

Order Making Authority Statement of Case

Background

On 10th July 2012, the North Meols Parish 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 adding to it a public footpath from Banks Road to Station Road, North Meols. The application was supported by 28 user evidence forms ("UEFs") which described public use of the application route (Evidence Bundle Document 3).

Officers from Lancashire County Council (hereinafter referred to as the OMA) investigated whether a public right of way exists over the application route and prepared a report of their recommendations (Submission Bundle Document 21). This report was considered by the OMA's Regulatory Committee on 26th March 2014 where the decision was made to accept the application (Submission Bundle Document 15). The Regulatory Committee decided to make an order to modify the DMS by adding to it a footpath and to promote the order to confirmation as it was satisfied that the higher test could be met.

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 9th May 2014 (Submission Bundle Document 15).

A Definitive Map Modification Order was duly made on 18th December 2014 (the "Order") (Submission Bundle Document 1). The Order was made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act, namely the discovery by the surveying authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way (being a public footpath) 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.

Notice of the making of the Order was served to affected individuals and prescribed organisations, erected on site and published in the local press in accordance with paragraph 3 of Schedule 15 of the 1981 Act (Submission Bundle Document 6).

During the specified period for objections and representations to the Order, the OMA received eight objections and one representation from Openreach confirming that no apparatus exists within the area (Submission Bundle Document 4). It is noteworthy that only two objectors dispute the existence of a public right of way across the Order Route. The other six objectors merely dispute the status of the public right of way.

They believe that the route carries higher rights and should be recorded on the DMS as a public bridleway rather than a footpath.

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

The Order Route is located in North Meols, in the District of West Lancashire. If confirmed, the public footpath would be recorded as starting at the junction with Banks Road opposite the start of Bridleway 47 North Meols and adjacent to 100 Banks Road (point A on the Order Plan) and run in a south south easterly direction along the east side of a field boundary for approximately 90 metres on a 1.5 metre wide undefined route to cross a field boundary (point C) and then continue in a generally south easterly direction parallel to The Sluice for approximately 520 metres as a 3 metre wide path to the junction with Station Road (point I). The route runs a total distance of 610 metres and is shown as a bold broken line on the Order Plan marked A-B-C-D-E-F-G-H-I. This route is referred to as the "Order Route".

Legal Issues

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.

The relevant statutory provision in relation to the dedication of a public right of way is Section 31 of the Highways Act 1981 (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.

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.

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The historical documentary evidence, which was evaluated by experienced officers and considered by the Regulatory Committee on 26th March 2014, is detailed in the Committee Report (Submission Bundle Document 21).

In summary, evidence shows that the Order Route between points D-E-F-G-H-I existed as a physical track on the ground from at least 1968 (as evidenced from the 1969 edition of the 1:2500 Ordnance Survey map, Evidence Bundle Document 22). This is corroborated by aerial photographs from 1963 which show a wide track from point C through to point I (Evidence Bundle Document 25). The same photograph appears to show available access at point A and a worn track leading into the field. Whilst no continuing worn track is visible up to point B and to C, there are no field boundaries so the route between A-B-C appears to have been accessible at this time to join up to the worn track at C through to I.

Aerial photographs from 1988 (Evidence Bundle Document 26) and 1999 (Evidence Bundle Document 27) showed that access to the Order Route at point A was still available and that the Order Route appeared to be accessible for the rest of its full length down to point I.

Although the map and documentary evidence does illustrate that the Order Route appears to have existed since at least the 1960s, it does not indicate whether the Order Route carried public rights of way over it. A public footpath was found not to exist on C-I in 1955. Accordingly, the determination of the existence of the footpath depends on the evidence of public use and whether dedication of a public footpath can be presumed to have occurred in accordance with section 31 of the 1980 Act or inferred at common law.

With regard to the statutory test of presumed dedication, and specifically the date that the public's use of the Order Route was brought into question, some UEFs mention new fencing at point A, erection of notices and using the Order Route until it was "blocked" and some date this as having occurred in the late 1990s or early 2000s. The owner of the land crossed by section A-C of the Order Route, the Southport Land & Property Company, deposited a statutory declaration under section 31(6) of the 1980 Act on 23rd March 1998. In the absence of any firm evidence of earlier challenges to the public's use of the Order Route, the OMA has taken the landowner's statutory declaration as the event which brought the public's use of the Order Route into question. Consequently, the 20 year period under consideration for the purpose of section 31(2) is submitted to be March 1978 to March 1998.

The information contained in the 28 UEFs (Evidence Bundle Document 3) accompanying the application showed that 27 users had used the Order Route on foot (with one user not specifying mode of use).

12 users claimed to have used the Order Route throughout this 20 year statutory period; 13 users had used it for different periods during the 20 years; two had used it

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(and stopped using it) before the 20 year period had commenced and one had only used it after the 20 year period had ended.

Should an earlier action by Southport Land and Property Company be sufficient to call the route into question the 20 year period would be earlier but it is submitted the earliest it would be is 1970-90 as 1990 was when the Company purchased the land.

Looking at the user evidence submitted with the application the earliest claimed use of the Order Route is 1958, with three users claiming to have commenced their use of the Route in the 1950s; four in the 1960s; 12 in the 1970s; eight in the 1980s and one in 2008.

Frequency of use ranged from "*most days*", "*regular*", "*all year*", 200 times per year, weekly (two users), 20+ times per year (14 users), 2-12 times per year (six users), and during the summer months (two users).

17 of the 28 users stated that they had not used the Order Route by any means other than on foot and three didn't answer the question. Seven users indicated that they had used the Order Route on a bicycle as well as on foot and only one said that they had used it with a horse. Six users reported seeing equestrian use of the Order Route by others but the most common means of usage witnessed by others was on foot.

The purpose for which the Order Route was used was recreational in nature, for example, dog walking, exercising, visiting friends and relatives on Station Road, walking with children, accessing bus stops on Station Road etc. Some users refer to it as being used as a cut through from one side of the village to the other.

Several users mentioned that there were stiles/gates/fences along the Order Route although some explained that these only came about in the 10-12 years prior to them completing the UEF (i.e. in the late 1990s/early 2000s) and two users recalled the fences appearing later than that - in the "*last few years*" and in 2010. 16 users specifically stated that they had not been prevented from using the Order Route by any stiles/gates/fences. Seven users indicated that they had been prevented from using the Order Route by these features but in all cases the suggestion was that this only occurred after the statutory period under consideration had ended (i.e. after 1998).

25 users confirmed that they had never asked permission to use the Order Route and 21 had never seen any prohibitory notices along the Route. Seven users stated that they had seen notices with four of these users describing the notices as indicating that either the land was private and/or trespassers would be prosecuted. Three of those who saw signs describe these as only appearing since the early 2000s in conjunction with the track being fenced off by the current landowner. One user recalled there being public footpath signs which disappeared at some point and another user remembers a public footpath signpost.

24 users answered in the negative to the question of whether they had ever been stopped or turned back whilst using the Order Route. The only user to state that they

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had been challenged was an infrequent user of the Route (using it only 3/4 times per year since 1970) and they said that it had happened only once. No further details were provided of the nature of the challenge.

Overall, the evidence suggests regular pedestrian use of the Order Route by the public over a prolonged period of time. Whilst recollections between users vary, it seems more likely than not that any attempts to discourage public use of the Route (with fences and signs) by the Southport Land & Property Company landowner occurred following the deposit of the statutory declaration in 1998. Prior to this, the full length of the Order Route appears to have been accessible to the public, so entry was not forced nor undertaken secretly, and public use was unchallenged.

On balance, the available evidence indicates that the Order Route had been used as a footpath by the public, as of right and without interruption, for a full period of 20 years from 1978 to 1998 such that a presumption of deemed dedication under section 31 is raised. The user evidence does not support a finding that the Order Route carries higher rights as a bridleway.

The only landowner who is reported to have taken any steps to try to prevent public use of the Order Route is the Southport Land & Property Company (who owns the land crossed by section A-C) and it seems that this owner had owned the land for at least eight years before taking any action that was noticeable by the public and/or effective. The OMA considers that there is insufficient evidence that between 1978 and 1998 any freehold owners of the land crossed by the Order Route had taken any overt action to disabuse the public of the belief that the way had been dedicated to public use. As there is no evidence to rebut the presumption of dedication raised by the user evidence, the OMA considers that, on the balance of probabilities, a public footpath subsists along the Order Route in accordance with section 31.

Since the Order was made, the OMA has obtained signed witness statements from several individuals who completed UEFs (Evidence Bundle Documents 5-8, 11, 13-16 and 18-21) as well as from users of the Order Route who had not completed UEFs (Evidence Bundle Documents 4, 9, 10, 12 and 17) and their evidence is submitted and is consistent with the picture of the Route having been used as a public footpath for a long time. A few people mentioned seeing equestrian use of the Order Route but the numbers were very low. The OMA has also attempted to speak with the six individuals who objected to the Order on the grounds that it should be recorded as a bridleway rather than a footpath. Whilst there is some evidence of equestrian use from some of these individuals for part of the statutory period under consideration, the OMA is of the view that the user evidence from horse riders is insufficient to support a finding that a bridleway can be reasonably alleged to have come into existence.

In the event that a statutory dedication of a highway is found not to exist, the OMA will rely upon a dedication at common law. The UEFs support use of the Order Route dating back to the 1950s. It is however noted the decision in 1955 not to include the route on the Definitive map. It is submitted that use continued with 17 users having commenced their usage of the Order Route before the start of the s.31 statutory period in 1978. The OMA is of the view that the available evidence indicates that the public

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had used the Order Route as a footpath for a lengthy period prior to the statutory declaration deposit in 1998 and indeed prior to the Southport Land & Property Company Limited's acquisition in 1990 of land crossed by part of the Route during which time the landowners took no action to discourage such public use. Given the volume and length of use, it would be reasonable on balance, in the absence of a statutory dedication, for a dedication to be inferred at common law.

Conclusion

The OMA submits that a public footpath subsists along the Order Route. The OMA further contends 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 for confirmation is met. the objections received to the Order do not give any grounds for the OMA to reverse its decision on promoting the Order to confirmation. The OMA therefore respectfully requests that the Planning Inspector confirms the Order without modification.