

Wildlife and Countryside Act 1981

Application for Definitive Map Modification Order

Church Meadows, North Turton

1.0 Introduction

1.1 The purpose of this report is to assist the Council in the determination of an application for a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement. The route under investigation (the application route) is shown by a broken black line on Plan 1 (Tab 1) attached to this report.

2.0 Background

2.1 The land over which the application route runs is open uncultivated land situated between Ward's Reservoir and St Peter's Church at North Turton. Since circa 2003 the land has been registered as Access Land for the purposes of the Countryside and Rights of Way Act 2000 and therefore the so called "Right to Roam" provisions apply, namely the public have a right to walk anywhere over this area. A copy of the map showing the extent of the Access Land is included in the document bundle at Tab 2.

2.2 It should be noted that whatever the outcome of the application currently under consideration the access rights provided under the Access Land provisions within the Countryside and Rights of Way Act 2000 will still remain in place and the public will have a right to wander anywhere over this piece of land on foot (and subject to any restrictions placed upon it by the 200 Act provisions).

2.3 It is understood that in or about 2011/12 the ownership of this area of land changed and this triggered local concerns over future access provisions. As a result, in March 2012 the Council received an application for a Definitive Map Modification Order to add the routes shown by broken black lines on Plan 1 to the Definitive Map. The applicants believe that these routes are public footpaths, and that they should be recorded as such. Eighty three user evidence forms indicating use from 1953 to 2012 (59 years) were submitted in support of the application. A copy of the application is included in the document bundle at Tab 3. Copies of the user evidence forms are included in the bundle under Tabs 4 – 7.

3.0 The Surveying Authority's Responsibilities

3.1 When considering the application the Surveying Authority acts in a quasi-judicial capacity. It is fundamental that the consideration and determination of the issue is based upon the evidence before the Committee and the application of the law. The merits of a matter have no place in this process and so the fact that a decision might benefit or prejudice owners, occupiers or members of the general public, or the Authority, has no relevance to the issues which Members have to deal with and address.

3.2 The Committee's decision whether to "make" an Order is the first stage of the process. If Members decide that an Order should be "made", and there are no objections to the Order, the County Council can "confirm" the Order. However, if objections are received, and not subsequently withdrawn, the Order must be referred to the Secretary of State for a decision whether, or not, it should be "confirmed". Under such circumstances the matter is usually considered by an Inspector, appointed by the Secretary of State at a local public inquiry.

4.0 Legal Context

4.1 Blackburn with Darwen Council is the Surveying Authority for the purposes of Section 53 of the Wildlife and Countryside Act 1981. The Surveying Authority has a duty pursuant to Section 53 of the 1981 Act to maintain the Definitive Map and Statement for its area, and to modify it, by way of making Definitive Map Modification Orders upon the discovery of evidence, which show, when considered with all other available evidence, that they require amendment or updating. Members of the public have a right to apply for a Definitive Map Modification Order, to seek amendment to the legal record using the procedures set out within Schedule 14 of the Wildlife and Countryside Act 1981.

Public Rights of Way - General

4.2 Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are public highways. A highway is a way over which the public have a right to pass and re-pass. Not all highways are maintainable at public expense, nor is there any need for a way to have been “adopted” before it is either a highway or a highway maintainable at public expense.

4.3 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.

4.4 Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principal of “Once Highway, Always a Highway”¹ applies. Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of local authority administrative order or a Court Order.

Types of Highway

4.5 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. who may use it) is dependent upon the specific type of highway status attributed to a route.

Types of Highway: Common Law

4.6 Under the common law there were, and indeed still are, only three types of highway. These are:

- Footpaths,
- Bridleways; and,
- Carriageways

4.7 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).

4.8 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including leading horses) and possibly the right to drive cattle.

4.9 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including leading horses), non-mechanically propelled and mechanically propelled vehicles.

¹ Harvey v Truro Rural District Council (1903) 2 Ch 638 & Dawes v Hawkins (1860) 8 CB (NS) 848, 141 ER 1399

Types of Highway: Statute

- 4.10 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance under the provisions of the Countryside Act 1968 cyclists are granted a right to use bridleways. Other legislation provides for Public Carriageways to be subdivided into various categories which include, motorways, cycle tracks, restricted byways and byways open to all traffic.
- 4.11 When determining the status of a specific route one must first consider the common law situation and then apply any necessary restrictions to status imposed by statute in respect of restricted byways and byways open to all traffic. Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case. Use by cycles may however result in the establishment of either bridleway or restricted byway status depending on the specifics of the case.

How Highways Come into Being – Basic Principles

Dedication and Acceptance

- 4.12 Subject to a small number of exceptions, before any highway can come into being there must be an act of dedication by the landowner, followed by the acceptance of the strip of land as a highway by the public.
- 4.13 The act of dedication may be express, or implied depending upon the actions or inactions of the land owner. Acceptance is usually demonstrated by public user, however acceptance of a way as a highway by the Highway Authority may also suffice. The principles of how rights can come into being are further discussed in more detail below:

Burden and Standard of Proof

- 4.14 The duty to make a Definitive Map Modification Order is triggered upon the discovery of evidence, by the Authority, which demonstrates that, having taken into account all of the available relevant evidence, the alleged rights are reasonably alleged to subsist. Such an Order can however only be confirmed if the alleged rights can be shown, on the balance of probability, to subsist. The test for making an Order therefore differs from the test for confirmation.
- 4.15 Both of these tests are a complex balancing act, involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together. With regard to the “reasonably alleged” test, in the event that there is a conflict of credible evidence both for and against the establishment of public rights, the Courts have ruled² that an Order should be made so as to allow the evidence to be properly tested through the Order process.

Common Law

- 4.16 The establishment of highway rights under the common law is not bound by the so called “20 year rule” (discussed below), with the courts having ruled³ that rights can be established in a very short period of time. It may therefore be helpful to look at this area in more detail.
- 4.17 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938*, both quoted with approval by Laws J in *Jaques v SSE 1994*, who described the former’s summary as a *full and convenient description of the common law*. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC 1956*, *Mann v Brodie 1885*

² R v Secretary of State for Wales Ex p Emery [1998] 4 All E.R. 367

³ North London Railway Co v Vestry of St Mary, Islington (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18 month period

and *Poole v Huskinson* 1843. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute. Dyson J's judgment in *Nicholson v Secretary of State for the Environment* 1996 comments further on aspects of these differences.

4.18 Halsbury⁴ states – “Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.

4.19 The inference of dedication may arise in three ways:

- i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example in *North London Railway Co v Vestry of St Mary, Islington*⁵ the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public cab rank had been established on part of the bridge. The Justices' conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages some time after receiving notice of the proceedings before the Justices merely evoked the comment from Blackburn J. that “As to the erection of the barriers by the appellants, that was done too late to do away with the dedication”.
- ii) Second, the inference has been drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred⁶.
- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact⁷.

Statute

⁴ Halsbury's Laws of England (Volume 55 'Highways')

⁵ (1872) 27 L.T. 672

⁶ See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA)

⁷ See e.g. *Parker J in Webb v Baldwin and others* (1911) 75 JP 564 at p565

4.20 It is possible for highways to be created as a result of statutory processes such as enclosure awards, or in more modern times various types of statutory creation order. The route under consideration has not however been subject to such process and therefore there is no need to discuss such creation processes further.

4.21 The Highways Act 1980, Section 31 has also, to a certain extent, codified the common law (discussed above) by identifying a specific set of circumstance whereby a presumption of dedication may arise. One of these circumstance is the requirement that the way in question must be used for a full period of twenty years, with such use being further qualified as having to be “as of right” and “without interruption”.

Highways Act 1980, Section 31

4.22 Section 31 of the Highways Act 1980 states:

“(1) Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the 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 twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise.”

“Where the owner of the land, which any such way as aforesaid passes has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway”

4.23 Section 31(1) has two ‘limbs’ the first provides that proof of twenty years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention to dedicate the way as a highway defeats the claim.

4.24 Section 31 is further supplemented by Section 32 of the Highways Act 1980, which states:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document, which is tendered in evidence, and shall give weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

5.0 Summary of Evidence

5.1 An initial trawl of documentary evidence has not revealed anything to support the historical existence of any public rights of way across the land. The application should therefore be considered in context to modern user evidence.

5.2 Eighty three user evidence forms have been submitted in support of the application. These are included in the evidence bundle at Tabs 4 – 7. These forms provide evidence of use from 1953 until 2012 when they were completed. Taken at face value they appear to provide evidence of uninterrupted use which was without force, without secrecy and without permission throughout that period.

5.3 No evidence has been discovered to suggest that users were ever challenged, deterred or prevented from using the application route.

6.0 Consideration of User Evidence

Highways Act 1980, Section 31

Date of Calling into Question and the Relevant 20 Year period

6.1 Before the provisions of Section 31(1) of the Highways Act come into effect there must be some act or event which calls into question/challenges the existence of the route in question. A typical example would be the locking of a gate or the erection of signs deterring use. In the absence of such a challenge it is possible to rely upon the date of submission of the application for a Definitive Map Modification Order. In either case the relevant twenty year period is calculated back from that date.

6.2 In this particular case there have been no acts or events which would constitute a calling into question therefore the date of the application for the Definitive Map Modification Order will have to be relied upon. The relevant twenty year period will therefore be 1992 – 2012.

Use by the Public

6.3 A substantial body of user evidence has been submitted in support of the application. From an assessment of this evidence it may be reasonable to conclude that the application route is used by the general public.

Use “As of Right” and “Without Interruption”

6.4 The term “as of right” means without force, without secrecy and without permission. For use to qualify it must meet all of these criteria. There is however no need for the user to believe that the way they are using to be a public right of way for their use to qualify.

6.5 The user evidence forms may generally be considered to support the contention that users of the application route were using it “as of right”. They were certainly using it without force and without secrecy; and they believed they were doing so without permission. However from approximately 2003 onwards the area of land crossed by the application route was designated Access Land under the provisions of the Countryside and Rights of Way Act 2000. This means that any use from that time onwards would be subject to the so called “Right to Roam” provisions within the 2000 Act. This means that any use from that time onwards would be considered to be “by right” (i.e. in the exercise of rights granted under the 2000 Act) and as such this use would not qualify as being “as of right”. This will be fatal to any case relying upon user between 1992 and 2012 because the last 9 – 10 years of use is not “as of right”.

6.6 There is no evidence of any interruptions to use of the application route.

Evidence of the Landowner’s Lack of Intention to Dedicate during the 20 year Period

6.7 If a prima facie case in favour of the establishment of a public right of way is proved, it may still be overturned if there is sufficient evidence of the landowner’s lack of intention to dedicate. Such evidence would need to be evidence of actions by, or on behalf of, the

landowner, directed at actual users of the way, which demonstrate that the land owner had no intention for the route to become a public right of way (e.g. challenging users, putting up suitable signs or blocking the route).

- 6.8 No evidence to suggest any lack of intention to dedicate the application route as a public footpath has been discovered as part of the investigations.

Conclusions regarding Section 31 of the Highways Act 1980

- 6.9 Whilst at first glance there would appear to be a case in favour of a presumption of dedication arising under the provisions of Section 31 of the Highways Act 1980 between 1992 and 2012, such a case is defeated as a result of the land being designated as Access Land circa 2003 because this renders any use after that date as inadmissible (because it is “by right” and not “as of right”). The designation of the land as Access Land circa 2003 does not constitute a calling into question within the meaning of Section 31 of the Highways Act 1980 therefore no alternative 20 year period can be considered.

- 6.10 The fact that there is no evidence of any lack of intention to dedicate on the part of any land owner does not affect the outcome of the application because the case in favour of the existence of public rights failed at a point before the land owner was required to produce such evidence.

- 6.11 Taking into account the above matters it would be reasonable to conclude that a case relying up the provisions of Section 31 of the Highways Act 1980 must fail. This does not however preclude consideration of the matter under the common law.

Common Law

- 6.12 Under the Common Law the onus falls upon those claiming the public right of way to prove an intention to dedicate on the part of the land owner. Evidence of a landowners actions, or in some cases lack of action, may go some way to raising a presumption in favour of dedication. If dedication is claimed to have occurred at some time in the past then evidence of the reputation of a way as being a public right of way may be also be sufficient.

- 6.13 The designation of the land as Access Land circa 2003 will also have an effect on any case under common law because any use must still be “as of right”. However there is no requirement under the common law for the existence of the rights to be called into question, nor is there a requirement to have a period of twenty years use spanning a period immediately prior to such a challenge. It is therefore possible to consider a case based upon public use from 1953 (the earliest user evidence) until 2003 (a period of 50 years) when the land was designated as Access Land.

- 6.14 The user evidence in the bundle suggest that the application route has been subject to continuous use throughout the period 1953 to 2003, a period of 50 years. Such use would appear to be “as of right” and of sufficient quantity to reasonably conclude that the land owner must have been aware that it was taking place. These factors coupled with the fact that no actions were taken on the part of land owners to suggest they did not intend dedication public rights may reasonably be considered sufficient to give rise to a presumption of dedication under the common law.

7.0 Conclusions

- 7.1 In reaching a decision over whether or not to make the requested Order it must be remembered that, in evidential terms, it is only necessary for there to be a “reasonable

allegation” that the claimed rights subsist. If it is concluded that this test has been met the duty to make an Order is triggered, even if it is considered that the tests for confirmation (i.e. that on “balance of probability” the alleged rights subsist) cannot be met. This may create a situation whereby the Surveying Authority is duty bound to make an Order even though it does not consider such an Order to be capable of confirmation.

7.2 With regard to a case under Section 31 of the Highways Act 1980, as discussed above, this must fail because during the second half of the requisite 20 year period the use was “by right” and not “as of right”.

7.3 Any case under the Common Law and relying upon the period 1953 – 2003 will not be affected by the problems encountered in the Highways Act 1980 Section 31 case. Use during the period 1953 – 2003 may be considered to be “as of right” and by the public. This use combined with the lack of any preventative action by the land owners may be sufficient to give rise to a reasonable allegation of a presumption of dedication under the common law. It would therefore be appropriate to make a Definitive Map Modification Order to add the application route to the Definitive Map as a public footpath.

8.0 Consultations

8.1 Consultations have been undertaken in line with the Parliamentary Rights of Way Review Committee’s Code of Practice on consultation, but using a response time of six weeks rather than the suggested 3 months (which is considered excessive). Any evidence arising as a result of the consultation exercise has been included within the body of the report. Copies of responses are included in the bundle at Tab 8.

9.0 Decision Required

9.1 If the Authority is satisfied, having considered all of the available and relevant evidence, that either the common law or legislative tests have been met, they should resolve that:

- a) a Definitive Map Modification Order be made to add the route shown on Plan 1 to the Definitive Map as a Public Footpath;
- b) if no objections are received in response to the making of the Order, the Order be confirmed.
- c) If objections are received, and not subsequently withdrawn, the Order be passed to the Secretary of State for determination.

9.2 If however, the Authority is not satisfied, having considered all of the available and relevant evidence, that the relevant tests have been met, they should resolve that:

- a) the application be refused; and,
- b) the applicants be advised of their right of appeal.

10.0 Recommendation

10.1 Whilst it is the investigating Officer’s view that there is a reasonable allegation in favour of the establishment of public rights over the application route, and therefore a Definitive Map Modification Order should be promoted, it is for the Authority to make its own decision, based upon the facts and evidence before it.

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