

# Wildlife and Countryside Act 1981

## Application for Definitive Map Modification Order

### Swan farm close Lower Darwen Blackburn

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#### 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 alter the registered status of a path at Swan Farm Close in Lower Darwen Blackburn. The route under investigation (the application route) is shown by a broken black line on the plan in Tab 1 attached to this report.

#### 2.0 Background

2.1 Swan Farm Close (the application route) is currently not recorded on the Definitive Map (the legal record of Public Rights of Way) as a Public Footpath. In 2015 the Council received and an application for a Definitive Map Modification Order to amend the status of the route from Non-definitive to definitive footpath. The applicants believe that the route should be recorded on the Definitive Map and that it is historically a footpath. The applicant submitted historical photographic evidence along with written user evidence. A copy of the application is included in the document bundle at Tab 2.

#### 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 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 However, if objections are received, and not subsequently withdrawn, the Order must be referred to the Secretary of State for a decision whether, or not, it should be "confirmed".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”<sup>1</sup> 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.

#### 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 subdivide 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.

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

### How Highways Come into Being – Basic Principals

#### Dedication and Acceptance

- 4.12 Subject to a small number of exceptions (such as express creation by statutory process) 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 in this case that, having taken into account all of the available relevant evidence, on balance of probability the alleged rights subsist.
- 4.15 This test comprises a complex balancing act, involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together as a whole.

#### 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 ruled<sup>2</sup> 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* 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 Halsbury<sup>3</sup> 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

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<sup>2</sup> *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

<sup>3</sup> Halsbury’s Laws of England (Volume 55 ‘Highways’)

dedication). For example in *North London Railway Co v Vestry of St Mary, Islington*<sup>4</sup> 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 occurred<sup>5</sup>.
- 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 fact<sup>6</sup>.

#### Statute

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 falls within this category but dedication by other means should not necessarily be discounted.

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."*

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<sup>4</sup> (1872) 27 L.T. 672

<sup>5</sup> See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA)

<sup>6</sup> See e.g. *Parker J in Webb v Baldwin and others* (1911) 75 JP 564 at p565

*“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 complied, and the custody in which it has been kept and from which it is produced.”*

## 5.0 Summary of Evidence

### Public Maps (Tab 2-2)

5.1 The application route is shown on the current aerial map hosted by Lancashire County Council and evidence in tab 2-2. The aerial photography presented as evidence has no date stamp however this does indicate the route from the application is in existence.

### Photographic evidence (Tab 2-2)

5.2 Three photographs have been provided in tab 2-2 and dated by the applicant as July 2015 showing the route either side of the kissing gate marked on Plan 1 between E and D. Two further photographs have been provided showing the same area with a date stamped into the image. The dates are 31/08/2015 and 02/12/2015 respectively.

### User Evidence (Tab 2-3)

5.3 The applicant has submitted supplementary evidence in the form of a statement with attached documents. These can be viewed in Tab 2-3 labelled as documents 1 to 5.

Tab 2-3 Doc. 3 includes three photos

- Two showing where a young lady is on the route estimated conservatively to be less than 10 years old, according to the statement this lady is now in excess of 30 indicating the route has been established for over 20 years.
- The third photo shows cars parked in front of the houses, next to the start of the route. The route appears to start no more than a car's length from the footway in front of 21. Part of the route that is visible in this photo is adjacent

to the garage and trails off towards the position of the kissing gate. The photo is not date stamped however; the newest car according to registration date is D30 RHG and was manufactured in 1986. Although we can say this photo is no older than 1986 we cannot confirm when after this date the photo was taken.

The applicant's supplementary evidence includes notes from a site visit as part of a planning application 10/94/1332 (Tab 2-3 Doc. 004) where the officer notes the existence of the footpath being claimed on the 06/10/1994.

The applications supplementary evidence includes consultation notes as part of a planning application 10/11/0872 (Tab 2-3 Doc. 005). The comments recorded by the PROW (Public Rights Of Way team) indicate the existence of the route and the departments opinion that in 2011 there was likely in excess of 20 years use to link Swan Farm Close to FP112.

In addition to the afore mentioned evidence 17 user evidence forms have been submitted. These all claim use of the application route and attest to its reputation as a footpath. Twelve of these have been submitted from the immediate street and a further five from the surrounding area.

## **6.0 Consideration of Evidence**

### Public Maps (Tab 2-2)

- 6.1 The inclusion of the route on Lancashire County Council aerial photography support that the route in the application is currently in existence and gives a point to count back from for the number of years of use.

### Photographic evidence (Tab 2-2)

- 6.2 The photographs provided some near recent evidence that the area has changed but the route has remained unobstructed.

### User Evidence (Tab 2-3)

- 6.3 The user evidence provides a picture of long use of the application route by the public and also of its reputation as a footpath. The user evidence also includes some documentary evidence from planning applications showing that Council officers have previously acknowledged the existence of the footpath. The combination of these may be sufficient in to support the establishment of public footpath rights during the Twentieth Century based upon either the common law or section 31 of the Highways Act 1980.

## **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 necessary for the evidence to show on balance of probability that the alleged rights subsist. If it is concluded that this test has been met the duty to make an Order is triggered. The case does not have to be proved beyond reasonable doubt.
- 7.2 When the evidence is taken as a whole there is a case in favour of the historical existence of public footpath rights over the application route. It may therefore be considered to be wholly appropriate to make an Order to modify the Definitive Map by adding the footpath as shown in Tab 1.

## **8.0 Consultations (Tab 3)**

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). No responses were received.

## **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 as 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 case in favour of the existence of public footpath 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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