

**Statement of Case on which the Order Making Authority considers that the
Order should be confirmed**

Background

1. On 15th March 2005, an application (Document 27) was received by Lancashire County Council (hereinafter referred to as "OMA") from Mr Jack Nield Heys (Deceased) of 22 Commercial Street, Loveclough, Rossendale to add a footpath to the Definitive Map and Statement of Public Rights of Way (hereinafter referred to as "DMS") from Public Footpath No. 1 to Public Footpath No. 9, Rawtenstall, Rossendale Borough.
2. Officers from the OMA investigated the Application to determine whether there was evidence to show that the footpath applied for should be added to the DMS. Officers prepared a report of their recommendations (Document 25) which was considered by the OMA's Regulatory Committee (hereinafter referred to as "the Committee") on 27th September 2006. A decision was made to accept the application and to make an order to modify the DMS by adding a footpath to the DMA and to promote the order to confirmation as it was satisfied that the higher test could be met.
3. The Order ('First Order') was duly made on 25th October 2006 entitled: *The Lancashire County Council Definitive Map & Statement of Public Rights of Way (Definitive Map Modification) (no.6) Order 2006* (Document 1A).
4. Following the making of the Order, and on receipt of a number of objections, the OMA conducted interviews with users that had filled in user evidence forms submitted with the 2005 application (Document 21) and concluded that a substantial part of the Order route had only come into existence on the alignment claimed following the development of farm buildings into residential properties in the late 1980s.
5. As a result of those interviews, it was the view of the OMA that there was insufficient evidence of use of the route recorded in the First Order to promote it to confirmation.
6. A second report was presented to the OMA's Regulatory Committee on 1st July 2015 (Document 23) whereby it was decided that the 2006 Order be submitted to the Secretary of State requesting non-confirmation and that a further Order (the 'Second Order') be made to record a public footpath along the route confirmed by the users to be the one used prior to the redevelopment of the farm and that the Second Order be promoted to confirmation.

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7. The First Order has been duly referred to the Planning Inspectorate for non-confirmation and the Second Order – which is the subject of this Statement of Case was made (Document 1B).
8. The Second Order, titled 'The Lancashire County Council (Love Clough Fold, Rawtenstall, Rossendale Borough) Definitive Map Modification Order 2018' was made on 17th January 2018.
9. The Second Order (hereafter simply referred to as 'the Order') seeks to record public footpath rights along the route used by the public prior to 1989-1990 and is shown on the Order Map by a thick dashed line between points A-B-C-D.
10. The Order was made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of events specified in Section 53(3)(b) and Section 53(3)(c)(i) of the 1981 Act, namely the expiration 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 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.
11. 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 3 of Schedule 15 of the 1981 Act (Document 7B).
12. During the specified period for objections and representations to the Order, the OMA received 6 objections (Document 4).
13. 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

14. A site inspection was carried out in November 2014 and photographs of the route taken at that time have been submitted to the Planning Inspectorate (Document 24).
15. The Order route starts from a junction with Footpath Rawtenstall 1 at point A on the Order Map, running in a north-easterly direction south of Loveclough CPA Social Club following a tarmac access road for 55 metres to a gateway at point B and then continuing in a generally north-easterly direction through gardens for 65 metres passing the corner of Cloughfold Barn at Point C and crossing an access road, to an unmarked junction with Footpath Rawtenstall 9 at Point D on the Order Map; a total distance of 120 metres.

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16. Between point A and point B the Order route now forms part of the access road to Love Clough Fold and has remained unaltered from prior to the redevelopment of the farm buildings in the late 1980s.
17. The Order route between points B-C-D is now largely unwalkable – and no longer physically exists - since 1989-1990 - when the former farm (Love Clough Fold) was redeveloped into private residential houses.

Legal Issues

18. 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.
19. 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 both upgrading and downgrading of highways and deletions from the map. The statutory tests at S53(3)(c)(i) each comprise 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.
20. 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.
21. 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-D on the Order Map should be added to the DMS as a footpath.
22. 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

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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.

23. Presumed dedication at common law will also be considered. Dedication at Common Law does not require there to be twenty years use so long as the use would appear to be as of right and exercised by sufficient members of the public.
24. A Common Law dedication of a highway may be inferred if the evidence points more likely than not to an intention on the part of the landowner to dedicate. The burden of proof is on the OMA to prove the dedication on the balance of probability.
25. All the circumstances must be taken into account and a landowner may rely on a variety of evidence to indicate that he did not intend to dedicate. Use needs to be by the public and "as of right" which would mean that it had to be open, not secretly or by force or with permission. Toleration by the landowner of a use is not inconsistent with use as of right. The use would have to be of a sufficient level for a landowner to have been aware of it. The use must be by such a number as might reasonably have been expected if the way was a highway. Also, use must not be interrupted. Long use by the public without challenge can constitute evidence that the landowner intended to dedicate the used route as a public right of way. Such use must be continuous, evidenced and reasonable.
26. It is the view of the OMA that taking all evidence into account that a dedication may be inferred at Common Law and that the Order route subsists as a footpath and should be recorded as such on the DMS (Document 19). Should the Planning Inspector have any doubts in relation to a Common Law dedication of public rights then the OMA also consider that the statutory 20 year test has been satisfied and that dedication can be deemed under Section 31 over the 20 year period 1969-1989.

Evidence

27. This matter is unusual in that it stems from the realisation, following interviewing witnesses, that the line of the more modern access route claimed in 2005 was not on the same line as the pre-1989 route used by members of the public. Instead the route used by the public followed an old track across open land which passed through the farm and which was there until approximately 1989-1990 when the development of the farm into residences began.

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28. No express dedication of the Order route has been found but the OMA consider that there is sufficient evidence from which to deem dedication under S31 or infer dedication from all the circumstances at Common Law.
29. Considering S31, it is understood that there were some challenges to some users of the Order route in 1989 but the main challenge would be at that time when the development of the site affected the Order route which became incorporated into new garden areas. There is no evidence that users of the Order route were challenged prior to 1989. It is therefore suggested that the twenty years of use to be considered would be 1969-1989.
30. Looking at the user evidence from both those interviewed and those who provided user evidence forms and confirmation of their use of the route, it appears that local users used the track through the farm until 1989-1990 and then continued on the line of the new access road created as part of the development until access was denied by gates, fencing and verbal challenges. This is why use by many continues through to 2004 and why the application was made in 2005.
31. The OMA consider that there is sufficient evidence of use by the public documented during the period 1969-1989 without interruption and with no evidence of actions taken by the landowner for the twenty years being considered such that dedication can be deemed under S31.
32. The 2005 application was supported by the submission of 156 evidence of use forms indicating knowledge of the Order route for over 70 years (3); 60-69 years (5); 50-59 years (8); 40-49 years (12); 30-39 years (22); 20-29 years (28); 10-19 years (25); less than 10 years (43); and ten unspecified periods.
33. The forms indicate use of the route for over 70 years (1); 60-69 years (5); 50-59 years (7); 40-49 years (11); 30-39 years (20); 20-29 years (27); 10-19 years (25); less than 10 years (49), and eleven unspecified period of use.
34. The OMA is very aware that the user evidence forms were completed in 2004 – over twenty years ago – and that a number of users (including the applicant) are now deceased. Others will be very elderly, and many can no longer be contacted.
35. The previous owners and tenants of the site crossed by the Order route are no longer available to provide evidence and current residents of the properties affected have limited first-hand knowledge of the Order route or its use prior to 1989.
36. The considerable number (156) of evidence of use forms submitted is therefore of greater importance in providing a high number of individual recollections of use of the Order route over a lengthy period of time.

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37. The earliest use recorded is by Mrs Blunt who used it from 1930 onwards, Mrs Burston who used it from 1933 onwards and Mr Belsford from 1939. What followed, as evidenced by the rights of way user evidence forms, was evidence of regular use continuing all the way through to the sale of the land and redevelopment of the farm in the late 1980s.
38. 16 users (including Mrs Blunt, Mrs Burston and Mr Belsford) were interviewed by the OMA to confirm the route that they used through the farm was the Order route A-B-C-D. Unfortunately, written statements were not prepared at that time but all 16 confirmed the evidence submitted as part of the 2005 application when interviewed by officers from the OMA in 2010.
39. The evidence of use covered the 20 year period 1969-1989 but significantly was documented as occurring before that time with several references to the farmer (Mr John Bridge) not stopping or challenging anyone from walking it.
40. The main purposes for walking the Order route included walking the dog, for pleasure/leisure, to go fishing, trips onto the hills and for picnics, walking to and from work.
41. One user (Mr Collinge) provided the OMA with an undated photograph (Document 29) which was used to illustrate how the farm had altered since the redevelopment had taken place and which was subsequently sent to users of the route asking them to mark on it the route they took through the farm. It is undated but is thought to have been taken in the 1980s (the car shown on the photograph being a Mk 4 or Mk 5 Ford Cortina produced from 1976 which provides the earliest possible date). The farm no longer appeared to be a working farm – again suggesting the photographs dated from the mid-1980s and is not inconsistent with a route approximating to a straight line being available to walk on foot to connect to the footpath adjacent to the watercourse (footpath 9 Rawtenstall).
42. After carrying out the interviews officers wrote to the other users who did not attend an interview with a copy of the photograph provided by Mr Collinge to ask them to draw on the exact route they used before the development was carried out. 58 users replied, the OMA could only locate 57 of these replies (Document 22), users marked on the route through the farm along the old track confirming that their evidence of use pre-1989 related to the Order route.
43. Also considering the evidence of public use of the route and lack of action by the owner as circumstances from which the owner's intention to dedicate a footpath for the public could be inferred, it is suggested that this evidence too would be sufficient from which to draw such an inference of a common law dedication in the years before the new development post 1989.

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44. Alongside the user evidence submitted by the applicant, the OMA considered map and documentary evidence. The early maps do not show the route except for A-B which was defined by boundaries shown on County Series Ordnance Survey maps (excerpts included in Regulatory Committee Report dated 1st July 2015).
45. The first key piece of photographic evidence is the aerial photograph taken in the 1940s (Document 31) showing that access along the Order route may have been possible through the farm with a faint line consistent with pedestrian use visible between point B-C-D across an open area of land. User evidence from Jim Belsford, Mrs Burston and Mrs Blunt plus several other users documents use of the Order route as far back as the 1930s and 1940s and the photograph appears to confirm that such use would have been possible.
46. In support of the user evidence which spanned over half a century (1930 through to 1989) the other relevant pieces of map and photographic evidence examined are the 1:2500 OS map surveyed in 1960 and published in 1962 (Document 34), and the 1960s aerial photograph believed to have been taken in approximately 1963 (Document 32), together and the aerial photograph submitted by the Loveclough Fold Residents Association (c1960) all of which clearly show that a physically defined route consistent with that of the Order route existed through the farm prior to redevelopment and that it appeared to be capable of being used.

Summary

47. The Order has been made based on 'modern user' spanning over half a century (1930 to 1989) as supported by map and aerial photographic evidence.
48. Looking at whether dedication can be inferred on balance at Common Law, the OMA has concluded that there is sufficient user evidence to find footpath status has been dedicated prior to 1989 when land crossed by the Order route was sold off and redeveloped.
49. In the alternative the OMA concluded that the user evidence submitted showed that a statutory dedication of public rights had occurred during the 20-year period 1989-1969.
50. There is no evidence that a legal stopping up of any part of the Order route has ever taken place.

Conclusion

51. On the balance of probabilities and taking all the evidence into account, the OMA considered that the higher statutory test for dedication of a public right of way between points A-B-C-D is satisfied. 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 as claimed. The OMA duly accept

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the application for the Order route marked A-B-C-D to be added to the DMS as a public footpath and promote the Order to confirmation.

52. Whilst there is no express dedication in this matter, the OMA considers, on balance, that there is sufficient evidence from which to have dedication inferred at Common Law from all the circumstances.
53. The OMA further states that the criteria for a modification of the DMS under section 53 of the 1981 Act are satisfied.
54. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in para 19 is met. The objections received do 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 Order.