



Order Decisions

Inquiry opened on 29 June 2011

by Helen Slade MA FIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: **23 NOV 2011**

Order Ref: FPS/Q2371/7/45

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Lancashire County Council Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No. 4) Order 2009.
- The Order is dated 18 November 2009 and proposes to modify the Definitive Map and Statement for the area by adding a footpath across the playing field of Helmshore Primary School, as shown in the Order plan and described in the Order Schedule.
- There were 25 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. This Order was made by Lancashire County Council ('the County Council') at the direction of the Secretary of State following a successful appeal by the applicants against the refusal to make an Order. The County Council is both the Order Making Authority ('the OMA') and the landowner in this case. At the inquiry the OMA took a neutral stance, and in its capacity as landowner the County Council objected to its own Order. The case in support of the Order was presented on behalf of Helmshore Community Action Group ('HCAG'), the body which had made the original application.
2. At the end of the second day of the inquiry it was necessary to adjourn due to the unavailability of some of the parties. During the adjournment I invited a late submission from one of the statutory objectors, who was also an affected landowner, but who had not had sight of all the relevant evidence. As a consequence of this I also received supplementary statements from the applicants, and some further information from the County Council as landowner. The inquiry sat for a total of 3½ days, closing on Thursday 20 October 2011.
3. I carried out an unaccompanied site visit the afternoon before the inquiry opened, and a formal site visit at the end of the second day. On that occasion I was accompanied by representatives of both the objectors and the supporters, and I was able to access the area immediately adjacent to the school premises in addition to the school field. I did not consider it necessary to return to the site at the end of the inquiry, and I was not requested to do so.
4. I have taken into account all the evidence I have received, whether submitted in writing or given orally, but I am able to give more weight to that evidence which was given at the inquiry and which was thus tested through cross-examination.

The Main Issues

5. The Order was made in consequence of an event set out in Section 53(3)(c)(i) of the 1981 Act which provides that the Definitive Map and Statement should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in it subsists or is reasonably alleged to subsist over the land in question. The Order was made by the County Council at the direction of the Secretary of State, on the basis that it was reasonably alleged that a public right of way subsisted, but at the confirmation stage of the proceedings I must be satisfied that the right of way subsists.
6. The case in support of the Order relies on the evidence of use of the way concerned. Section 31 of the Highways Act 1980 ('the 1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way 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. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.
7. In determining this particular Order, the question of signage is an important issue. Section 31(3) of the 1980 Act states that where the owner of the land over which a claimed right of way passes has erected a notice inconsistent with the dedication of the way as a highway in such a manner as to be visible to users of the way concerned; and where that notice has been maintained since its erection; that notice is sufficient evidence to negative the intention to so dedicate the way, in the absence of proof of a contrary intention.
8. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. A public inquiry is such a tribunal.
9. The test I must apply is the balance of probabilities.

Reasons

Background

10. An application to modify the Definitive Map and Statement was made to the OMA in 2006 by HCAG. The application related to a footpath, consisting of three 'arms', running principally across the playing field belonging to Helmshore Primary School. The claimed route effectively forms a triangle across land at one end of the field, and throughout this decision I intend to refer to it by its three 'arms' in accordance with the lettering on the Order Plan: Route A-B-C from Milton Close to Mayfair Close; Route C-B-D from Mayfair Close to Rhodes Avenue; and Route A-D from Milton Close to Rhodes Avenue. At Mayfair Close the access to the boundary of the playing field is a few metres beyond the end of the highway and must be approached by crossing a narrow section of land forming part of the garden to No. 11 Mayfair Close, owned by Mr E Atkin (C-B).

11. The claim was made entirely on the basis of the use of the claimed routes. The application was refused, but an appeal against that decision was made and allowed by the Secretary of State. The case in support of confirmation of the Order was made at the inquiry by HCAG entirely on the basis of the statutory tests set out in Section 31 of the 1980 Act; I was not requested to consider the matter on the basis of a common law dedication, and I have not done so.
12. There is no historical documentary or mapping evidence to support the existence of the routes, or their status.

Section 31 of the 1980 Act:

The date on which the right of the public to use the claimed routes was brought into question

13. During the school summer holiday of 2005, a security fence was erected within the school field along vulnerable sections of its boundary. There is no dispute about this event – Mrs Morris submitted a photograph said to be taken at the time, before the erection of the fence had been completed. In answer to questions about the origin of the photograph, she explained that she had returned from her own holiday to find that the fence was being erected. She took the photograph for posterity, her house lying immediately adjacent to the school boundary.
14. It was common ground that it was the erection of the fence which prompted the application because access to the field from any of the three claimed access points (A, B and D) was effectively prevented at that time. Who instructed that the fence be erected, or why, is not relevant to this point. The material issue is the effect of its construction.
15. Mr Atkin claims that he has taken steps at frequent interval over the years to prevent access to the boundary wall by planting shrubs on his strip of garden in front of the wall and by placing (and re-placing) coping stones on the top of the wall. However none of these actions appears to have prompted any formal application to recognise the footpath routes, nor to have prevented continued access to the playing field.
16. Reference is made in some of the submissions to a previous application for a right of way from Mayfair Close, but no documentary evidence has been submitted to substantiate this alleged claim.
17. Whatever had happened before the summer of 2005, it was certainly the complete prevention of access to the school field at that time which appears to have finally brought into question the right of the public to use the claimed routes. I must therefore examine the evidence in respect of the 20-year period between 1985 and 2005.

Whether there is a way of a character capable of giving rise to a presumption of dedication at common law

18. One of the principal thrusts of the County Council's arguments as landowner, both before and during the inquiry, was that the use of the school field which has been made by the public has been general recreational use of the area as a whole, and not use of specific routes.
19. There is no dispute amongst the parties that such recreational use has occurred, and that it has been used in this manner for many years. The field

was apparently purchased for school use in 1937 or thereabouts, and it is alleged by the supporters of the Order that it has been used by the community in general ever since for recreational games and activities. Such usage has increased since the late 1960s and early 1970s with the building of residential estates encircling the school and the field in question. However, it is also the supporters' case that specific routes across the field have been used by the public as short-cuts to locations around the locality.

20. The surrounding area has been developed considerably since the 1960s and was designed in such a way as to leave two roads – Mayfair Close and Milton Close – ending as cul-de-sacs against the field boundary. Each of these routes has residential properties alongside it, resulting in houses at the termini of the cul-de-sacs having a property boundary alongside the school field. The boundary between the field and the development was defined by a low dry-stone wall. Some cine film taken in the early 1970s by Mr Atkin, one of the objectors and who lives in one of the properties at the end of Mayfair Close, shows the surrounding development at that time. It clearly shows that the low wall at the end of Mayfair Close was flat-topped, apparently finished off with cement or mortar of some description.
21. The supporters of the Order claim that a stile was provided at the end of both the cul-de-sacs to permit access to the field as it was recognised at that time that there was a right of way across it. The stiles were described as consisting of two protruding 'steps' on either side, facilitating access across the smooth top surface of the wall. Mr Atkin's opinion is that the 'steps' were nothing more than large stones placed lengthwise through the wall as ties¹; a common and usual feature of dry-stone walls.
22. There is no evidence of a right of way pre-dating the construction of the surrounding estate in the locations now claimed. The only right of way mentioned in the user evidence is a route across the north-eastern end of the playing field from the vicinity of 'Causeway End' and which cut through the yard of the school to reach Gregory Fold. It does not correlate with any of the claimed routes and does not appear on any of the maps available to me.
23. However, given the configuration of the estate development and the nature of the construction of the wall, whether deliberate or not, it seems to me that it is more likely than not that access between Milton Close and Mayfair Close (A-B) would have been attractive to residents, whether children or adults. Such a route would have joined highways at each end and I see nothing in the character of any such route as being incompatible with a potential presumption of dedication at common law.
24. The situation is rather different with regard to the claimed routes which run towards Rhodes Avenue. Rhodes Avenue is not an adopted highway; its status in this regard is unknown. In fact, Rhodes Avenue itself appears to leave Helmshore Road² in a west-south-westerly direction passing four properties (Nos. 1, 3, 5 and 7) before turning north-west past the two remaining houses (nos. 9 and 11) and leading to a vehicular entrance to the school field. At the point where Rhodes Avenue turns sharply, a narrower road or track continues west-south-west past the north elevation of St Thomas Church and on to properties comprising Bent Meadow Farm and its associated dwellings, to which

¹ Sometimes referred to as 'through-stones' or 'throughs'

² An acknowledged highway

- it provides the only vehicular access. The main entrance to St Thomas's Church is from a gate at the junction of Rhodes Avenue with Helmshore Road, leading to an entrance porch on the south side of the building. However, access to the Church and the Church Hall is also possible via paths on the north side.
25. The claimed routes A-D and C-B-D pass through the school boundary at a point alongside the narrower track leading to Bent Meadow Farm, but are described in the Order as reaching the un-adopted road known as Rhodes Avenue. I have been provided with no details of who owns either the length of Rhodes Avenue abutting the houses 1-11 Rhodes Avenue, or the length of the onward track to Bent Meadows Farm; and no details of the highway status of any part of that route. The claimed routes A-D and C-B-D do not therefore appear to meet a highway at their joint southern terminus.
26. It was argued by the supporters that the route leads to a place to which the public habitually resort as many people made use of that route to get to the Church Hall for a variety of activities and events, or to get to the Church itself. It is thus of a character capable of being a highway.
27. The evidence of use which has been submitted does indicate regular access to the Church Hall for the purpose of attending Playschool, Brownies, Church Fetes, Keep Fit classes etc. but also indicates onward use to shops, the Post Office, Hairdressers, the park and other places. However, although some people (Mr Pilkington in particular) clarified that they had used the onward route of Rhodes Avenue for at least some of their journeys, I have been unable to clarify the position with the vast majority of user witnesses who did not give oral evidence at the inquiry. It seems to me that having reached Point D there is a variety of choices for an onward route. For example, it is possible to reach Helmshore Road by crossing the church-yard. I should therefore not assume that all the witnesses continued along Rhodes Avenue to Helmshore Road, or indeed visited the Church or its Hall.
28. So I must determine whether or not the termination point at D is a point to which the public has a right of access, and it seems to me that the evidence is somewhat lacking in this respect. The claimed route meets but does not cross the narrow track, and therefore does not reach land which has been shown to be within the curtilage of the Church or the Church Hall itself. Neither does the claimed route reach a point on an acknowledged highway (Helmshore Road) and the evidence of use provided is generally too vague for me to assume that all users who give destinations other than St Thomas's Church or its Hall (if indeed that is where they mean) carried on down Rhodes Avenue to Helmshore Road.
29. Nevertheless, it is clear that the Church Hall was used for a variety of purposes which included many activities that involved a cross-section of the community and not just the congregation of the Church. In that sense, Point D gives access to a destination to which the public could be expected to have habitually resorted. I therefore consider that the claimed routes to Point D are of a character capable of presumed dedication at common law.

Whether user has been by the public

30. Although the HCAG state in their statement of case that 31 members of the public submitted statements in support of the footpath application, I have been provided with only 28 user evidence forms ('UEFs'). The OMA in their report to

the Regulatory Committee on 9 April 2008 also make reference to 28 UEFs. At the inquiry Mr Charnock, who had not completed a UEF, gave oral evidence regarding his use of the claimed route. Some of the witnesses are clearly related to each other, living at the same addresses. Other witnesses have provided evidence of use of routes which are not the same as those on the Order and I have discounted their evidence.

31. The County Council, in objecting to the Order, claimed that any use of the routes which had taken place was by such a limited amount of people that they could not qualify as 'the public'. It was more in the way of user by a limited section of the residents for particular purposes. Counsel for the County Council pointed out that the numbers of people who gave oral evidence of use at the inquiry was even smaller. He argued that their evidence – the only evidence on which I could really rely – showed such a low level of use during the relevant period that they could not qualify as 'the public at large'. He bolstered this view by referring to the fact that none of the teaching staff had ever seen anyone, least of all the witnesses, using the claimed route, and that no worn routes were visible on photographs taken during the relevant period.
32. Section 31 of the 1980 Act does not define the term 'the public' as used in this context. The question has been addressed to some degree in judgements, and the opinions suggest that the term should be interpreted in the normal dictionary sense of the word: the public as a whole or the community in general. There is no indication of the number of users required to qualify as 'the public' and it has been accepted that in some places the only users of a particular way are likely to be local residents³. Section 31 does not refer to 'the public at large', whatever interpretation might be given to that phrase.
33. Section 31 of the 1980 Act also provides various means by which landowners can protect their land against possible claims for public right of way. One of those means is set out in Section 31(6) and provides for the deposition of maps, statements and declarations in relation to the acceptance or otherwise of public rights across the land in question. This measure is designed to allow landowners to protect themselves from any such claims whether or not they are aware of any use of their land in the required manner. Thus it would seem to me that it is not necessary to show that a landowner must be aware of the use of a way by the public in order to show that use by the public has taken place.
34. The UEFs, however lacking in detail, have been submitted by a number of local residents living in the surrounding area. Given the location of the claimed routes I do not find it surprising that most of the witnesses come from a relatively small and defined set of streets or roads. Nevertheless, it is acknowledged in the evidence of Mrs Myers, the Head Teacher, that they represent 21 households. I see nothing to suggest that the witnesses who claim to have used the way in question are not representative of the local community. I am therefore satisfied that they qualify as 'the public' in the context of Section 31 of the 1980 Act.

Whether there has been user of specific routes

35. In order to examine the nature of the use which is claimed, and whether or not such use has been exercised as of right, I think it is helpful to consider the

³ e.g. *R v Southampton (Inhabitants)* [1852] and *Fairey v Southampton City Council* [1956]

sequence of events which has resulted in the application for an Order. Bearing in mind that I am looking principally at the period 1985 to 2005, I first look to the situation prior to 1985 and, specifically, at the development of the residential areas around the school.

36. I have already referred to the fact that the area began to be developed in earnest in the late 1960s. Prior to that, in the immediate area of the school, there was some 19th and early 20th century housing along Helmsore Road, Gregory Fold and Rhodes Avenue, and some more isolated properties. These can be seen by referring to the Ordnance Survey ('OS') base map on which the Definitive Map is drawn. The church of St Thomas can also be identified, but not the Church Hall. The relevant date of the Definitive Map is 1 September 1966, and the base map does not show any of the more recent estate development.
37. The Milton Close area of the estate was completed before the Mayfair Close area⁴, but the houses in Mayfair Close were occupied from about 1973 onwards. Mr Atkin was one of its first residents, if not the first, and thus he claims a long memory of events. He lives in number 11, alongside the school field at the head of the cul-de-sac, and the Order route crosses a narrow strip of his land. Mrs Morris moved into number 10 with her husband and young family in 1988, having previously lived nearby since 1980. She lives opposite Mr Atkin and her property also lies at the head of the cul-de-sac alongside the school field. Mr Pilkington has long knowledge and long family associations with the area; relatives of his mother lived at Bent Meadow Farm where he himself now lives in Bent Meadow Cottage. He also lived in Mayfair Close for a short while during the late 1970s but moved away in 1979 and did not return to his present address until 1999. Mr Charnock lives in Kingston Crescent and has been there since 1981. He was Deputy Head at Helmsore School for 10 years between 1980 and 1990 and so is in a good position to speak on the early history of the claimed route during the relevant period as both a user and a member of staff at the school. Mr Lund and his family have lived in the area for a long time, moving into a house in Chelston Drive in 1971, and then to Mayfair Close in 1986.
38. It is inevitable that, in placing more people into the immediate environs of the school playing field, there must always have been the possibility that it would provide an attraction for children to play on, outside of school hours. Indeed the supporters allege that the low wall that formed the boundary to the field adjacent to Milton Close and Mayfair Close was constructed purposely to allow such access. There does not seem to be any dispute that the field was used by local children and families for a variety of activities. Mr Atkin's cine film shows his own family using the field for that very purpose in the early 1970s and the present members of the school staff acknowledge that such use did take place, before the fence was erected.
39. Unfortunately, other types of less acceptable use also occurred, resulting in undesirable materials being littered on the field: in particular dog faeces and broken bottles. Other items which the school staff claim to have found include the detritus left after a barbecue and items connected with drug-taking.
40. The documentary evidence submitted shows that in 1979 discussions took place regarding complaints from residents in both Milton Close and Mayfair

⁴ Mr J Lund's evidence – not contradicted

Close about the vandalism and mis-use of the school field. During the course of several exchanges of memoranda the informal recreational use of the school field was acknowledged and meetings took place with residents. Mr Atkin was involved in some of these and so were a Mr F A Goldsworthy and a Mr G A Casson. Mr Casson then lived at number 10 Mayfair Close. Correspondence from that time (1980) contains reference to the presence of a 'style-type' stepping stone at the head of Mayfair Close (Point B), the alleged alterations to it made by Mr Atkin, and also to the allegation that there was a right of way over the field.

41. As a consequence of these discussions and meetings it would appear that extra signs were erected and the possibility of a higher fence or wall was also considered. The existing wall was described in a memorandum dated 14 December 1979 from the District Educational Officer to the Chief Educational Officer as being '18" high' and that it was merely a demarcation line. He considered that it could in no way have been described as a 'boundary wall'. The cost of providing a higher wall prevented the school from doing anything other than erecting more signage, and Mr Atkin stated at the inquiry that he decided to use shrubs, rather than fencing, to discourage access. However, he also stated that at about that time he gathered some large stones from a nearby building site and used them as coping stones to top the wall. At first he just placed them on top of the wall but he later took to cementing them, although he could not remember how often he had had to repair the wall or when the repairs took place.
42. There appears to be no dispute that, throughout the relevant 20-year period, a sign was in existence at Point B on the school field. The user witnesses are consistent that it said 'No unauthorised use. No exercising of dogs' or words to that effect. The existence of the sign can be seen in a photograph submitted by Mrs Morris and taken during the summer of 2005, just prior to the present security fence being completed. The same memorandum to which I have referred above, written in December 1979, notes that local people have been playing in the field for a number of years despite the existence of 'No unauthorised use signs' and recommends that '*additional i.e. 4 or 5 "No unauthorised use" signs*' should be erected. This memorandum also contains the statement that '*There are no rights of way over the playing fields*'.
43. The picture of signs submitted by Mrs Myers during the second day of the inquiry show that the blue sign carried the words 'No Unauthorised Use. No Exercising of Dogs' and was headed 'Education Committee'. These appear to have been standardised signs that were in existence at other schools within the County area.
44. So it would appear that by about 1985, the start of the 20-year period I am considering, it is common ground that:
 - There was a low wall at the end of Mayfair Close (and a similar wall at the end of Milton Close);
 - The school field was used for informal recreation, including dog walking, and had been so used for many years;
 - Mis-use of the field had caused difficulties for local residents either due to noise or vandalism and that dog walking was a particular concern;

- Signs were in existence on the school field (the blue signs), including at the Milton Close and Mayfair Close 'access' points, which indicated that unauthorised use and the exercising of dogs was prohibited.
45. Differences of opinion arise over whether or not the walls in question had been altered by that time or at a later date; and whether or not the alleged 'step' in the side of the wall facing Mayfair Close had been removed - or indeed whether it had ever existed.
46. Whether the through-stones were there to tie-in the dry-stone wall, or whether they had been intended to be steps for a stile, it might be expected that they would have protruded on both sides of the wall. None of the photographic evidence shows the through-stones extending on the road-side face of either wall (i.e. Milton Close or Mayfair Close). However, the description of the wall as being only 18" high suggests that a step, certainly on the road side, might have been unnecessary. What appears to be indisputable is that, step or no step, people were getting over both walls (Point A and Point B) with relative ease and frequency to make use of the school field in general. It is therefore just as likely that access over the wall was available to people who were wishing to use specific routes across the field as part of an onward journey.
47. The evidence of the user witnesses that was heard at the inquiry was unshakeable on this point: that they had used specific routes for specific purposes. As none of the objectors could gainsay that evidence, I have no reason to conclude that it did not happen. Given the configuration of the estate roads and the location of the local facilities and services, I do not agree with those witnesses for the objector who considered that the claimed routes were not the short cuts claimed for them. For anyone living in Milton Close, Mayfair Close or Kingston Crescent, the journey round to the Church Hall by road on foot would take considerably longer than the route across the field. Likewise, for some people it would have been slightly quicker to get to main school entrance by cutting across from Mayfair Close to Milton Close and going along Gregory Fold. As for the journeys to the paper shop and other facilities, the distances may or may not have been significantly shorter in all cases, but I am satisfied that such journeys did take place.
48. I accept that there does not appear to have been a clear worn line visible in the aerial photographs. Furthermore, it was apparent from the oral evidence that it was not possible to take what was written on the UEFs at face value, and that the frequency of use by any one individual varied considerably over time. However I would say that this is not unusual because forms are always generalised by their very nature, and thus a compromise; but it does mean that I must treat untested evidence with a great deal of caution. Mrs Moden, for example, claimed use of all the paths two to three times a week on her UEF, but it was clear at the inquiry that her use had become much reduced in the later part of the relevant 20 year period when her children were older and after certain trips became less necessary.
49. Mr Charnock described the field as 'very healthy' in terms of lushness although Mrs Myers and other objecting witnesses considered the field to be very wet. In my view, the field as I observed it is no different from many other large areas of grass and would be perfectly easy to cross in normal shoes for much of the time. It may quite naturally have been avoided in very wet weather, and this would further reduce the likelihood of a worn path becoming visible.

50. From the evidence available to me, and particularly on that which I can place more weight, I conclude that the user was not intensive. It was more likely to have been opportunistic and to have been somewhat less frequent overall than the impression given in the UEFs. Nevertheless, I am in no doubt that some use of the specific claimed routes has taken place over the years, into and throughout the relevant 20 year period I am considering.

Whether there been user of as of right

51. For user to have been as of right it is necessary to show that it was exercised without secrecy, without force and without permission.

Secrecy

52. Given the less intensive use which I have concluded took place, it is necessary to consider whether that use could be classified as having taken place secretly or covertly.
53. I have already referred to the fact that the evidence shows that use of the field by locals for recreational purposes had been acknowledged by the school, the Education Department and by Mr and Mrs Atkin. Clearly use of that nature was normally conducted out of school hours: evenings, weekends and holidays. It is possible that some of that recreational use was by permission (there is evidence of one or two lettings in more recent years) but there is no evidence of any policy in that respect for the majority of the relevant 20-year period. Although such recreational use cannot be taken into account in terms of the use of specific routes, I must conclude that use of the field, in general, was not secretive.
54. I cannot seriously believe that, amongst the more general use of the field, there were people 'skulking about' following specific routes. There is no evidence to suggest that those people who gave evidence at the inquiry were acting in such a fashion; they were simply more likely to have been using the path outside of school hours and therefore not to have been seen.
55. The exception to that is, possibly, Mrs Moden who stated that she often used to go to the Post Office and shops during school hours. She was never seen by any of the school staff who gave evidence. Conflicting evidence was given by them about how visible the claimed routes were from the school-yard but it was also acknowledged that their primary focus was the children in their charge. I consider that, owing to the low frequency of her journeys across the field during the period I am considering – perhaps once a week during the majority of the relevant period according to her oral evidence – there would have been little chance of her being seen. Her passage was unlikely to have coincided with times when any of the classes were using the field itself and the view from the playground was acknowledged to have been extremely limited by several of the staff during most of the relevant period.⁵
56. I find no evidence to support that the use by the public of any part of the claimed route was secretive.

⁵ Prior to the removal of the toilet block

Permission

57. No-one at the inquiry, either objectors or user witnesses, made any reference to the existence of specific permission being granted or sought to cross the land in question.
58. The existence of the blue signs at two of the entry points onto the school field (Points A and B) was acknowledged by all parties, particularly the one at Mayfair Close. The evidence in relation to the existence of such a sign at Milton Close was less clear, but not seriously challenged. There was little evidence to suggest that such a sign existed at Point D; any signage in that vicinity appears to have been beside the vehicular gate off Rhodes Avenue.
59. Mrs Morris and Mr Lund both considered that the reference to 'No unauthorised use' on the blue signs applied to inappropriate use, and not to the use of the claimed route. This was not the interpretation of its meaning according to the objectors who considered that the meaning was clear: the only use of the field which was allowed was that which had received official authorisation.
60. The alleged presence of the later 'off-white' signs, and the presence of the existing 'white signs' was much debated. However, for the purposes of deciding whether or not use of the claimed routes was exercised by permission they are not so controversial. Neither the blue signs nor the later signs give, or imply, specific permission to walk across the field. Despite Mrs Morris's belief that walking across the field was an 'authorised' activity I conclude that there is no evidence of permission, implied or otherwise.
61. However, there is evidence amongst the UEFs of considerable use for the purposes of getting to school. This was questioned by the principal objectors due to the fact that the main gate to the school is not, and never was, onto the field. Looking carefully at the written evidence, and taking into account the oral evidence of use, I believe that there are two issues to consider in this respect.
62. Firstly it is clear from the written evidence, and supported by Mr Charnock at the inquiry, that there used to be a gate into the school-yard (marked on several of the maps attached to the UEFs) towards the northern end of the school field. It seems to have been common-place for some children to cross the field from the estate and to enter school by this means. This is not one of the claimed routes.
63. Secondly, if that gate was shut, or after it was permanently locked, children (and some teaching staff) crossed the field using the route C-B-A and then entered the main school entrance via Milton Close and Gregory Fold.
64. I consider that such use of the claimed route C-B-A could be considered to have been by implied permission or licence, since the purpose of using it was to gain access to the school across land owned or managed by the school itself. This may also apply to the other two arms of the claimed route, although to a much lesser degree. There is thus a considerable volume of more frequent use, including some use by Mr Charnock himself whilst he was Deputy Head, which I ought to discount because it constitutes user by permission. Similarly, Mr Charnock's use of other parts of the route during that time (1980-1990) might be considered to be permissive since he was a senior member of staff at

the time. His use after that period, although not by permission, was considerably less frequent.

65. It is alleged by the objectors that some of the user witnesses have not made clear in their UEFs that they were, at least at times, members of staff at the school in some capacity. In the absence of clear evidence to that effect, I have simply treated the claimed volume and frequency of use of the relevant route (C-B-A) with a degree of caution, in line with the approach I have already set out, especially where that use appears to have been connected with going to school.

Force

66. A number of particular issues were raised in connection with the opinion of the objectors that user had been exercised by force. The County Council, as landowner, considered that use of the field for any purpose, whether it be for general recreation or using the claimed routes, was user by force in the face of contrary signage and through being advised by school staff to leave the field. User as a consequence of the damaged fence at Point D was also considered to be evidence of user by force.
67. Mr Atkin's view was that user by force was demonstrable owing to the damage caused to the wall which he maintained. He also considered that damage had been caused to the shrubs he had planted in front of the wall, and that he had personally stopped people from using the field. Whether or not he owns the wall is not strictly relevant in this context; he does appear to be responsible for its maintenance according to his deeds.
68. With regard to the signage, it would appear that the blue sign, at any rate, was present at Point C throughout the 20 year period. The wording on the sign was ambiguous and did not specifically deny the existence of any right of way. There is a suggestion that the similar sign at Point A may have been vandalised at some point, but no clear evidence of when this might have occurred. Nevertheless, continued, unchecked use of the claimed route in the face of such a sign cannot, in my view, demonstrate user by force. Neither can continued use of a route in the absence of such a sign.
69. With regard to the possible existence during the relevant period of a later sign, the wording, even though more detailed,⁶ still did not specifically make reference to the use of a specific route across the field. Mrs Myers acknowledged at the inquiry that she had made inquiries of the legal department at the County Council about the reference to trespassers, and was advised that the notice carried little weight. My conclusion is therefore the same with regard to any later sign: user by force cannot be demonstrated.
70. None of the user witnesses who gave evidence at the inquiry had ever been asked to leave the field when using the claimed routes. There was no evidence that any other people had been asked to leave under the same circumstances. Conversely, there was evidence that some people had been asked to leave the premises when behaving in an anti-social manner, but these related largely to activity in the immediate vicinity of the school. There was some anecdotal evidence that people had been asked to refrain from playing football on the field, or to refrain from walking their dogs, but none of these events related to the use of the claimed routes.

⁶ See paragraph 87

71. Neither the school nor Mr Atkin was able to provide evidence of having challenged people using the claimed routes for the purposes of walking during the relevant period. The absence of any such challenges, particularly when challenges were being made in other circumstances, lends support to the conclusion that user of specific routes was not being exercised by force.
72. With regard to the damage to the fencing at Point D, the evidence that emerged was that it had been in disrepair for many years, despite Mrs Myers original contention that it had been repaired in 2000. Mr Walker was able to confirm that it was still damaged in 2004 when one of his pupils was able to abscond through it. Whether it had originally been vandalised or not, there was no evidence to suggest that any of the user witnesses had done anything other than to take advantage of the resulting gap. Their own use had not been 'by force' in any way.
73. The alleged damage to Mr Atkin's shrubs could not, in my view, be adequately pin-pointed to the relevant 20 year period. Both Mr Morris and Mr Lund, the alleged perpetrators, acknowledged trimming the bushes but stated that it was either later than 2005 or that it was in the course of trimming their own shrubs on the adjoining garden plot (in Mr Morris's case). I am not convinced from the evidence that Mr Atkin's bushes were sufficiently well established during the relevant 20 year period as to require force on the part of the users of the claimed routes.

Conclusion on user as of right

74. I am satisfied that there is no evidence of user by stealth. I am also satisfied that there is no evidence to support that there has been user by force. However, I consider that there is some evidence that suggests that a proportion of user of one of the routes in particular (C-B-A) was exercised by implied permission. Thus the use of the claimed routes which has been exercised by the public as of right is reduced in volume and frequency from that which initially appears to be the case from the UEFs. Nevertheless, it does not eliminate it altogether. I am satisfied that the evidence of use for the purposes of visiting friends, getting to shops, bus-stops, the playschool and St Thomas's Church has been exercised as of right.

Whether there has been uninterrupted user

75. It is not necessary to show that use of a way has been continual to demonstrate that it has been uninterrupted for the purposes of Section 31 of the 1980 Act. A mere absence of continuity in de facto user will not stop time running. An interruption must be an interruption in fact, and it must be shown to have been for the purposes of preventing use of the way concerned.⁷
76. It is alleged by the objectors that use of the field for organised activities, whether undertaken by the school or by other organisations, would have interrupted the use of the claimed routes, particularly those running towards Point D. More specifically it was stated that the marked football pitch straddled the route A-D.
77. There is no evidence that users of the claimed routes were at any time prevented from using them by other activities. It may be that, at times when the church fete was being held on the field or other such activities were taking

⁷ *Lewis v Thomas* [1950] 1 KB 438

place, it was necessary to deviate slightly from the direct line which the user witnesses normally followed. I do not consider that a deviation of a few metres, which is all that would have been necessary in my view, would be capable of giving rise to an interruption to use of the claimed routes.

78. I place no weight on the suggestion by Counsel for the County Council that trees, bushes or other vegetation interrupted the use of the route C-B-D. If the trees visible on the aerial photographs submitted were indeed on the line of the path, I prefer the view of Mrs Morris and others that they would have simply been walking beneath them.
79. There is no evidence to support a conclusion that user of the claimed routes during the relevant period was interrupted in a manner such as that required in the context of Section 31 of the 1980 Act.

Conclusion on user overall

80. I am satisfied that the evidence supports that there has been some use as of right of the claimed route throughout at least the period of 20 years I am considering. I have discounted some of the claimed use which I have concluded was exercised by implied permission. I therefore consider that it is more likely than not that the use has been less frequent and less intensive than the impression given by the supporters of the Order, but it has been sufficient to satisfy the user requirements of Section 31 of the 1980 Act.

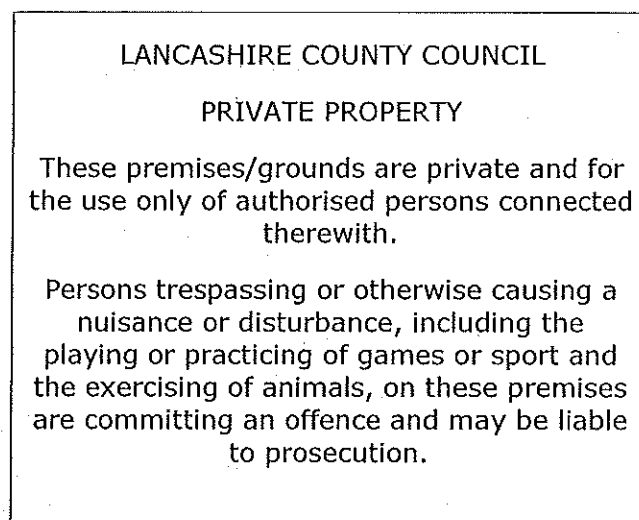
Whether there is sufficient evidence of a lack of intention to dedicate during the relevant period

81. This aspect of Section 31 of the 1980 Act was thoroughly examined in *R (Godmanchester and Drain) v SSEFRA* [2007] UKHL 28. It was clear that their Lordships considered that any act which was sufficient to evidence a lack of intention to dedicate a public right of way would also be likely to be an action which called into question the public's right to use the way. Anything less than that would be the exception rather than the rule. Nevertheless Section 31 does provide some specific measures which qualify as sufficient evidence of a lack of intention to dedicate.
82. Of the means set out in that section, there is no evidence that any deposit, statement or declaration was deposited with the County Council as Highway Authority under the provisions of Section 31(6). Neither is there any evidence of any other sort of notice being deposited with the appropriate council under the provisions set out in Section 31(5).
83. However, it is not in dispute that some form of signage has been in existence on the ground during the whole of the 20 year period I am considering. I must therefore consider that signage in the context of the provisions of Section 31(3) of the 1980 Act.⁸
84. The presence of the blue signs did not prompt a response from the public at any time, and so cannot be considered to have brought their right to use the claimed routes into question. There certainly seem to have been at least two signs in existence (at Points A and B) which would have been visible to anyone using any 'arm' of the claimed route. The question is whether or not they

⁸ See paragraph 7

could be considered to be inconsistent with the dedication of a public right of way.

85. The wording of the blue signs did not explicitly deny the existence of any public right of way. It merely referred to 'No Unauthorised Use' and 'No exercising of dogs'. The supporters of the Order, including those who provided written evidence, referred repeatedly to the fact that it was not necessary to get permission to use the claimed route as it was a public right of way. As such, they considered that their use was 'authorised'.
86. Mr Charnock was questioned closely about the attitude of the school during the time he was there (1980-1990) and when asked what his understanding was of the need to control access to the premises stated "*the most truthful answer is that the school did nothing*". He said that no permission was given to the public to walk across the field but it had been going on for such a long time and no-one told anyone that they could not cross. The usage just carried on. He acknowledged that, technically speaking, walking across the field was an 'unauthorised use', but in the light of the inaction of the school to reinforce that message it seems to me that the wording of the notice was ineffectual in providing sufficient evidence of a lack of intention to dedicate. The public using the claimed routes were entitled to draw the conclusion that their use of the routes was a form of 'authorised' use.
87. There was much debate about when and where subsequent signage was erected. The evidence was not consistent and I have tried to reconcile the differing views, even amongst the teaching staff themselves, to reach a conclusion on the actual situation. The wording on the 'off-white' signs, and that on the newer, 'white' signs is identical. They are much wordier than the blue signs, and more specific about what activities are prohibited. For clarity I reproduce them here:



88. There was a lack of consistency amongst the staff of the school about where such signs had been erected. There were clearly some erected on the school buildings themselves, but where else they were erected was not at all clear. Given the nature of the wording, I consider that there must have been at least some located on the playing field. It was alleged by some of the objectors'

witnesses that one of the off-white signs was erected next to, or in the same vicinity as, the blue sign at Point B on the Order plan. Mr Walker in particular seemed to recall seeing both signs as he stated that he '*thought the world had gone mad*'. He was puzzled that he could not see the off-white sign in the photograph taken by Mrs Morris in 2005 and suggested that it could have been obscured in a dark area on the right hand side of the photograph. However, more recent photographs of the same area⁹ show one of the newer signs to the other side of the posts on which the blue sign was erected.

89. Even if a sign with the wording quoted above was in position at Point B or Point A, it seems to be common ground that there never was such a sign at Point D. Furthermore, the existence of such a sign, if it was there, was not raised by any of the user witnesses. Many of the user witnesses did make reference to the blue sign, and I consider it unlikely that, having recalled the existence of one sign, the presence of a second sign would have gone completely unnoticed. I am drawn to the conclusion that the second sign, whether it was off-white or white, was erected after the fence had been put up, and not before. Consequently it is not relevant to the 20 year period I am considering.
90. If I am wrong on this point, and the sign was there for a short period before the end of the 20 year period, I consider that, even with the more detailed wording, it is still ambiguous as far as walking across the field on a direct route is concerned. Such use, having been going on for even more years by that time, would not have seemed any less 'authorised' to those people undertaking it than it had been before. Notwithstanding the fact that users may have believed that their use of the routes was authorised, I have already concluded that no permission existed, either express or implied.
91. With respect to the rest of the notice, Mrs Myers confirmed that she had sought advice from the legal department as to the effectiveness of such wording and had been told that it was largely ineffectual. In any case, none of the signs directly address the lack of any public right of way, and therefore cannot be considered to be inconsistent with dedication. They do not therefore fulfil the requirements of Section 31(3) and thus do not automatically constitute sufficient evidence of a lack of intention to dedicate a public right of way.
92. I have already concluded that any challenges to use have been made towards persons using the field in an inappropriate manner (e.g. dog walkers wandering about and youths behaving in an antisocial way). Such challenges, not having been directed against people using the claimed routes, cannot be considered evidence of a lack of intention to dedicate a public footpath.
93. With respect to the actions of Mr Atkin, he himself acknowledged that he should have erected a six-foot fence in 1980 when it was first suggested. His failure to take concerted action since then simply does not demonstrate sufficiently his lack of intention with regard to the dedication of the short stretch of path across his land.
94. I therefore conclude that there is insufficient evidence on the part of any of the landowners – whether it be the landowners themselves or their agents in the form of the School Governors – of a lack of intention to dedicate a public right of way across their land. I accept that it may have been in their minds to do

⁹ Taken after 2005 and therefore outside the relevant 20-year period

such a thing, but they have failed to adequately demonstrate that fact to the people who were using the route.

Other Matters

Location of Point A

95. Counsel for the County Council considered that the Order map was incorrect in showing the location of Point A. He maintained that the through-stones visible in the wall are nearer to the driveway of No. 12 Mayfair Close suggesting that, if that had been the crossing point, the map was inaccurate as showing Point A in the centre of the turning head.
96. I accept that there are protruding stones still in existence nearer to No. 12, and that these may have been the crossing point of the wall. However, the wall has been considerably altered by the construction of a vehicular access to the school from the end of Mayfair Close. Point A is now in the centre of the new vehicular access and consequently the wall has been removed at that point.
97. If it should be the case that the crossing point were nearer to No. 12 than shown on the Order plan, the distance involved would be approximately 5 metres, or thereabouts. I consider that this distance is not significant and does not affect my overall decision. I decline to modify the Order.

Issues irrelevant to my decision

98. Many of the letters in support of the school's objection to the Order refer to the undesirability of allowing the public unfettered access to the school premises. Mrs Myers herself was concerned that her school would fail to reach Ofsted requirements if she did not take greater steps to exclude or prevent unauthorised access.
99. I acknowledge the serious concerns expressed in connection with the safety of pupils and would not wish to underestimate the responsibility placed on staff in this respect. However, these are not issues which are relevant to my decision and I cannot allow them to influence me. Provisions exist in other legislation which may assist in managing any problems which arise as a consequence of this decision.

Village Green

100. I have also been alive to the fact that, initially, it seemed that HCAG might have been minded to apply for Village Green status for the land. The principal objector considered that this intention undermined the quality of the user evidence. The evidence of use required for each type of application is quite different. I acknowledge the risk implied by Counsel, that the evidence may be tainted in some way, and I have taken a cautious approach to the evidence of use overall. I have discounted a significant amount of use, including that relating to uses which are not appropriate in respect of a claim for a public right of way.

Conclusions

101. Having regard to all the submissions made, both in writing and at the inquiry, I conclude that the requirements of Section 31 of the 1980 Act are met and that a public right of way can be deemed to have been dedicated over the route shown in the Order plan.

102. I therefore conclude that a public right of way has been shown to subsist and that the Order should be confirmed.

Final Decision

103. I confirm the Order.

Helen Slade

Inspector

APPEARANCES

For the applicant:

Mr Jonathan King

*Counsel, instructed by Helmshore
Community Action Group*

Who called:

Mr Keith Pilkington

Local resident and user

Mr Neil A Charnock

Local resident and user

Mrs Patricia Moden

Local resident and user

Mr John Lund

Local resident and user

Mrs Julie Morris

Local resident and user

For the Principal Objectors:

Mr Jonathan Easton

*Counsel, instructed by Lancashire County
Council Legal Services (acting in their
capacity as landowners)*

Who called:

Mrs Christine Myers

Head Teacher

Mr Martin Walker

Teacher and Learning Resources Manager

Mrs Joanne Perry

Assistant Head Teacher

Mrs Karen Allsop

Teacher

Mr Andrew Connolly

Estates Surveyor, Lancashire County Council

Other objectors

Mr Ernest Atkin

Local resident and landowner

Mrs Sharon Deal

Local resident

INQUIRY DOCUMENTS

Submitted by Helmsshore Community Action Group

- 1 Statement of case and file of supporting documents
- 2 Bundle of proofs of evidence
- 3 Five supplementary statements
- 4 Closing submission of Counsel (Mr King)

Submitted by Lancashire County Council as objectors

- 5 Statement of case and appendices
- 6 Bundle of proofs of evidence
- 7 Aerial photograph with overlay
- 8 Two photographs of signs
- 9 Extract from Head Teachers report to governing body dated 23 November 2000
- 10 Closing submission of Counsel (Mr Easton)

Submitted by other objectors

- 11 Statement and appendices submitted by Mr Ernest Atkin
- 12 Statement submitted by Mrs Sharon Deal

Submitted by Lancashire County Council as the Order Making Authority

- 13 Statement of case (neutral stance)
- 14 Copy of advertisement of inquiry

Claimed Public Footpaths

- a) from Milton Close to Mayfair Close,
 - b) from Mayfair Close to Rhodes Avenue,
 - c) from Rhodes Avenue to Milton Close, Haslingden, Rossendale Borough.
- Claim No. 804/442

