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| **Order Decision** |
| On papers on file |
| **by K R Saward Solicitor, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 29 December 2021** |

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| **Order Ref: ROW/3271528** |
| * 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 (Addition of Restricted Byway from Main Road to Packet Lane, Bolton le Sands) Definitive Map Modification Order 2017. |
| * The Order is dated 25 October 2017 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway from Main Road to Packet Lane, Bolton le Sands as shown in the Order plan and described in the Order Schedule. |
| * There were 3 objections (and 1 representation) 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 confirmed subject to modifications.** |
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Procedural Matters

1. The original application concerned the recording of a byway open to all traffic (‘BOAT’) over the Order route. The Council as Order Making Authority (‘OMA’) concluded that an Order should be made to record a restricted byway. When notice of the Order was published, three objections and one representation were submitted to the OMA. Of those three objections, two were made anonymously. The remaining objector gave their name but did not provide any contact details. In the absence of any contact details, the objectors and person making the representation have made no further contribution to the process for the determination of the Order.
2. I am satisfied that my decision can be made on the papers on file without the need for a site visit having had due regard to the nature of the objections and representation. The OMA agreed to this in-house procedure. In reaching my decision I have taken into account all the evidence, submissions, and comments insofar as relevant to the issues before me.
3. The representation raises safety concerns in connection with the annual bonfire and fireworks display. It does not relate directly to use of the claimed route.
4. There is a typographical error in the Order which refers to section 53(c)(i) of the 1981 Act rather than section 53(3)(c)(i). Further, the Order has been made under section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in section 53(3)(b) and/or section 53[(3)](c)(i). Whilst both sub-sections are cited and either could be satisfied, the Order should have referred to one or both sub-sections instead of being expressed in the alternative. As it is, the OMA states that the Order was made pursuant to section 53(3)(c)(i). It is unlikely that anyone will have been misled by either of these points and it would not affect how the route is recorded in the DMS, if confirmed.

Main Issue

1. The main issue is whether the discovery by the OMA of evidence which (when considered with all other relevant evidence available) is sufficient to show, under section 53(3)(c)(i), that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
2. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be *reasonably alleged* to subsist, the standard of proof is higher for the Order to be confirmed. The test of the evidence is on the balance of probabilities and the burden of proof lies with those who assert the existence of a public right of way.

***Background and statutory framework***

1. The Order route crosses the former car park of a public house known as the ‘Packet Boat Inn’. It is measured as 16m in length and provides a link between Main Road and Packet Lane in the parish of Bolton-le-Sands.
2. The application was made by Bolton-le-Sands Parish Council for a BOAT, defined within section 66(1) of the 1981 Act as ‘a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used’.
3. Having considered the evidence, and in light of the Natural Environment and Rural Communities Act 2006 (‘the 2006 Act’), the OMA made the Order on the basis that the claimed route is a restricted byway. A restricted byway allows the public a right of way on foot, on horseback (or leading a horse) and in/on vehicles other than mechanically propelled vehicles. This includes cycles and horse-drawn vehicles, but not motorised vehicles.
4. I shall examine the evidence as a whole to establish whether a public right of way for vehicles exists along the Order route. However, the provisions of the 2006 Act extinguished public rights of way for mechanically propelled vehicles, subject to certain exceptions within section 67. It is not argued that any of those exceptions apply here. Therefore, if any rights for mechanically propelled vehicles had been established along the Order route then they would have been extinguished as a result of the 2006 Act. Accordingly, if I find in favour of public vehicular rights existing, the way should be recorded as a restricted byway.
5. The evidence adduced is of claimed use by the public. Therefore, it is necessary for me to consider whether dedication of the way has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in section 31 of the Highways Act 1980 (‘the 1980 Act’), or by implied dedication at common law.
6. Under section 31 of the 1980 Act, the use of the claimed route must have been actually enjoyed by the public ‘as of right’ (meaning without secrecy, force, or permission) and without interruption for a full period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a highway. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner/s during the 20 year period to dedicate the way for use by the public.
7. Should the test for statutory dedication fail under section 31, then it may be appropriate to consider the dedication of the way at common law.
8. Although the Order was made on the basis of the user evidence, I address the historical evidence considered by the Council as part of its research. Section 32 of the 1980 Act requires that documentary evidence is taken into consideration ‘before determining whether a way has or has not been dedicated as a highway’ – and that such weight is given to this evidence as ‘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 was produced.’
9. There is no need for there to be evidence of both use of the route over a 20-year period and supporting documentary evidence. One or other may suffice or dedication may be inferred at common law.
10. It is important to note that these provisions are concerned with whether public rights of way have already come into effect. Objectors refer to a ‘new byway’ but a definitive map modification order does not create *new* rights but seeks to record those already in existence. Therefore, whether there is a need for the route because an alternative is available cannot influence my decision. Similarly, I cannot consider how the presence of a public right of way might adversely impact upon a change of use of the premises to a house and garden.

**Reasons**

***Documentary evidence***

1. The archival research undertaken by the OMA reveals that the claimed route did not exist at the time of the Tithe Map and Award for Bolton-le-Sands of 1846 due to the presence of buildings. Buildings remain shown across the route on a succession of Ordnance Survey maps up to and including the 1967 revision (published 1969) as reinforced by an aerial photograph taken in the 1960’s. The earliest documentary evidence where a gap has emerged between buildings is the 1:1250 scale Ordnance Survey map from 1985. This indicates that the building was removed at some point between 1967-1985.
2. When listed building consent was sought and granted for alternations at the Packet Boat Inn in 2007, the land over which the Order route passes was annotated as a car park on the submitted drawings. The alternations included widening the vehicular access off Main Road to 6m in width and installation of dropped kerbs.
3. Street view images from 2009 show both ends of the Order route available for vehicular use without any form of obstruction. The full length of the hard surfaced route can be seen in an aerial image of 2010.

***Statutory dedication***

*Bringing into question*

1. The first matter to be established in relation to section 31 of the 1980 Act is when the right of the public to use the route was brought into question.
2. The brewery confirms that it sold the public house premises on 31 March 2015. This was after its closure. Fencing was subsequently erected across each end of the former car park. Evidence from the users indicates that this occurred in July 2015. For the purposes of section 31, this would give a relevant period of July 1995-July 2015 which is the period applied by the OMA.
3. I have also considered whether an earlier date might apply with reference to vehicular use because the listed building application of 2007 included the provision of two drop down bollards at the Packet Lane end of the route to restrict vehicular access. The bollards were to be dropped down for deliveries. The OMA says there is no reference to any public vehicular use being restricted or prevented by the erection of bollards. However, one of the users describes in their user evidence form (‘UEF’), completed in November 2015, how ‘*perhaps five years ago some removable bollards were placed at the exit onto Packet Lane to deter vehicular use. These were removed permanently when the difficulty of getting cars down the lane was realised – quite quickly*.’ The user then states that the bollards were in place for ‘*a matter of a few weeks’*.
4. There is no indication that the bollards would have prevented use as a through route on foot or bicycle. If this user is correct then vehicular use of the route was obstructed in or around 2010. In all likelihood the earliest it would have been is 2007 after works at the public house were authorised. There is no sign of any obstruction in the street view images of 2009 where a car is captured entering the premises from Packet Lane. Whether the bollards had been installed and then removed before or after this shot was taken is unclear.
5. Bollards would not have prevented use of the pub car park but they would have stopped vehicular use by the public as a link between Main Road and Packet Lane. Accordingly, I shall consider this as a possible event calling into question the right of the public to use the route with vehicles, applying the period 1987-2007 and considering other periods as appropriate.

*Evidence of use by the public*

1. The OMA believes that the 30 UEF’s mentioned in its Officer’s report to the Regulatory Committee is an error. The Council possesses 27 UEF’s in total, only three of which accompanied the original application. All 27 UEF’s are supplied.
2. The users all say that they followed the same straight line across the pub car park using it as a through route connecting Main Road with Packet Lane. Many say it offered a safer pedestrian route and shorter means of access to the local school and community facilities, in particular, rather than continuing further along the narrow lane which is busy and congested with traffic at times. Whether the route across the car park was in fact safer does not matter. There is consistency in the evidence regarding both pedestrian and vehicular use of the route as an easy shortcut for these purposes, amongst others.
3. Twenty-five users say they regularly drove along the route. All but one walked the route. Around twenty-two of those users claim use on foot throughout the 20 year period ending in 2015 and twenty in vehicles. One claims about 43 years use up to 2014. A further two users had periods when they did not use the route but one claims vehicular and pedestrian use of around 15 years up to 2015 and the other claims 30+ years on foot only. Two others claimed 14 and 19 years vehicular and pedestrian use up to 2015.
4. Even if vehicular use was called into question as early as 2007, there are still around twenty users claiming continuous use throughout the preceding 20 year period with five others claiming between 5-19 years.
5. Only three witnesses claim cycle use, two of whom can show 20 years use whether the date is taken as 2007 or 2015. In isolation, such low levels of cycle

use would not suffice to demonstrate status as a restricted byway.

1. Most users saw other people using the route on foot, by bicycle and in vehicles. Various references are made to witnessing daily use by numerous other people taking and collecting children from school. Only two witnesses indicate having seen other users on horseback. In both those cases, it is possible the box has been ticked mistakenly as such use is not borne out by other witnesses.
2. Some users claim use up to 2016 although the evidence indicates that fencing had already been erected by that time. I have taken this into account when calculating periods of claimed use. A couple of users claim use prior to 1967 when the documentary evidence indicates the route did not exist. Bearing in mind how long ago this is, it would not be surprising if memories have faded over which year their use began. That is not of significance in terms of working backwards from the date of calling into question for statutory dedication.
3. The picture overall is of a route in regular and open use by a large number of people on foot and by vehicle over many years and sufficient to demonstrate a full 20 year period of uninterrupted use preceding the date of calling into question whether the 2015 is applied or the earlier date of 2007. There is no suggestion that users were given permission to use the route.

***Whether any landowner demonstrated a lack of intention to dedicate***

1. One objector claims that local people abused the Packet Boat car park to the annoyance of the hotel owners for 40 plus years, even using the car park when collecting children from school. However, there is no evidence before me that the owners expressed dissatisfaction in any way to the users of the claimed route or challenged such use.
2. When the brewery confirmed its sale of the premises on 31 March 2015, it made no further comment.
3. For a landowner to demonstrate a lack of intention to dedicate a path, there would need to be an overt act of which users would have been aware. There is some evidence of the erection of bollards to prevent vehicular use as a through route for a short period at some point between to 2007-2010 or thereabouts. However, by that time a large body of users were already able to show in excess of 20 years uninterrupted vehicular use.
4. The users are consistent in saying their use was never challenged. Where users encountered anyone from the public house, they say that pleasantries were exchanged or ‘general conversation’.
5. There is insufficient evidence that the landowner had demonstrated a lack of intention to dedicate to defeat the claim.

*Conclusion on statutory dedication*

1. On the balance of probabilities and having regard to the totality of evidence, I am satisfied that the use by the public has been enjoyed as of right and without interruption for the full 20 year period under consideration for not only use on foot but also for public vehicular rights. The evidence does not indicate that any landowner demonstrated a lack of intention to dedicate the route during these periods. Therefore, the tests in section 31 of the 1980 Act are met and the way is deemed to have been dedicated as a public right of way. Having found that public vehicular rights subsist, and further to the provisions of the 2006 Act as set out in paragraph 10 above, it follows that the Order route should be recorded as a restricted byway.
2. Given my findings that statutory dedication has taken place it is unnecessary for me to go on to consider dedication at common law.

**Other Matters**

1. An objection is raised to the width being recorded as 6m. The recorded width should be that used rather than that required to exercise the right. I am satisfied on the balance of evidence that 6m reflects the width used by the public.

Overall Conclusion

1. I am satisfied that a restricted byway is deemed to have been dedicated over the Order route and that consequently, on the balance of probabilities, a public right of way subsists.
2. As the typographical error described in my ‘Procedural Matters’ should be corrected, I will take the opportunity to also modify the Order with a correction to delete reference to section 53(3)(b). As minor points of clarification, such modifications can be made without the need for the Order to be re-advertised.
3. Having regard to these and all other matters raised in the written submissions, I conclude that the Order should be confirmed subject to those modifications.

**Formal Decision**

1. I confirm the Order subject to the following modifications:-

* In the first paragraph delete “*Section 53(3)(b) and/or*” and replace “*Section 53(c)(i)”* with “*Section 53(3)(c)(i)”.*

*KR Saward*

INSPECTOR

