

**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
(DEFINITIVE MAP MODIFICATION) (NO. 6) ORDER 2012**

Order Making Authority Statement of Case

Background

1. On 13th January 2010, Thurnham Parish Council submitted an application (Document 22) 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 a point on the Lune Estuary Cycleway dismantled railway line at Condor Green picnic site along the Lune estuary to rejoin the cycleway at Nans Buck Cottages in the parish of Thurnham, Lancaster.
2. The application was supported by user evidence, photographs, statements from members of the public who had used the route and a statement from a previous landowner.
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 25th April 2012 where the decision was made to make an order to modify the DMS by recording a footpath along the route shown by a bold dashed line between points A-B-C-D-E-F-G-H-I-J on the Order Map.
4. 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 27th April 2012 (Document 15).
5. A Definitive Map Modification Order was duly made on 21st November 2012 ("the Order") (Document 1). The 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)(i)

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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 two objections (Document 4).
8. The objections 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 Thurnham in the City of Lancaster.
10. Photographs of the route applied for were taken in 2011 and included in a PowerPoint presentation shown to Committee Members (Document 21) in 2012 with the route described in detail within the Regulatory Committee report (Document 20).
11. The Order route is described in the Order as running from the Lune Estuary Cycleway at grid reference SD 4567 5610 in a generally northerly direction along the edge of the estuary (above the mean high water mark) passing west of properties known as 'Pennyhill' and 'Waterloo Cottage' and continuing along the edge of the estuary to a point on the same dismantled railway line (Lune Estuary Cycleway) at 'Nans Buck', SD

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4570 5758. Field gates wide enough to provide for vehicular access are recorded at both ends of the route.

12.The Order Maps (3 in total) show the Order route denoted by a thick dashed line between points A-B-C-D-E-F-G-H-I-J.

13.Subsequent to the Order having been made and advertised, the current owner of the land requested a site visit and queried the alignment of the route in the vicinity of Pennyhill. An Officer from the OMA met with the landowner and confirmed that further clarification of the route used by the public would be needed.

14. A further site visit was held attended by members of Thurnham Parish Council (the applicants) and an Officer from the OMA where it became apparent that given the open nature of the land and tidal variations the public had been walking along a wide swathe of land (all within the same land ownership) comprising above, along and below the sloping masonry wall as the route passed through point D to continue towards and past Pennyhill and Waterloo Cottage to point H. A proposed modification to the Order route was considered to record the route along the base of the sloping masonry wall as shown on the amended Order plan (Document 33) although the user evidence and more detailed witness statements are quite detailed in explaining that access along this stretch was over a wider strip of land effectively encompassing walked lines above, on and below the sloping masonry depending on the tide, weather and inclination. It should be noted that the description of the Order route set out below nevertheless still accurately reflects the route used.

15.Whilst the plan submitted as part of the application, and subsequently agreed by the applicants as being correct, shows the route used as recorded on the Order Map it is also noted by the OMA that the plan used by the Parish Council was at a scale 1:2500 and was provided by the OMA so that the applicant could draw on it the route applied for.

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Plans attached to the majority (but not all) of the 37 user evidence forms were at a much smaller scale (1:6500) and largely showed the route drawn onto it equating to the proposed modification detailed above.

16. All users consistently detail use of a route from point A to point I which ran above the high-water mark and followed the edge of the estuary with strong supporting evidence from aerial photographs taken in 2000 and 2006 (Documents 24 and 26). It is unenclosed following the boundary of the estuary above the mean high-water mark. When first inspected by the OMA in 2011 there was still evidence of a worn pedestrian route following the challenges made in 2007.

Landownership

17. Lancashire County Council (the OMA) are the owners of the land crossed by A-B (LAN87034 (Documents 29 and 30)) and I-J (LAN87095 (Documents 31 and 32)). The land, which comprised part of the former Lancaster to Glasson Dock railway line, was acquired as part of a derelict land reclamation scheme. It is held for the purposes of informal recreation and the land was developed to provide a recreational route for walkers, cyclists and horseriders. There are no restrictions on the public use of the land for walking and indeed public use (including the Order route A-B and I-J) is entirely compatible with the management aims for the site.
18. The rest of the land crossed by the Order route (B-I) is in the ownership of Stodday Land Limited who purchased the land in 2006. It was following the change in ownership that challenges were made to public use of the Order route which prompted the Parish Council to co-ordinate the submission of the application to record public footpath rights along the route.
19. Prior to 2006 the land crossed by the Order route was owned by W and J Pye Limited and in support of the application a significant number of members of the Pye Family have provided evidence in relation to public use of the route and an acceptance of that use during their ownership including a statement from the former managing director of W and J Pye

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Ltd, Mr John Pye (deceased) which was included as part of the application and is dated 11/11/07 (Document 22) which states that as previous owners of the foreshore at Ashton and Conder Green, he wished to verify that for their period of ownership, of more than seventy years, public access was never restricted and that there was open access to the path from Nans Buck to the Conder Green car park which to his knowledge was regularly used by members of the public .

Legal Issues

20. 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.
21. The statutory tests 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.
22. 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

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

23. 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*, is sufficient from which to infer public footpath rights have been already dedicated on the Order route, marked A -J on the Order Map, and it should be added to the DMS as a footpath.

24. It should be noted that a common law dedication of a footpath may be inferred if the evidence points to an intention on the part of the landowner to dedicate. The burden of proof is on the applicant to prove, on the balance of probabilities, the dedication. Evidence of use of an Order route by the public and how an owner acted towards them is one of the factors which may be taken into account in deciding whether a public right has been dedicated. No specific minimum period is necessary. All the circumstances must be taken into account. The use needs to be 'as of right' which means it must be open, not secretly or by force or with permission.

25. It should also be noted that a 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 actually been enjoyed by the public, 'as of right' (meaning without secrecy, force or permission) 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. Section 31 does not necessarily preclude dedication of a public right of way under common law, however.

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26. It is the view of the OMA that the Order route subsists as a public footpath and should be recorded as such on the DMS (Document 18).

Map and Documentary Evidence

27. A variety of maps, plans and other documents were examined to see when the Order route came into being and to try to determine what its status might be. No map or documentary evidence was found to support the existence of the Order route, other than the sections between point A to point B and point I and point J which had been constructed by 1891 to provide access onto the marsh from Conder Green and Nans Buck. The existence of an access route between point A and point B and point I and point J is shown on all Ordnance survey maps since 1891 and although this does not indicate whether access was open to the public it supports the user evidence which details access to and from the Order route at those points. Nans Buck was originally tied to the Ashton Hall Estate however with no public access to the property suggesting that until the railway line was dismantled in the 1960s, there would have been no public means of accessing the Order route at point I.

28. The railway opened in 1883 to transport goods and people from Glasson Dock to Lancaster. The railway closed to passengers in 1930 but remained in operation carrying goods until 1964. The line was subsequently sold and was purchased by Lancashire County Council who redeveloped it as a multiuser trail in the early 1970s.

29. Aerial photography from the 1960s (Document 23) shows part of the Order route between point A and point D as a worn track. Beyond this the Order route becomes more difficult to follow as it closely follows the masonry wall (which can be seen) which would not show any trace of use by walkers. Beyond Waterloo Cottage at point H a thick white line is visible all the way up to the end of the Order route at point J. On close examination this appears to be the masonry wall, which is now obscured by vegetation. North of point D it is not possible to determine whether

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the Order route existed although with the closure of the railway in 1963 and subsequent removal of the track it is possible that people had started to walk the route of the railway in addition to the Order route during the mid to late 1960s.

30. Google Earth Pro images captured in 2000 (Document 25) clearly show virtually the whole of the Order route as a well-trodden route across open land. These images are significant as they were not available when the application was first investigated but clearly substantiate the evidence of users.

31. In addition, virtually the whole of the Order route could be seen as a worn track on aerial photographs taken in 2006 (Document 26) providing further indication that at that time it was being regularly walked.

User Evidence

32. The Parish Council (applicant) submitted a substantial amount of user evidence in support of their application giving a clear indication of the strength of local feeling when access to the Order route was challenged in 2006-2007.

33. A total of 37 detailed user evidence forms were submitted. These had been completed in 2009 following challenges to use of the Order route in 2006-2007 by the new landowners (Stoddy Land Limited) and the submission of a Section 31(6) deposit by them in December 2007 (Document 36). The majority of users refer to use continuing through to 2009 despite the challenges and the OMA have observed that there is still use being made of the route in 2024. For the purpose of this Order however, it is noted that it is consideration of use prior to 2006-2007 that is relevant to the confirmation of the Order.

34. 37 user evidence forms provided evidence of use of the Order route by 39 people (with two forms providing evidence from two people within

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the same households). The earliest reference to use – and to knowledge of others using the route was 1957 (Betty Pye). Mrs Pye – who was born in 1934 – was subsequently interviewed in 2016 by the OMA and a detailed statement prepared in support of her evidence (Document 37).

35. Mrs Pye's husband – Mr Jim Pye also completed a user evidence form documenting knowledge of the route – and use of it – since his birth in 1931. Mr Jim Pye was also interviewed by the OMA in 2016 and prepared an unsigned statement (Document 46) explaining that the land crossed by the Order route B-I was in the ownership of his grandfather's company W&J Pye Limited. He explained that William and John Pye co-founded the company in the 1800s with the company staying in the family until it went into administration in 2006. When interviewed, he explained that as far as he was aware the members of the landowning family never had a problem with people walking on the shore and accepted it to be a public right of way.
36. In addition to the 37-user evidence forms a further 19 letters, emails and less detailed evidence forms were submitted – some of which overlapped with information provided in the more detailed forms.
37. The evidence provided was consistent and covered a lengthy timescale during which the land was owned by the Pye family who lived locally and would have seen people walking the route – particularly, as documented, when they spent holidays staying at Waterloo Cottage.
38. There is no reference in any of the user evidence forms submitted that use of the Order route was challenged by the Pye family and the letter submitted as part of the application from Mr John Pye dated 11th November 2007 (Document 22) confirms this.
39. The evidence presented by users shows that the Order route had been regularly used over a lengthy period of time for amongst other things recreational walks, dog walking and bird watching. Some users referred

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to using it as part of a circuit – walking along the Order route to Nans Buck and then back along the dismantled railway (or vice versa). Many referred to the views afforded from the route. The frequency of use varied with some more local users stating they had used it on a daily basis. Some users completing evidence forms lived further away but knew of the route, believed it to be a public right of way and would travel to the area to walk along it.

40. Following the making of the Order the OMA interviewed 12 of the users who had provided evidence as part of the application. Copies of these statements have been submitted to the Planning Inspectorate (Documents 37 through 48) providing further detail and information about public use of the route and knowledge and acceptance of public use by the landowning family prior to 2006. It should be noted that the Statements, whilst compiled in 2006 were not signed and that time. Letters and draft statements were sent out in 2024 and those persons still able to do so, signed the Statements and confirmed the content.

Summary

41. It is the OMA case that the route A - J is already a public footpath in law such that it should be recorded on the DMS. Since there is no express dedication, it is advised that the evidence is considered to determine whether a dedication can, on balance, be deemed under S31 Highways Act 1980 or inferred at Common Law.

42. With regards S31 Highways Act 1980, for a dedication to be deemed it must be determined that the Order route has been actually enjoyed by the public, as of right and without interruption, for a full period of 20 years without there being sufficient evidence of a lack of intention to dedicate by the owners. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by notice or otherwise.

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43. The land in question was purchased in November 2006, with the majority of users claiming use was challenged verbally, by signage and the locking of gates around the same time. It is the OMA case that the Order route was called into question in 2006, following the current owners' acquisition of the land and subsequent erection of "Private Land" Notices. The period of use from which dedication can be deemed is 1986 to 2006.
44. To this end, the user evidence submitted provides good, consistent user evidence for the required 20-year period 1986-2006.
45. The ownership of the former freehold owners of the majority of land at issue, W & J Pye Limited, covers the full 20-year period 1986-2006. During that period, there is no evidence of any actions taken by the freehold owners to show lack of intention to dedicate to the public. To the contrary, it will be noted the statement of Managing Director of the owner Company until 2006, Mr John Pye (deceased), confirms that as previous owner of the foreshore he had no intention of restricting access to the land over which the Order route ran. It will also be noted that the further supporting statements from members of the Pye family and other adjoining owners, confirm that access to the Order route was open, available and used for the 20-year period.
46. Similarly, Lancashire County Council as owners of the short sections at each end of the Order route took no action to indicate a lack of intention to dedicate public rights.
47. The OMA also consider dedication can be inferred at common law in addition to or in the alternative to what is stated above. The evidence indicates that whilst the Order route crossed land was in the ownership of W and M Pye Ltd and the OMA, there is evidence of acquiescence in user such that an intention to dedicate the route for use by the public can be inferred. The OMA considers that there is sufficient evidence from which to have dedication inferred at common law.

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Conclusion

48. The Order cites Section 53(3)(c)(i) as the event requiring the making of the Order. It is view of the OMA that 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 includes any presumed dedication.
49. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in paragraph 21 is met. The objections received do not give any grounds for the OMA to reverse its decision on promoting the Order to confirmation.
50. With reference to the OMA's Comments on Objections (**Document 5**) and specifically to the objection made by Mr Alan Kind the OMA can confirm that details of the two gates specified in the Order as limitations at grid references SD 4567 5610 and SD 4570 5758 could be modified so as to specify them more accurately as field gates of a minimum width of 3 metres at GR SD 4567 5610 and a minimum width of 2.9 metres at SD 4570 5758 if the Planning Inspector considers this appropriate and necessary.
51. With regards to the route shown on the Order Map, the OMA had considered a proposed modification of the alignment shown (Documents 33 and 34) but this is open to the Planning Inspector to consider as the body of evidence suggests use of a wider strip of land over the section leading to and past Pennylands and Waterloo Cottage.
52. Accordingly, the OMA therefore respectfully requests that the Planning Inspector confirms the Order subject to any modifications referred to in the preceding paragraphs.