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## Order Decision

Site visit made on 13 August 2019

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 10 September 2019**

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### **Order Ref: ROW/3216294**

- 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 (Old Lane, Bispham) Definitive Map Modification Order 2014.
- The Order is dated 30 December 2014 and proposes to modify the Definitive Map and Statement for the area by adding a public bridleway as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Lancashire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The order is proposed for confirmation subject to the modification set out in the Formal Decision.**

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### **Procedural Matters**

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case based on the written representations forwarded to me. I carried out an unaccompanied site visit on Tuesday 13 August 2017.

### **Main Issues**

2. The main issue in this case is the requirements of Section 53 (3) (c) (i) of the 1981 Act namely, whether the evidence discovered, when considered with all other relevant evidence available, shows on the balance of probabilities that a right of way not shown in the map and statement subsists over the land in question and that the definitive map and statement therefore require modification.
3. As noted above, one objection was outstanding when the Council submitted the Order to the Secretary of State for confirmation. The objection was made on a number of grounds; first, that the Council's interpretation of the Finance Act 1910 documents was erroneous. Secondly, there was no evidence that horse riders had used the route and that none of the historic documents indicated the status of the route. Lastly that use by the Council of the tithe map to determine the historic width of the Order route was erroneous as tithe maps were inaccurate; the 1960 Ordnance Survey map was to be preferred as an indicator of the width of the route as this map reflected the situation on the ground during the last 50 years of ownership of Sills Farm.
4. For its part, the Council rebuts these objections. Firstly, the interpretation placed on the Finance Act was not erroneous; in the context of the totality of the documentary evidence, the exclusion of the route from assessment gave a strong indication that the route was considered to be a public highway. Secondly, the Council's case was based on the interpretation of the

documentary evidence from which an inference of dedication at some point in the past could be drawn, not on a recent period of user. Lastly, the assessment of width was not based on the tithe map but on the width measured on the Ordnance Survey 25 inch to 1-mile map which was published in 1894.

5. Other than taking issue with the Council's interpretation of the Finance Act 1910 documents, the objectors have offered no alternative interpretation of the remainder of the documentary evidence adduced by the Council in support of its case.

## **Reasons**

### ***The status of the Order route***

#### *Documentary evidence*

##### *Eighteenth and nineteenth century commercial mapping*

6. Extracts from the small-scale maps published by Yates (1786), Greenwood (1818), Stockdale (1818) and Hennet (1830) all cover the area of the Order route.
7. The Order route is depicted in these maps in two ways. Although published 30 years apart, neither Yates nor Stockdale show the Order route or any part of Old Lane in Bispham; Yates shows the very northern end of Old Lane in Mawdesley where it meets Back Lane whereas Stockdale does not.
8. Greenwood and Hennet both depict Old Lane in Bispham (and the Order route) as a 'cross road' leading to and crossing Bentley Brook but do not show that part of Old Lane in Mawdesley.
9. It is not known what Greenwood or Hennet understood by 'cross road' but given that the only other category of roads shown in the keys to their maps were 'turnpike roads' it is possible (and may be probable) that they considered the Order route to be part of a minor road open and available for public vehicular or equestrian traffic which provided a link between other major roads. It is not known why Old Lane in Mawdesley was not shown in any of these maps or why Stockdale's map (published contemporaneously with Greenwood's map) does not show any part of Old Lane.
10. The small-scale maps suggest that the Order route and a means of access over Bentley Brook was an observable feature in the landscape as early as 1818, but do not directly assist with the determination of the status of the Order route.

##### *Tithe Maps and Apportionments*

11. The Bispham tithe map of 1845 shows Old Lane and the Order route as a continuous through route running to and over Bentley Brook to connect with a route in Mawdesley, of which only the first few metres is shown. The route is described as 'Lee Lane' on the tithe plan and is coloured ochre in the same way as other roads in the area. There is no key to the map, so it is not known what significance (if any) the use of colour had.
12. At the northern end of the Order route, Bentley Brook is shown as flowing over the lane with a narrower crossing point in the centre of the lane. There is no indication on the map as to the nature of this crossing point or its width. Other roads crossed by Bentley Brook are depicted in the same way.

13. The Order route is shown to be part of land parcel 207 which the apportionment lists as being a 'Public Road'; there are no parties listed as being the 'owner' or 'occupier' of this land parcel.
14. The tithe documents for Mawdesley are dated 1837. The tithe map shows Old Lane crossing the township boundary at Bentley Brook, the means of crossing the brook being shown to be wider than on the later Bispham tithe map. Old Lane is shown coloured ochre and connects with Back Lane at its northern end and is numbered 1067 as is Back Lane, Gorsey Lane, School Lane and Moody Lane. In the apportionment, parcel 1067 is described as 'Roads'.

#### *Hesketh Estate Records*

##### *Undated plan of the township of Mawdesley*

15. Although the plan is undated it bears remarkable similarities to the Mawdesley tithe map of 1837. It is drawn in the same style and the field numbers on the plan are the same as those found in the tithe plan. All roads (Old Lane, Back Lane, Gorsey Lane, School Lane and Moody Lane) are coloured ochre but not numbered. Old Lane is depicted as crossing the township boundary at Bentley Brook and is annotated '*from Bispham*'. Back Lane is similarly shown and is annotated '*from Bispham Green*'. The plan shows that the land either side of Old Lane, but not the lane itself, was in the ownership of Sir Thomas George Hesketh.
16. This plan may be a private copy of the tithe map made for the Hesketh Estate or an estate plan made using the tithe map as its source. It shows that Old Lane was not considered to be in private ownership which suggests that it and the continuation '*from Bispham*' was considered by the Estate to be a public through route.

##### *Hesketh Estate sale catalogues 1887-1888*

17. The Hesketh Estate offered land in Mawdesley for sale at two auctions in 1887 and 1888. The sale catalogue for the auction held on 25 May 1887 describes the lots as '*all adjoining good roads*'; lots 24 and 25 were adjacent to Old Lane and lot 17 comprised two parcels of land on opposite sides of Old Lane but did not include the lane itself. The sale catalogue plan shows the southern end of Old Lane marked '*from Bispham*'; other roads which cross the township boundary are similarly annotated with points of destination.

##### *Ordnance Survey maps*

18. All Ordnance Survey (OS) maps published from the late nineteenth century carry a disclaimer that a route or way shown on them is not evidence of the existence of a public right of way. The maps published by OS do however provide good evidence as to the existence and position of observable features in the landscape at the time of the survey.
19. Several OS maps at various scales published in the nineteenth and twentieth centuries were submitted; these maps consistently show the Order route as part of a through route between Back Lane, Mawdesley and Maltkiln Lane, Bispham along Old Lane and Lee Lane.
20. Old Lane is shown by OS as a separate land parcel in relation to the surrounding land, is consistently enclosed by fences, hedges or walls and is

unobstructed throughout its length. Those properties at either end of Old Lane, namely Sills Farm (formerly Blackleuge) and Beech House are shown to be separate to and distinct from Old Lane; that is, the lane passes to the side of these properties and not through them. On all the maps submitted, Old Lane is consistently shown at a width which would have been capable of carrying equestrian and wheeled traffic.

21. The six-inch map and 25-inch maps submitted all show the crossing of Bentley Brook by means of a bridge or culvert in the same way that other crossing points of Bentley Brook on other known public carriageways are shown.
22. The 1894 six-inch and the 1894 and 1909 25-inch maps follow the OS convention of the time of showing metalled public roads for wheeled traffic, kept in good repair by the highway authority by means of thickened casing lines on one side of the road; Back Lane, Moody Lane and Gorse Lane are so shown. Old Lane is not shown with thickened casing lines.
23. The absence of such casing lines on Old Lane suggests that by 1894 Back Lane had become the preferred and better maintained route to Bispham and Bispham Green. The 1960 1:2500 scale map depicts Old Lane by solid boundary lines with double peck lines running along the lane indicating a change in vegetation along it; other known public roads in the area are depicted in the same way.

#### *Object Names Book*

24. In the OS Object Names Book of 1907 (revised 1926), Old Lane was described as a '*District Road*' extending from a point south of Sills Farm to Back Lane; the authority for the spelling being the surveyor of highways of Chorley RDC.

#### *Other commercial mapping*

25. Bartholomew's half inch maps published between 1904 and 1941 show the Order route and Old Lane as a single continuous through route running between defined boundaries. The key to the 1904 map shows that Old Lane was an '*Indifferent (Passable) Road*'. The 1920 edition shows Old Lane as an '*inferior road not to be recommended for cyclists*' whereas the 1941 edition shows the Order route as part of a '*good secondary road*'.
26. Bartholomew's half inch maps were published from 1897 and revised until around 1975. The maps were very popular amongst motorists and cyclists and had a clear road classification scheme by which purchasers could gain an understanding of the conditions of the roads likely to be encountered when planning a journey. As the Order route and Old Lane were not depicted as footpaths or bridleways, the understanding of the publisher appears to have been that the route was one over which wheeled traffic could pass.
27. The Geographia Street Atlas published in 1934 was another commercial publication providing information to the motorised travelling public. This large-scale map shows the Order route as part of Old Lane and is shown in the same manner as Back Lane and Lee Lane to which it connects. Although the Geographia map does not provide proof of the status of the Order route it suggests that at the time of publication the Order route was considered to be available for public use and was suitable for use with wheeled vehicles.

### *Finance Act 1910*

28. The 1910 Finance Act introduced a new levy known as Incremental Land Value Duty. This tax was to be levied at the time of sale on any incremental rise in land values after an initial baseline survey had been carried out. All land was required to be valued unless exempted. Routes shown on the base plans which correspond with known public highways, usually vehicular, are not normally shown as included in adjacent hereditaments. Instead, they are uncoloured and unnumbered.
29. The Finance Act valuation plans show Old Lane to be wholly excluded from adjacent hereditaments and is depicted in the same way as the known public carriageways to which it connects.

### *Highway Authority records*

30. The responsibility for the maintenance of rural and urban district roads was transferred to County Councils in 1929. This process required the production of lists and maps of those routes within rural and urban areas which the respective RDCs and UDCs had previously maintained. That part of Old Lane from Back Lane to the borough boundary at Bentley Brook is shown as road 5/182 whereas that part of Old Lane in Bispham from Lee Lane to point B on the Order plan is recorded as road 7/82. The Order route is not recorded as having been maintained.
31. A schedule of public footpaths in Mawdesley drawn up in 1932 notes a footpath running from '*Old Lane to Regional Boundary at Harrock View*' which corresponds with footpath 11 as shown on the current definitive map. It is notable that the person or persons who compiled this list did not include Old Lane in the list which suggests that the lane was considered to have a higher status than a public footpath.
32. Surveys of public rights of way were carried out in 1951 under the provisions of the National Parks and Access to the Countryside Act 1949. As part of the survey, parish councils were required to record all paths believed to be public, but not to record public vehicular routes recognised as part of the public road network. In Bispham, no part of Old Lane was recorded as being a public right of way. In Mawdesley, Old Lane was not recorded as a public right of way although footpath 6 was described as proceeding '*into Old Lane*' and footpath 11 was described as having an '*Entrance from Old Lane*'. Neither the Order route nor Old Lane were shown as public rights of way in the draft, provisional or definitive maps or in any subsequent review of the definitive map.
33. The Council's maintenance records show that, with the exception of the Order route, Old Lane is recorded as a highway maintainable at public expense. The Council submits that whilst most routes shown in the List of Streets carry public vehicular rights, the recording of a route in the List of Streets is not conclusive as to the nature of the rights over a given route. The Council cannot shed any light upon why the extent of the maintainable highway in Bispham ends at point B and not at the parish boundary at point A.

### *Other documentary sources*

34. Aerial photographs taken in 1940, 1960 and 2000 all show the Order route and Old Lane as a through route between Lee Lane and Back Lane. The appearance

of the surface of the lane is shown to alter during that 60-year period and probably reflects the changing nature of use of the lane through time.

35. A local history of Mawdesley published in 1981 notes that '*Kesters Old Lane*' had been a favourite walk for generations of residents. The walk is described as a road from Back Lane passing by Sills Farm to connect with Lee Lane. It is also stated that a bridge which had spanned Bentley Brook had collapsed during the war and had been replaced by a culvert pipe. Another local history suggests that Old Lane was known as '*Nelson's Walk*' on account of the local legend of Lord Nelson having walked there during his visits to Fairhurst Hall.

#### *Conclusions on the documentary evidence*

36. The documentary evidence demonstrates that the Order route is part of a much longer through route of some antiquity. Greenwood's map shows that the Order route together with a means of crossing Bentley Brook was in existence in 1818 but does not show a continuation through Mawdesley, whereas Yates' map shows the northern end of Old Lane to have been in existence in 1786.
37. It is not known why Yates and Greenwood, or other early map makers did not record the entirety of Old Lane. However, the tithe documents demonstrate that by 1845 at the latest, the Order route formed part of a continuous through route between Back Lane and Lee Lane.
38. The Bispham tithe documents describe Old Lane as a '*public road*' whereas the Mawdesley documents do not differentiate between Old Lane, Back Lane, School Lane or any other known public roads in the township, describing them all as 'roads'. The purpose of the tithe commutation process was not the ascertainment of public rights of way and the tithe map and apportionment do not provide conclusive evidence of the status of the Order route. However, the tithe documents were produced under parliamentary authority and were subject to local scrutiny. I consider that some weight can be attached to the tithe documents as evidence of the perceived status of the Order route during the middle of the nineteenth century.
39. The Hesketh Estate documents are consistent with the tithe documents in that Old Lane was not considered to be in the ownership of the Estate and was part of a through route '*from Bispham*'. Although the Estate sale catalogues do not relate to land crossed by the Order route, these documents provide evidence as to how Old Lane in Mawdesley and its continuation to the south were perceived in the late nineteenth century. That perception was of Old Lane being part of the ordinary highway network in the area; the land which the Estate offered for sale was said to adjoin '*good roads*'; one of those '*good roads*' being Old Lane. The Estate documents provide supporting evidence of the continuing reputation of the Order route as part of the public road network.
40. Ordnance Survey maps do not provide evidence as to the status of any route shown. However, the various maps submitted consistently show the Order route and Old Lane as part of the ordinary highway network and are consistent with the other documentary evidence. Whilst not being conclusive, the description of Old Lane as a '*District Road*' in the Object Names Book provides supporting evidence of the Order route being part of a public through route capable of supporting wheeled traffic.



41. Old Lane was wholly excluded from valuation under the Finance Act 1910 survey. The objector submits that the exclusion of Old Lane from valuation does not mean that the lane was a public highway and contends that as the lane provided the sole means of access to parcels of agricultural land and property in private ownership and occupation, ownership of the route may have been in doubt. The Council submit that the valuation plans and field books show that in 1910 the only land served by Old Lane south of Bentley Brook was Sill's Farm.
42. As to the objector's submission that the valuer may have been in doubt as to the ownership of Old Lane at the time of the survey, the Finance Act documents regarding ownership are wholly consistent with both the tithe documents created some 70 years earlier and the 1888/89 sale particulars of the Hesketh Estate. The documentary sources considered are consistent in showing that throughout the nineteenth and early twentieth centuries there was no known owner of Old Lane. Given this fact and given that the route had also been consistently depicted in the same way as other known public roads by OS and other map-makers, the inevitable conclusion is that the Inland Revenue valuer excluded Old Lane from claimed ownership because the lane was part of the public highway network and not some private means of access for a limited number of individuals.
43. Throughout the nineteenth and early twentieth century the Order route was considered to be part of the public carriageway that was Old Lane. This reputation appears to have continued at least until the early 1950s as the survey of public rights of way included public footpaths which terminated at Old Lane, but which did not cross it. As the survey had been carried out by the parish council, the omission of Old Lane from the survey is indicative of the Order route having a local reputation of one that did not need to be recorded in the definitive map.
44. The Council's conclusion on the documentary evidence was that the Order route was of a greater status than a footpath and that an inference of dedication as a public bridleway at some indeterminate point in the past could be drawn. Whilst I concur with the Council that dedication as a public right of way by at least 1845 can be inferred, I place weight upon the tithe and Finance Act 1910 documents as evidence of the Order route as having been dedicated as a public carriageway.
45. As no evidence has been submitted which demonstrates that those rights have subsequently been extinguished, they remain in existence although currently unrecorded.

***Whether the Order route can be recorded on the Definitive Map and Statement as a BOAT***

46. Having viewed the Order route, I consider that its location, physical condition and appearance are such that it is more likely to be used for the purposes for which footpaths and bridleways are so used. Although evidence of use by the public on horseback was submitted in support of the original application to add the Order route to the definitive map, no evidence has been submitted of recent use by the public in vehicles. I conclude that the character of the route is such that it satisfies the statutory definition of a BOAT found in section 66 (1) of the 1981 Act.

***The impact of Section 67 of the Natural Environment and Rural Communities Act 2006***

47. Section 67 (1) of the 2006 Act extinguished, as of 2 May 2006, any right the public had to use mechanically propelled vehicles (MPVs) over a route that was not shown in the definitive map and statement or over a route that was shown in the map and statement but only as a footpath, bridleway or restricted byway.
48. The general extinguishment provision of section 67 (1) is however subject to a number of exceptions which are set out in section 67 (2) to (8). None of those exceptions appear applicable in this case; consequently, I conclude that any right the public may have had to use the Order route with MPVs was extinguished on 2 May 2006. It follows that the Order route cannot be recorded on the Definitive Map and Statement as a BOAT. However, as the public's right to use the Order route with non-mechanically propelled vehicles is unaffected by the provisions of section 67 of the 2006 Act, it can be recorded as a Restricted Byway.

**Width**

49. Although the objector refers to the Council's suggested width being based on measurements taken from the 1845 Bispham tithe map, the Council has based its conclusions as to the historic width of the Order route on measurements taken from the 1894 25-inch to 1-mile OS map. The Council used this map as it is the earliest document of those considered which can provide reliable measurements of the historic width of the route at issue. From this map, the Council has concluded that the Order route historically varied between 3 and 8 metres with the available width at the culvert over Bentley Brook being a maximum of 4 metres.
50. The objector submits that the width should be calculated from the 1960 1:2500 OS map as this map was the first to show the extent of the surfaced portion of the lane which appears to follow the current course on the ground. As I understand the objector's case, it is contended that the width to be recorded should be that part which is surfaced as opposed to being measured from the centre point of the boundary hedge or fence. The objector's measurements taken on site showed that at Bentley Brook the available width was 4 metres with all other surfaced parts of the Order route being 3 metres in width.
51. Having had the benefit of viewing the Order route, I concur with the objector regarding the available width at the crossing of Bentley Brook and the width of the surfaced part of the lane. However, the currently surfaced part of the lane sits within the boundaries defined by hedges or fences and the public right of way shown to subsist by the documentary evidence runs between those boundaries; no evidence has been submitted to demonstrate that the public would have been restricted to solely the surfaced part of the lane.
52. The documentary evidence demonstrates that the Order route has been part of a public through route since 1845 at the latest. It is entirely possible that with the passage of time, the available width of the Order route has varied and what is present on the ground today is different to what was present almost 200 years ago.



53. In the absence of any documentary evidence which specifies the historic width of the Order route, a determination of that width must be arrived at using the best available evidence. The document which serves this purpose is the 1894 OS 25-inch map; it is drawn to a recognisable scale and was the product of successive surveys. It can therefore be viewed as providing an accurate record of the width of the Order route at the date the map was published.

### **Other matters**

54. The case put forward by the Council is based on the interpretation of documentary evidence and not on recent use by the public. Some evidence of use by the public had been submitted in support of the original application to record the Order route as a public bridleway. That there may have been limited or no use of the Order route by the public during the period in which the objectors have owned the land is not a relevant matter if the documentary evidence demonstrates that a public right of way had come into existence at some point in the past and which had not subsequently been formally extinguished.

55. Given my conclusion above that the documentary evidence demonstrates, on a balance of probabilities, that the Order route formed part of a public carriageway by 1845 at the latest and that those public rights have not been subsequently extinguished, the limited or non-use of the route by equestrians in recent years is of no consequence.

56. The initial letter of objection described the objector's agricultural operations and their use of the Order route to move livestock and machinery between the fields that make up the farm, and submitted that these matters must be noted as the frequent use of the Order route by vehicles and livestock would be incompatible with horse traffic and would present significant health and safety problems.

57. Whilst I acknowledge that the objectors have concerns regarding the impact the recording of a public right of way over the Order route may have on their use of it, these matters are not ones which I can consider in reaching my decision. The process under section 53 of the 1981 Act is concerned with the recording of those public rights which are shown by the available evidence to subsist on a balance of probabilities; the section 53 process is not concerned with recording what might be preferable or desirable by one party or another.

### **Overall conclusion**

58. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed subject to modifications.

### **Formal Decision**

59. I propose to confirm the Order subject to the following modifications:

- (a) throughout the Order and Order plan, replace any reference to bridleway with Restricted Byway;
- (b) in the Order plan replace the notation for bridleway with that for Restricted Byway.

60. Since the Order as proposed to be confirmed would show as a highway of one description a way which is shown in the Order as a highway of another description, I am required by virtue of Paragraph 8 (2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Alan Beckett*

Inspector

