

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

**THE LANCASHIRE COUNTY COUNCIL**  
**(ALDCLIFFE HALL DRIVE, ALDCLIFFE WITH STODDAY, LANCASTER)**  
**DEFINITIVE MAP MODIFICATION ORDER 2018**

**Order Making Authority Statement of Case**

**Background**

1. On 20<sup>th</sup> December 2017, the Parish Council of Aldcliffe-with-Stodday 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 restricted byway for the full length of Aldcliffe Hall Drive, from Aldcliffe Road to Aldcliffe Hall Lane, Lancaster.
2. The application was supported by 105 user evidence forms with a spreadsheet summarising the evidence; 88 emails responding to the initial call for evidence of use; letters; details of historical research and maps detailing the location of the route applied for.
3. Officers from Lancashire County Council (hereinafter referred to as "the OMA") investigated whether they considered that public rights existed over the application route and prepared a report detailing their investigation together with their recommendation that the application should be accepted in part and that an Order should be made to record the route as a public bridleway (Document 23).
4. The report was considered by the OMA's Regulatory Committee on 6<sup>th</sup> June 2018 where the decision to accept the application was made. The Minutes of the Regulatory Committee (Document 15) recorded that reference had been made to a bridleway in the report and that the original (published) recommendation was to accept the application subject to recording public bridleway rights (based on the substantial amount of user evidence submitted).
5. It was explained in the Minutes that the original recommendation for bridleway had been in reliance of the case of *Whitworth v Secretary of State for Environment, Food and Rural Affairs* (Document 15) where it

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was suggested that subsequent use of an accepted but unrecorded bridleway, where use of the bridleway would have been permitted by virtue of section 30 of the Countryside Act 1968, could not give rise to anything other than a bridleway. Essentially, the inference of dedication at Common Law or the presumption of dedication under S31 is based on the landowner being aware of and acquiescing to use by the public and only the lowest status commensurate with that use can be so inferred or presumed – i.e. because cyclists have been allowed on bridleways since 1968 any post-1968 use by pedal cyclists is consistent with bridleway status and it would be unreasonable to infer or presume a higher status when the landowner could not prevent cycling on that earlier bridleway.

6. However, it was reported that a 2017 Planning Inspectorate decision (Document 25) had subsequently been considered by the OMA which had very similar circumstances to this application, in that there had been no pre-existence of bridleway rights. The balance of pedal cycle users was the opposite of that in the Whitworth case. It was noted that, in this case, use by cyclists outweighed use by horse riders; no horse riders had claimed to use this route. Therefore, there was no basis from which a less burdensome bridleway could be inferred; the evidence of use by cyclists supported the establishment of a restricted byway over the application route.
7. The Committee therefore decided to accept the application and to make an Order to add a restricted byway, as opposed to a bridleway.
8. 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 19<sup>th</sup> June 2018 (Document 15).
9. A Definitive Map Modification Order was duly made on 3<sup>rd</sup> October 2018 ("the Order") (Document 1). The Order was made because it appeared to the OMA that the DMS for Lancashire required modification in

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consequence of an event specified in Section 53(3)(b) and Section 53(3)(c)(i) of the 1981 Act: namely, the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path; and 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 restricted byway.

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 Order, the OMA received one objection (Document 4).
12. The objection has 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**

13. The Order route is known as Aldcliffe Hall Drive. It extends from a point on Aldcliffe Road adjacent to Lancaster Canal (at point A on the Order Map), through stone gateposts and passing East Lodge to ascend gently uphill in a generally south westerly direction along the driveway and passing Ashlar House and Ashlar Lodge to concrete posts at point B on the Order Map. From point B, the Order route continues in a south south westerly direction with properties along either side to meet Aldcliffe Hall Lane at point C.

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14. The total length of the Order route is 230 metres with a width varying between 3 and 9 metres, to include footways in some sections. The entire route is shown between points A and C of the Order Map with a dashed green line.

15. Photographs of the Order route were taken in March 2018 and are included in the OMA's submission bundle (Document 24).

### **Legal Issues**

16. 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)(b) and S53(3)(c)(i) of the 1981 Act: namely, the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path; and 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 restricted byway, then the OMA should make an Order.

17. 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. S53 permits the upgrading and downgrading of highways and additions 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

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satisfied in deciding whether to confirm the Order. The statutory test for S53(3)(b) is that a presumption of dedication is raised on the balance of probabilities.

18. 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.
19. 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 restricted byway was already dedicated on the Order route and the Order route marked A-B-C on the Order plan should be added to the DMS as a restricted byway.
20. Under section 30 of the Countryside Act 1968 any member of the public has the right to ride a cycle on any bridleway, but the cyclist must give way to pedestrian and persons on horseback. In similar cases referred to PINS it is understood that that it has been held that the use on pedal cycle would have had to have shown *earlier acceptance* of the Order route as bridleway, for the cycle use to be supporting use as bridleway, rather than restricted byway.
21. In cases where there has been no pre-existence of bridleway rights and where the balance of pedal cycle users outweighs use by horse riders; and no horse riders have claimed to use this route, there is no basis from which a less burdensome bridleway can be inferred, the evidence of use by cyclists supports the establishment of a restricted byway over the Order route.

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22. It should be noted that a common law dedication of a public right of way may be inferred if the evidence points directly and unequivocally to an intention on the part of the landowner to dedicate. The burden of proof is on the applicant to prove 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 path has been dedicated. No 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.
23. 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.
24. It is the view of the OMA that the Order route subsists as a restricted byway and should be recorded as such on the DMS (Document 15).

**Historical, Map and Documentary Evidence**

25. The Order route crosses land which formed part of the Aldcliffe Hall Estate in the 1800s through to the 1950s.
26. The Order route appears to have physically existed on the same alignment since the early 1800s. The driveway appears to have been originally constructed as access to Aldcliffe Hall, with a lodge built at the

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gated entrance (point A) and a tree lined driveway provided from point A to the Hall and a further gated access leading to and from the Hall (and application route) at point C.

27. Following demolition of the Hall in the 1960s, further houses have been constructed along either side of the Order route between point B and C and this part of the Order route is now tarmacked with footways either side of much of it.

28. Vehicular access appears to be possible from point A to point B and from point C to point B, but not for those wider than about 2m as a through Order route due to the existence of bollards at point B. The bollards are shown on google photographs taken in 2015, but no earlier map or documentary evidence was found confirming how long they had been in place or who erected them.

29. The map and documentary evidence supports the user evidence submitted with regards to the fact that a route physically existed and appeared to be capable of being used throughout the period claimed, although bollards at point B have restricted vehicular access along the full length since at least 2015 and most probably for longer.

### **User Evidence**

30. The OMA consider that the evidence shows that the Order route has already become a public right of way (a restricted byway) under section 31 of the Highways Act 1980. This means that a route which has been used by the public as of right and without interruption for a full period of 20 years is deemed to have been dedicated as a highway, unless there is sufficient evidence that there was no intention during that period to dedicate it.

31. An Order route can also become a public right of way (a restricted byway) inferred from all the evidence under common law although this

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is harder to prove as the current landowners (who have owned the land since 2007 (LAN44377) (Document 26)) indicate that there is no intention to dedicate and therefore, for inferred dedication, we would need to consider whether rights had been dedicated before the current landowner had any interest in the Order route.

- 32.The applicant submitted a substantial amount of user evidence in support of their application.
- 33.A detailed analysis of the user evidence is included in the Regulatory Committee report (Document 23). The evidence submitted documented use of the Order route between the years 1954 and 2017. Of 105 users completing detailed evidence of use forms, 67 have used the Order route over a continuous period of 20 years up until 2017, and 38 users had used the Order route on foot over a continuous period of 30 years up until 2017.
- 34.Reasons for using the Order route were for pleasure, leisure, walking, exercise, running, dog walking, visiting, going to school/work, and cycling. Users had seen others using the Order route at the same time as them on foot; on horseback; cycling, and with wheelchair/pram and mobility scooters users.
- 35.None of the users have ever reported being stopped or turned back when using the Order route nor were they aware of anyone else being stopped or turned back and with the lack of evidence to the contrary the OMA considered that the application be taken as the calling into question and that the relevant 20-year period for Statutory dedication be taken as 1997-2017.No evidence was submitted to suggest that prior to the application being made use of the Order route had been challenged – it was simply noted that public rights were not recorded along it (hence the application being made).



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36. Of particular relevance in this case was the breakdown of user evidence whereby 61 users documented using the Order route on a bicycle with 8 also using it on foot and on bicycle. The remaining users documented use on foot. No users completed evidence testifying that they had used the Order route on horseback although 34 respondents referred to seeing people on horses along the Order route.

### **Summary**

37. The Order route is not currently recorded on the DMS or the List of Streets as a publicly maintainable route. Furthermore, there has been no express dedication in this matter.

38. Considering first the provisions of Section 31 Highways Act 1980. the period of use to satisfy the statutory test is 20 years from 20/12/1997 to 20/12/2017. The user evidence in this matter is substantial, there is ample user evidence that the route has been used throughout this period on foot and on pedal cycle and references to seeing people using the Order route on horseback. The OMA consider that there has been as of right use for the twenty-year period without any interruption and without any sufficient overt acts demonstrating an intention not to dedicate by the owners.

39. There was one reference to a notice mentioned by one user (from a total of 105) stating that it is not 'a bridleway' but the OMA consider that this is not sufficient evidence of no intention to dedicate.

40. The use by the public over two to three decades and owner's acquiescence may also be circumstances from which to infer dedication at Common Law. In this regard, the comments from the users who have used the Order route for over 20/30 years are important as it shows extensive use of the Order route with no evidence that use was challenged pre-dating the current ownership of the route which only dated from 2001 (10 years before the application was made).

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41. The fact that the Order route is consistently shown on maps as a through route and is also mentioned as a walking route in the Ramblers' Association publications (for further details see Regulatory Committee report (Doc)) indicates the Order route was available to the public possibly from the mid-1800s onwards connecting two vehicular highways probably means that it has been used as a thoroughfare for a considerable amount of time.
42. Taking all the evidence into account on balance, the OMA consider that there is sufficient evidence from which a dedication of this route as a restricted byway can be deemed under section 31 of the Highways Act 1980 and that the Order be confirmed. The balance of pedal cycle users outweighed use by horse riders and as detailed in the introduction to this Statement (Paragraph 6) the OMA considered the content of a 2017 Planning Inspectorate Decision letter in concluding that the Order should be made to record a Restricted Byway as opposed to a Bridleway. The evidence of use by cyclists supported the establishment of a restricted byway over the Order route.

## **Conclusion**

43. On the balance of probabilities and taking all the evidence into account, the OMA considered that the higher statutory test for confirmation of the Order is satisfied and on the balance of probabilities dedication of a restricted byway between points A to C has occurred.
44. Additionally, or in the alternative, the OMA also considered that the common law test for inference of dedication is satisfied for the full extent of the Order route.
45. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in paragraph

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18 is met. The objection received does not give any grounds for the OMA to reverse its decision on promoting the Order to confirmation.

46. The OMA wishes to point out that it made a clerical error in relation to the wording stated in the Order in respect of the events justifying the making of the Order set out below:

*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 restricted byway.*

Should be replaced with:

*Section 53(3)(b) and Section 53(3)(c)(i) of the 1981 Act: namely, the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path; and 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 restricted byway.*

The reference to section 53(3)(b) at the commencement of the Order should be omitted.

47. The OMA respectfully requests that the Planning Inspector confirms the Order subject to the modification referred to above.