

WILDLIFE AND COUNTRYSIDE ACT 1981
THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR THE COUNTY OF
LANCASHIRE
THE LANCASHIRE COUNTY COUNCIL
FOOTPATH FROM WENNINGTON ROAD TO HOME FARM CLOSE, WRAY WITH BOTTON
DEFINITIVE MAP MODIFICATION ORDER 2021

Order Making Authority Statement of Case

Background

1. On 30th April 2020, Wray with Botton 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") to modify the Definitive Map and Statement of Public Rights of Way ("DMS") by adding a footpath from Wennington Road to Home Farm Close, Wray with Botton, Lancaster.
2. The application was supported by 4 user evidence forms, a supporting letter, photographs taken showing notices erected on the route, an extract from the local village newsletter (the Wrayley Mail) dated November 2019, a letter detailing the granting of planning permission to build the property now known as 32 Wennington Road, a Deed of Grant relating to access across land from Wennington Road dated 1970 and map showing 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 (Document 20).
4. The report was considered by the OMA's Regulatory Committee on 18th November 2020 where it was resolved that the application be accepted and that an order made to modify the DMS by recording a footpath along the route shown by a thick dashed line between points A-B-C on the Order Map.
5. It was further resolved that being satisfied that the tests for confirmation could be met, that the Order be promoted to confirmation.
6. Notice of the OMA's decision to accept the application and to make an order, including a statement of reasons for making the Order, was sent to affected individuals on 5th January 2021 (Document 15).

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7. A Definitive Map Modification Order was duly made on 13th January 2021 ("the Order") (Document 1). The Order was made under Section 53(2)(b) and Section 53(3)(b) of the Wildlife and Countryside Act 1981 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) namely the discovery by the Surveying Authority 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 public footpath.
8. 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).
9. During the specified period for objections and representations to the Orders, the OMA received two objections to the Order and one representation. The objections were from the joint owners of 32 Wennington Road who owned the land crossed by part of the Order route (Document 4). The representation was from the previous owners of 30 Wennington Road which abuts the Order route (Document 4).
10. The objections have not been withdrawn and 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

11. The Order route is in the parish of Wray with Botton in the City of Lancaster and is shown on the Order Map between points A-B-C denoted by a broken bold black line.
12. Photographs of the Order route presented to the OMA's Regulatory Committee in 2020 have been submitted to the Inspectorate (Document 21).
13. The Order route commences at a point on Wennington Road (point A on the Order Map) between the properties numbered 30 and 32 and runs in a south easterly direction along a tarmac path to the side of 32 Wennington Road to

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then continue across a tarmac area to the rear of the property. It then continues along a tarmac/compact stone surfaced track to exit onto Home Farm Close (Point C). Immediately to the west of point C is an access point into a recreation ground/school field. The total length of the Order route is 0.70 km.

Legal Issues

14. 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 requires modification in consequence of the occurrence of an event specified in S53(3)(b) and S53(3)(c)(i).
15. Section 53 permits both upgrading and downgrading of highways and deletions from the map. The Statutory tests at S53(3)(b) and 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 that it is the 'higher' test A which needs to be satisfied in deciding whether to confirm the Order.
16. The 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 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.
17. 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)

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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.

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* is sufficient evidence from which to infer a footpath was already dedicated on the Order route and that the route marked A-B-C on the Order plan should be added to the DMS as a footpath.
20. It is the view of the OMA that the Order route subsists as a footpath and should be recorded as such on the DMS (Document 18).

Historical, Map and Documentary Evidence

21. The OMA considered on balance, whether there was sufficient evidence from which to have the Order route's dedication inferred at common law from all the circumstances or for the criteria in section 31 Highways Act 1980 for a deemed dedication to be satisfied based on sufficient twenty years "as of right" use to have taken place ending with this use being called into question.
22. The analysis of the map and documentary evidence indicates that the Order route did not physically exist in its current state until 32 Wennington Road was built in the late 1990s.

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23. Prior to that time the land over which the Order route runs was part of a wider access from Wennington Road to Main Street through Home Farm. Documentary evidence relating to catastrophic flooding of the village in 1967 and a Thanksgiving Service in 1968 (Documents 38 & 39) showed that the access road leading to Home Farm was also in use at that time to access the Church Field (now the school field). This suggests that the Order route may already have been started to be used by the public in the 1960s.
24. In addition, it was shown as a substantial track on the 1960s aerial photograph (Document 23) and on the Ordnance Survey 1:2500 map sheet SD6067-6167 published in 1973 where access appears to have continued beyond point C through Home Farm out to Main Street – suggesting that the public may have been using the route on foot as part of a longer through route in the 1970s. Maps and aerial photographs thus support the user evidence submitted as part of the application.
25. A Grant of Deed dated 1970 (Document 24) related to private access along the Order route to gain access to the school field (former church field). The agreement was made between the owner of the land crossed by the Order route (Mrs Phylis Dorothy Holt) and Lancashire County Council – who owned the playing field used by the village primary school (the former church field). The agreement specifically created private rights – including vehicular rights from Wennington Road to the playing field. A supplementary agreement dated 1995 diverted this private right to the route now forming part of Home Farm Close (Document 25).
26. Whilst both the 1970 and 1995 agreements and plans referred to above indicated that access may have been possible along the Order route during that time the OMA acknowledged that neither agreement conveyed public rights of access on foot. Of significance however is the fact that on the 1995 plan it is clearly shown that pedestrian access was to be retained at point A with the wording 'extended stone wall leaving pedestrian access'. By inference – and supported by the user evidence – this suggests that whilst all private rights of access previously granted to Lancashire County Council may

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have been diverted, a pedestrian link, which was used by the public, was to be retained.

27. When residential properties were built on the land in the late 1990s the original farm access track was re-routed to the alignment of Home Farm Close which was constructed as part of the development. This included the private access road initially agreed and constructed following the private agreement made by Mrs Holt and the county council in 1995. Home Farm Close was adopted by the OMA on 1st June 2004 and is now a publicly maintained public vehicular highway.
28. The OMA consider it can be reasonably alleged that there is sufficient evidence from which to infer dedication of a public footpath at common law. Significantly, planning permission granted in 1999 (Document 27) to construct a dwelling house (32 Wennington Road) contains a planning condition requiring a public pedestrian access to be maintained from Wennington Road to the land to the south of the site. The route was to be a minimum of 2 metres wide - which is the generally accepted width required for the creation or diversion of a public footpath – and was stated to be a condition made based on highway safety and to safeguard pedestrian access.
29. The condition imposed in the granting of planning permission demonstrates that at such time it was considered that a public route already existed, and the Local Planning Authority intended for such to be maintained despite the new house being development around it.
30. Whilst the original plan submitted as part of the application referred to the route in question as 'Pedestrian access to Garages' further plans did not label it as such. An amended plan dated as received by the Planning Authority on 25th January 2000 shows the route from Wennington Road as 2.6 metres wide, narrowing to 1.92 metres and then to 1.68 metres before widening again to 1.92 metres adjacent to the proposed building.
31. The planning condition was seemingly accepted by the planning applicant and the condition was never removed or relaxed. The property was built with

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a clearly defined route constructed (albeit at slightly less than 2 metres in width) and the planning condition was arguably complied with. Users state that they continued to use the Order route after the construction of the new dwelling up until 2019.

32. The OMA therefore submit that such action demonstrates that in 1999 the planning applicants had knowledge of the public using the route and further showed a willingness to allow the public to continue to use it. The planning condition requiring public pedestrian access is a clear direction that the route be provided for public use and that it was not just a pedestrian link to be retained to provide access to garages located adjacent to the Order route for which private access rights already existed.
33. Furthermore, it is arguable that private rights, unlike public rights, could be negotiated and would not normally be included as a planning condition.
34. The route detailed in the planning permission was provided by the owners of the land at that time and was used by the public. Existing private rights to access the garages remained unaltered and in place.
35. Should the Inspector have any doubts with regards to the existence of public rights prior to the planning application then it is argued that dedication of the Order route under common law is evidenced by the acceptance of the planning condition and user evidence has been submitted to show the acceptance by the public. This can be considered in conjunction with the relevant map and documentary evidence.
36. In addition, the remaining length of the Order route, which is now in the ownership of the Parish Council, has been used as part of the longer through route A-B-C and the Parish Council, in applying for this Order have shown a clear intention to record existing public rights if the Inspector concludes that public rights did not already exist.
37. Four user evidence forms were submitted in support of the application (Document 19), which refer to use of the Order route from as early as 1970.

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All users have referred to having witnessed other users whilst using the Order route themselves. Three of the users claimed to have used the Order route on foot weekly and one user claimed to have used the Order route monthly. Whilst three users claimed to have always used the Order route 'as of right' one user (Mr Peter Edge) did explain that whilst he had known and used the Order route since 1971 until it was blocked off in 2019, he has owned a garage and therefore also had a private right of access along the Order route for the last 3 and a half years of using the Order route.

38. Evidence of four users claiming to have used the Order route as of right, can be viewed as a relatively low number. However, the Applicant in this instance was the relevant Parish Council who stated that they were themselves representatives of the Wray Villagers. In addition, the Parish Council own over half of the total length of the Order route and are clearly in agreement that public rights already exist along it.

39. Following the making of the Order a further 31 user evidence forms were submitted by the Parish Council (Document 40). Whilst two of the forms referred only to use after the relevant period the other 29 provided evidence of use of the route from as early as 1957 with a substantial number of people using the route on a frequent basis both before and after the construction of 32 Wennington Road. None referred to the route being blocked when 32 Wennington Road was built but simply referred to it changing from a substantial access track to a narrower passageway. Whilst some referred to signs and a gate temporarily restricting access in approximately 2019-2020 most appeared to have continued to use the route and were still using it in 2024 when the forms were completed.

40. The OMA in making the Order considered that public rights were called into question in 2019. Two of the users submitting User Evidence Forms (UEFs) as part of the original application refer to the route being closed in June 2019 and in November 2019 an article was published in the Parish Newspaper (the Wrayley Mail) notifying the public that the route was to be closed off (Document 32). The article prompted a public meeting which then led to the application to record the Order route as a public footpath. It is therefore

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suggested that the 20 year period to be considered to determine whether use of the Order route by the public as of right raises a presumption of dedication would be the period June 1999 - June 2019 and the additional user evidence provided in 2024 is consistent with this.

41. Whilst the Inspector is invited to consider whether the user evidence satisfies the test for statutory dedication over a 20 year period as detailed above, the OMA consider that the available map and documentary evidence, taken together with the user evidence forms and testimonials of local people indicate use of the route by the public pre-dating the construction of 32 Wennington Road and the granting of planning permission in October 1999 also show that the Order route was already considered to be a public footpath by the village community prior to June 1999 and as such an earlier dedication of the route may also be considered.

Summary

42. The OMA considers, on balance, that there is sufficient evidence from to infer dedication at common law from all the circumstances or for the criteria in S31 Highways Act 1980 for a deemed dedication to be satisfied based on sufficient twenty years "as of right" use to have taken place ending with this use being called into question in June 2019.
43. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above is met. The objection received does 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 subject to the modification proposed below.
44. It is the OMA's case that the standard of proof required is the balance of probability.

Conclusion

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45. The OMA has concluded that taking all the relevant evidence into account, on balance dedication as a footpath under common law or in the alternative under Section 31 Highways Act 1980 can be deemed and the Order route should be recorded as having footpath status.
46. Furthermore, there is no evidence that a legal stopping up of any part of the route has ever taken place. The legal maxim "Once a highway always a highway" would apply as unless stopped up by proper legal process a highway remains where it was dedicated, even if no longer used.
47. Accordingly, the OMA states that a public footpath subsists along the Order route. The OMA further states that the criteria for a modification of the DMS under section 53 of the 1981 Act are satisfied.
48. It should be noted that the Order contains a minor clerical error in that the reference to 'and Section 53(3)(b)' after Section 53(2)(b) should be deleted. It should however be inserted before 'Section 53(3)(c)(i)' and the following should be inserted after 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 which that period raises a presumption that the way has been dedicated as a public path'.
49. The OMA decided that the Order should be promoted to confirmation because the higher test referred to above in para 15 is met. The objections received 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 subject to the proposed modification. It is not considered that any party will be in any way prejudiced.