that, on the balance of probabilities, there is substantial evidence to rebut the initial presumption that a right of way as shown on the Definitive Map (First Review) between A-B-C-D exists.
44. It is the view of the OMA that when the Definitive Map (First Review) was prepared, a drafting error occurred resulting in the footpath being shown incorrectly between points A-B-C-D on the Order Map. This is even more likely given the scale of the OS map used by those undertaking the task of reviewing the DMS (1:10,560) and thickness of the pen used to mark the routes on that map.

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

45. The OMA contends that, on the balance of probabilities, no public right of way existed along the section of Footpath 3 Broughton depicted between points A-B-C-D when it was first recorded on the Map (First Review) on 1st September 1966.

The Order route to be added (A-E-F-G)

46. The Order route to be added (A-E-F-G) is first shown on the Tithe Map of 1840 (Document 21) and then consistently shown on Ordnance Survey maps from 1893 onwards (with the exception of the 1961 1:2500 map). In addition, it was consistently shown in the definitive map material up until the publication of the Revised Definitive Map (First Review) which shows none of the route to be added, but instead shows a route recorded as Footpath 3 Broughton between points A-B-C-D (the route to be deleted) and does not show a route within the parish of Fulwood (from the parish boundary) through to Lightfoot Lane. In this particular matter, there is evidence on balance that errors were made in 1966 with regards to recording the line of Footpath 3 Broughton and not recording part of Footpath 47 Fulwood (F-G) on the Revised Definitive Map (First Revision). The Order route to be deleted (A-B-C-D) was not only shown incorrectly but as a cul de sac (ending on the Parish boundary) this would not have brought you out onto a public highway as point D ends within a field to the rear of private dwellings, yet the Definitive Statement makes it clear that this was not a cul de sac footpath.

47. In addition to map and documentary evidence examined, a user evidence form was provided by Mr & Mrs Swift (the applicants for the deletion of A-B-C-D) detailing use and knowledge of the Order route to be added (Document 41).

Summary

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

48. The OMA considers that there is evidence by way of the maps and documentary evidence that the Order route to be deleted (A-B-C-D) on balance was recorded in error from 1966 onwards and should have continued to be recorded on the line A-E-F-G (the Order route to be added). If the Order route to be added (A-E-F-G) could be considered to subsist as a footpath, this would not necessarily prove that the Order route to be deleted (A-B-C-D) was recorded in error.
49. The OMA considered whether it was likely that two paths existed so close to each other or whether there was only one route through from Sandyforth Lane to Lightfoot Lane and whether there was any evidence to suggest that two routes existed.
50. Taking all the evidence into account, the OMA consider that there is sufficient cogent evidence that the Order route to be deleted (A-B-C-D) was recorded in error and that it should be removed from the DMS and that the Order route to be added (A-E-F-G) be added to the DMS. The OMA considered that the evidence was sufficient to not only satisfy the test to make the Order, but also to promote the Order to confirmation.
51. There is no evidence that a legal stopping up of any part of either route under consideration has ever taken place which is particularly relevant to the section C-D which was recorded as a Footpath on the First Definitive Map but which was is not shown on the Revised Definitive Map (First Review).

Conclusion

52. Regarding the First Order, the OMA respectfully requests that the Planning Inspectorate formally reject the Order or do not confirm it on the basis that it is fatally flawed.

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

THE LANCASHIRE COUNTY COUNCIL
DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY
DELETION OF PART OF FOOTPATH NO. 3 BROUGHTON AND ADDITION OF A FOOTPATH FROM
SANDYFORTH LANE TO LIGHTFOOT LANE (DEFINITIVE MAP MODIFICATION) ORDER 2014

53. With regards to the Second Order, on the balance of probabilities and taking all the evidence into account, the OMA considers that the higher statutory test in respect of the Order route to be added is satisfied. It also considers that there is sufficient cogent evidence in respect of the Order route to be deleted and that the Order should be confirmed and the routes added and deleted from the DMS.

54. The OMA decided that the Order should be promoted to confirmation because the tests for confirmation could be met. The objection received does not give any grounds for the OMA to reverse its decision on promoting the order to confirmation.

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