

THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

**Order Making Authority Statement of Case**

**Background**

1. On 28<sup>th</sup> January 2013, Mrs P Mott of 4 Culshaw Way, Scarisbrick, Ormskirk, Lancashire L40 9SA together with Mrs J Ridout of 11 Everard Close, Scarisbrick, Ormskirk, West Lancashire L40 9QT 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 a public footpath from Sandy Brook Bridge (an existing public right of way) to Bescar Brow Lane ([Document 21](#)).
2. Sadly, since the application was made Mrs Mott developed Alzheimer's disease and no longer lives in the area. Mrs J Ridout however still lives at her original address and has confirmed her support for the Order.
3. The application was supported by 19 user evidence forms, Land Registry documentation showing land crossed by the route was not registered and a map onto which the application route had been drawn.
4. 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 30](#)). The report was considered by the OMA's Regulatory Committee on 26<sup>th</sup> March 2014 where the decision was made to modify the DMS by recording a footpath along shown as A-B-C-D on the Order map.
5. 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 8<sup>th</sup> May 2014 ([Document 33](#)).

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THE COUNTY OF LANCASHIRE

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FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

6. A Definitive Map Modification Order was duly made on 27<sup>th</sup> August 2014 ("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)(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 footpath.
7. On 11<sup>th</sup> September 2014 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).
8. During the specified period for objections and representations to the Order, the OMA received four objections, one of which was subsequently withdrawn (Document 4).
9. Three 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**

10. The Order route is in the parish of Scarisbrick in the District of West Lancashire and is shown on the Order Map between points A-B-C-D denoted by a broken bold black line.

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FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014**

11. The Order route was inspected on 12<sup>th</sup> October 2013 and photographs of the route – as it appeared at that time - were taken ([Document 24](#)).
12. The Order route commences from a junction with Bescar Brow Lane at point A on the Order map immediately to the south of the point where Eas Brook passes under the road. It runs in a generally north westerly and then north north westerly direction to following the north bank of Eas Brook to point B and continuing in a generally north easterly direction parallel to the southern bank of Sandy Brook to field gate at point C before continuing in a more north north easterly direction parallel to the side of Sandy Brook and crossing a field boundary to terminate at point D where it meets Public Footpath 14a Scarisbrick.
13. The Order route is 1.3 kilometres long with a recorded width of 3 metres.

#### **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. An Order should be made 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 footpath.

THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

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FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

15. The provisions of the Wildlife and Countryside Act 1981 set out the tests which must be addressed in deciding that the DMS should be altered. S53 permits both upgrading and downgrading of highways and deletions. The statutory tests at S53(3)(c)(i) 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.
16. 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.
17. 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.
18. 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

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THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

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.

19. It is the view of the OMA that Order route subsists as a footpath and should be recorded as such on the DMS ([Document 15](#)).

### Evidence

20. 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.

21. Ownership of the land crossed by the Order route is split with the first part of the Order route (A-B-C) was on land owned by the estate of Mary Lavelle deceased, gifted to her children in 1993, and tenanted since 2006. It was registered (Land Registry title LAN186897) ([Document 36](#)) in 2017 as being in the ownership of Mr Thomas Lavelle, Mary Elizabeth Kenworthy, Mr Robert Marshall and Mr Charles Marshall. Mr Thomas Lavelle (landowner) objected to the Order on behalf of all four registered owners and Mr Henry Ascroft (tenant farmer at the time the application was made) objected to the Order on behalf of himself and his son (Mr Ian Ascroft).

22. The owners of the land crossed by the Order route C-D are Mr John Forshaw and Mr Mark Forshaw and MSF SSAS Trustees Limited (LA579809). The Forshaw family responded to pre-Order consultations confirming that they were happy for people to walk along their track responsibly and that it was a beautiful walk.

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THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

23. The OMA assert that the Order route has been dedicated as a public footpath. As there is no express dedication, the OMA considered firstly whether there was sufficient evidence from which to deem dedication from use under S31 Highways Act 1980 and to then secondly consider whether, in all the circumstances there is evidence from which dedication could be inferred at Common Law.

24. Considering, firstly the provisions of S31 Highways Act and whether the public has enjoyed use of the Order route for a full period of twenty years. The evidence submitted to the OMA indicated that use of the Order route had never been questioned or denied by any landowner but in October 2012 the tenant made the landowner aware he had challenged a user about his right to use the Order route (as confirmed by Mr Lavelle in his objection to the Order) ([Document 4](#)). User evidence forms suggested, two users (Mr Ridout and Mr Ashcroft) had been challenged by the tenant of the land crossed by the Order route A-B-C in 2012 and details submitted by Scarisbrick Parish Council in their objection to the Order (Doc) state that two separate incidents were reported to the Police on 3<sup>rd</sup> September 2012 and 12<sup>th</sup> November 2012. Both incidents, it is believed, referred to challenges made to Mr Ridout.

25. The OMA has found no evidence that the public's right to use the Order route was challenged until at least 3<sup>rd</sup> September 2012 when the tenant farmer first challenged one of the users. The landowner, Mr Thomas Lavelle, in a Statement prepared dated 29 June 2013 ([Document 9](#)) explained that his family had farmed the land crossed by the Order route A-B-C and that he was very familiar with it up until 1966 when he moved away from the immediate area to a farm in Lydiate. He stated that there was no use of the Order route across the land owned by his family from 1953 to 1966. His family continued to farm the land after Mr Lavelle moved away and he visited on regular basis. From 1993 the land crossed by the Order route A-B-C was let to successive tenants.

THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

26. Henry Ascroft – who challenged users in 2012 – tenanted the land from 2006 although no evidence has been presented to suggest that he was requested to make such challenges by the landowner or that he had informed the landowner of use being made of the Order route. In addition, he did not live in close proximity or in view of the Order route. Mr Lavelle did not live in close proximity to the Order route during the 20-year period 1992-2012 and for at least 19 of those years the land was tenanted and not farmed directly by the landowning family. As a landowner, Mr Lavelle stated that he was not aware of it being used but the evidence presented to the OMA clearly supports the fact that it was being used during that time without any suggestion that the landowner had taken any action to challenge such use.

27. The OMA considers that without any other evidence available, the "bringing into question" of the Order route would be September 2012 and the 20-year period of use to consider would be 1992-2012.

28. 25 user evidence statements were submitted as part of the application ([Document 20](#)) detailing use of the route by 26 individuals with a further form submitted after the Order was made ([Document 1](#)). The user evidence forms collectively provide evidence of use going back as far as 1956 through to 2013 when the application to record the right of way was made.

29. An analysis of the user evidence was carried out prior to the making of the Order and is included in the OMA's report to the Regulatory Committee ([Document 30](#)).

30. Looking specifically at the period predating the challenges made to the use of the Order route A-B-C in 2012, 17 users provided evidence of use including over 20 years use which included the years 1992 to 2012 all of whom had used it for a longer period extending back before 1992

THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

with a further 10 users documenting use during the period 1992 to 2012.

31. More detailed evidence of use has been submitted by a number of the users who originally submitted user evidence statements ([Document 23](#)) although the OMA draws attention to the fact that as a result of the number of years that have passed since the application was made, and the age of the majority of users completing the user evidence forms, it is now quite difficult to get further information from many, or to expect or indeed to ask, quite elderly people to attend an Inquiry. A few of users can no longer be traced and sadly, a number of users are now deceased.
32. The OMA considers that in a rural area, the submission of so much user evidence as part of the initial application, from so many individuals who had lived in the area for many years is evidence that on balance, public footpath rights have indeed been dedicated along the route.
33. No evidence was found or referred to of any action being taken by landowners during that period to prevent access along the Order route and no references were made to anyone being given or asking for permission to use it. None of the users recalled seeing any signs indicating that the route was not a public right of way although there were references to some unspecified signage in 2012.
34. The User evidence forms refer to use of the Order route mainly for leisure, dog walking, exercise, running, recreation and looking at the wildlife. The Order route linked to a network of recorded public footpaths and many users refer to it forming part of a 'circular' walk from Bescar following the course of Eas Brook and Sandy Brook from Bescar Brow Lane through to Woodmoss Lane and then back into the village.

THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

35.Two of the user evidence forms were submitted by the registered owners (LA579809) ([Document 20](#)) of the land crossed by the Order route between point C and point D. The land crossed by the Order route was already in the ownership of the Forshaw family before 2012 but in submitting user evidence forms both Mr John Forshaw and Mr Mark Forshaw provide their own evidence of use of the route in its entirety – including that part A-B-C which did not cross land in their ownership. In doing so they were not only acknowledging use of the route on their own land by themselves, but both describe the full length of the route as having been used for as long as they could remember, particularly by dog walkers and local people with no reference to people being given permission to do so.

36.A further user evidence form was submitted by Mrs Carol Forshaw – wife of Mr Mark Forshaw, who also provided evidence of use of the full length of the route as a regular dog walk from 1986-2012, referring to regular use by other dog walkers.

37.Such statements by members of the Forshaw family provided clear evidence that they acknowledged use of the Order route across their own land; that they did not prevent such use; and that they themselves used the route which crossed neighbouring land without permission believing it to be a public footpath.

38.Whilst preparing documentation to submit to the Planning Inspectorate in 2024, the OMA contacted Mark Forshaw and John Forshaw with regards to their evidence. Mr John Forshaw responded in writing ([Document 34](#)) to explain that prior to the making of the Order they had allowed local people to use the route across their land in a responsible manner. In recent years the tenancy and use of their land has changed and irresponsible use, in addition to use by people from further afield and concerns over dogs and potential environmental impact of the Order route means that they now withdraw their support for the Order route. The OMA respect that

THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

opinions change over time, particularly as use of the Order route had effectively ceased over 10 years ago but ask the Planning Inspectorate to consider the user evidence submitted at the time that use of the Order route was originally challenged and views expressed by the landowners at that time when considering whether the Order should be confirmed.

39. Map and aerial photograph evidence predating 2012 is limited but supports the user evidence submitted. The Order route appeared to be capable of being used throughout the time that users claimed to have been walking it.
40. Whilst no inference can be made with regards to the existence of public rights aerial photographs dated 1988, 1999, 2000 and 2007 ([Documents 25, 26, 27, 28](#)) all support the user evidence submitted.
41. Ordnance Survey mapping published in 1970 ([Document 29](#)) shows that the route was not fenced off from the adjacent fields at that time and that other than a solid line across the route at the roadside (Point A) no other lines are drawn across it which would have necessitated the need to pass through a gate or stile. By 2000 aerial photograph suggests that the Order route A-B-C had been fenced off from the adjacent fields which were used to graze livestock and by 2013 the digital OS mapping used to prepare the Committee Plans and subsequent Order maps showed the route A-B-C fenced off from the fields but not gated at point C.
42. A number of users refer to some form of stile or barrier at point A, but that this does not appear to have been something that prevented access and users referred to it being negotiated quite easily. The applicant (Mrs Ridout) described it as a low fence that everyone stepped over. A Planning Inspectorate decision for another route in Lancashire ([Document 22](#)) considered a low wall which was being climbed over to access a particular route, the inspector found that use

**THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE**

**THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014**

was still as of right due to the nature of the wall as it seemed more likely than not that access would have been attractive to residents whether children or adults and people were getting over the wall with relative ease and frequency.

43. In line with this decision, the OMA considered that the railing at point A was similarly described by users as having been low enough for them to access the Order route with relative ease and frequency and that use prior to 2012 was capable of being as of right.

### **Summary**

44. The OMA consider, on balance, that the criteria in S31 Highways Act 1980 for a deemed dedication has been satisfied based on sufficient twenty years "as of right" use of the Order route having taken place ending with that use being called into question.

45. A presumption of dedication may be rebutted if there is sufficient evidence on the part of landowners to demonstrate that they had no intention to dedicate a public footpath during the 20-year period in question. The OMA consider that no such rebuttal has been made.

### **Conclusion**

46. 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 to D on the Order Map is satisfied.
47. The OMA decided that the Order should be promoted to confirmation because the higher test for confirmation referred to above in paragraph 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 DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY FOR  
THE COUNTY OF LANCASHIRE

THE LANCASHIRE COUNTY COUNCIL PUBLIC FOOTPATH FROM BESCAR BROW LANE TO PUBLIC  
FOOTPATH 14A, SCARISBRICK  
(DEFINITIVE MAP MODIFICATION) ORDER 2014

48. The OMA has noted that some wording has been omitted from the Order in error. The Order complies with the requirement that the Order in that it is still in a form substantially to the like effect and similar in form.
49. However, the following wording is required to be inserted after Section 53(3)(c)(i): '*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;*' replace 'namely,' with '*and the discovery...*' (continue to end).'
50. The OMA therefore respectfully requests that the Planning Inspector confirms the Order subject to the minor modification referred to above.