

Report to: Planning Committee

Date: 20th November 2014

Report of: Director of Environmental Services

Report No:

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Report Title: Application for a Definitive Map Modification Order for Land off Leigh Road, Westhoughton

Non Confidential: This report does **not** contain information which warrants its consideration in the absence of the press or members of the public

Purpose: An application has been made to Bolton Council to make and advertise an Order under section 53 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of a footpath at land between 233 and 235 Leigh Road, Westhoughton.

Recommendations:

1. That the Committee declines to make an Order that, on the basis of the available documentary evidence it does not demonstrate that it is reasonable to allege on the balance of probabilities that a right of way subsists.
2. Officers to write to the applicant explaining the decision and informing him he can appeal to the Secretary of State against the refusal to make an order.

Background Doc(s): **Appendix 1** Public Right of Way Officers Investigation Report.
Appendix 2 Definitive map modification orders – Guidance on Decision Making

Summary:

Summary and Context

1. An application has been made to Bolton Council to make and advertise an Order under section 53 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement of public rights of way by the addition of a footpath at land between 233 and 235 Leigh Road, Westhoughton.
2. The Council is the surveying authority for the purposes of section 53 of the Wildlife and Countryside Act 1981 and is required by law to keep the Definitive Map & Statement under continuous review and make any modifications necessary by Order as a result of the occurrence of certain events.

The Application

3. An application requesting that a Definitive Map Modification Order be made to add a footpath to the Definitive Map and Statement was received by the Council on 12th June 2014. The applicant is:
 - Mr Keith J. Wall of 231 Leigh Road, Westhoughton BL5 2JG.
4. The claimant relies on documentary evidence; no user evidence has been submitted showing use of the way by the public.

Summary of Public Rights of Way Officer's Report

5. The public rights of way officer's investigation report is contained in appendix 1 attached to this report.
6. The report's findings are in brief:
 - The terms of grant dated 1910, 1911, 1976, 1977 and 1994 indicate that the route between properties 233 – 235 Leigh Road was not considered to be public at these times.
 - No historical evidence of a public right of way was found.
 - No evidence of use has been submitted by other members of the public.
 - No new evidence has been discovered since the claim for a public right of way along the route between properties 233 – 235 Leigh Road was rejected by Judge Pelling QC (Wall v Collins 2006).

Conclusion of the Report

7. It is the conclusion of the public rights of way officer's investigation report that, on the basis of the available documentary evidence, the event needed to make a modification order on the basis that it is reasonable to allege on the balance of probabilities that a public right of way subsists has therefore not occurred.

Options

8. **a:** to make a Definitive Map Modification Order to amend the Definitive Map and Statement by the addition of a footpath at land between 233 and 235 Leigh Road, Westhoughton.
9. **b:** to decline to make an Order and do not make a Definitive Map Modification Order to add a footpath at land between 233 and 235 Leigh Road, Westhoughton.

Financial Implications

10. Financial cost are not a consideration as the Authority has a duty under Section 53 of the Wildlife and Countryside Act 1981 to keep the definitive map and statement under continuous review and to modify it by means of a legal order where evidence is discovered.
11. There is an opportunity for the applicant to appeal to the Secretary of State against a decision not to make an Order and Bolton Council would be responsible for the conduct of any hearing or public inquiry.

Legal Implications

12. The Council is under a duty to determine applications made under section 53 of the Wildlife and Countryside Act 1981. The appropriate legal tests to be applied and other relevant legislation are considered in the body of the report. Legal services were consulted on the report.

Recommendation

13. For reasons made clear in the public rights of way officer's investigation report, the Committee chooses option 9 b to decline to make an order on the basis that the evidence referred to in the public rights of way officer's investigation report does not demonstrate that it is reasonable to allege on the balance of probabilities that a right of way subsists.
14. Officers to write to the applicant explaining the decision and informing him that he can appeal to the Secretary of State against the refusal to make an order.

ES/HEDev/AS
20th November 2014

APPENDIX 1



Section 53 of the Wildlife & Countryside Act 1981
Application to add to the Definitive Map and Statement a footpath
along a ginnel between properties 233 – 235 Leigh Road,
Westhoughton.

Report

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Date 29/10/2014

Definitive Map Modification Order Application

Route between properties 233 – 235 Leigh Road, Westhoughton

Effects of application: Addition of a public footpath

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1 The Application

1.1 The application was made on 12th June 2014 by Keith John Wall of 231 Leigh Road, Westhoughton, Bolton and the claimant relies on documentary evidence; no user evidence has been submitted. The application was for the addition to the Definitive Map and Statement of a footpath referred to in this report as a route between properties 233 – 235 Leigh Road. The route starts from a point on the footway off Leigh Road, Westhoughton and runs in an Easterly direction for approximately 23 metres between brick boundary walls over a bitmac surface, where it meets the back street at the rear of 233 & 235 Leigh Road. A map showing the claimed route can be found at Appendix 2. Photographs of the claimed route can be found at Appendix 3.

1.2 Notice of the application was served on the landowners Mr Brian Collins & Mrs Jennifer Collins 233 Leigh Road, Westhoughton. A copy of the application certificate and notices can be found at Appendix 4.

1.3 The Evidence accompanying the application was a typed extract from a grant contained in title deeds dated 1910, an extract from a grant contained in land registry documents dated 1977, land registry documents dated 1995, two photographs showing the claimed route, title deed plans dated 1910/1911 & 1912, ordinance survey maps dated 1907/1927/1936/1967/2002, a land registry map dated 2004, two draft Chronologies, particulars of a claim between Keith John Wall and Shaun R. Harriss dated 04/12/12 and an extract from the court of appeal dated July 2007.

1.4 The applicant made the following comments: *‘there are at least two freeholder dedications (by deed in 1910 and 1976) and other legal documents and maps’* (Letter dated 31/05/14); *‘this is a long established ancient highway’* (Letter received 7/07/14); *‘it was established before the semi-continuous lines of houses appeared at the beginning of the last century. Used by the farming community for a livestock “driftway” carts and pedestrians moving between the farming areas on the eastern and western side of Leigh Road’* (Particulars of a claim between Keith John Wall and Shaun R. Harriss dated 4/12/12).

2 Relevant Legal Background

2.1 Evidence produced in connection with a Definitive Map Modification Order (DMMO), both presented in an application and discovered by the surveying authority, must be assessed according to the provisions of the relevant statutes: section 53 Wildlife and Countryside Act 1981 (WCA 1981) and section 31 Highways Act 1980 (HA 1980), and also on legal principles established by case law (court judgements).

2.2 Statute Law

2.2.1 s53 WCA 1981 imposes upon the council, as the surveying authority, the legal duty to keep the Definitive Map and Statement under continuous review (s53(2)(a) and s53(2)(b)). If an event specified in s53(3) has occurred, the authority is obliged to modify the definitive map and statement by means of a DMMO.

The event relevant to this application is:

s53(3)(c)(i) – *“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates”*.

2.2.2 The nature of “discovered” evidence in s53(3)(c)(i) WCA 1981 is “the finding out of some information which was not known to the surveying authority when the earlier map was prepared” (*Mayhew v. SoS* 1993). The evidence discovered can be either documentary, or evidence of use by the public, or both. This discovered evidence must be considered together with any other relevant evidence which is not newly discovered. The minimum level of proof required to show that the event has occurred under s53(3)(c)(i) WCA 1981, and to trigger the making of a modification order, is that it is reasonable to allege on the balance of probabilities that a right of way subsists.

2.2.3 The case of *R v SSE ex parte Bagshaw and Norton* (1994) has clarified the law in respect of the wording ‘subsists’ (Test A) and ‘or is reasonably alleged to subsist’ (Test B).

- ‘Test A’ requires that the claimed right of way subsists i.e. clear evidence in respect of the claim and no credible evidence to the contrary.
- ‘Test B’ requires that it is reasonable to allege that a right of way subsists i.e. even if the evidence is finely balanced, but there is no incontrovertible evidence that the claimed route could not subsist, then the test is met and an Order should be made.

2.2.4. The criteria against which the strength of documentary evidence must be judged are given in s32 HA 1980: “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 which is tendered in evidence, and shall give such 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.”

2.2.5 If it is concluded on the basis of the documentary evidence that public footpath rights existed historically, then because "once a highway, always a highway", unless it can be shown that the rights have been legally extinguished, they still exist.

2.2.6 The term ancient highway is used to refer to a road that was dedicated to public use as a highway before 31 August 1835, the date the Highway Act 1835 was passed (when the first of the modern Highways Acts came into force). Dedication could either be express or implied from public use. Express dedication has to be accompanied by public use of the way.

2.3 Case Law

2.3.1 Case law is the accumulated decisions of judges over time and thus evolves with each subsequent decision. Decisions of “courts of record” are binding on all inferior courts and tribunals. In terms of domestic law, the principal courts of record are the High Court, the Court of Appeal and the House of Lords. A higher court of record binds the decisions of a lower court. Decisions have immediate effect. They apply during any period in which an appeal could be lodged or, having been lodged, is pending.

2.3.2 Tribunals such as public inquiries are not normally bound by decisions of the County or Magistrates’ Courts, but such decisions may be persuasive. The weight to be attached to them will depend on the circumstances.

2.4 Making a modification order

2.4.1 If having applied the above legal principles, it is considered that it is reasonable to allege that dedication of public rights of way has taken place, so that a public right of way can be reasonably alleged to subsist, then the event in s53(3)(c)(i) WCA 1981, described in above, has occurred, and the Definitive Map and Statement must be modified by making a modification order. However, following the judgement in *Todd & Bradley* 2004, a higher standard of proof is required to confirm that order; there must be evidence to show that, on a balance of probabilities, the public right of way does subsist. Therefore it is sensible for the Council to assess before an order is made whether or not, in the absence of sustained objections to the order, it is capable of being confirmed i.e. not only is it reasonable to allege that the path subsists, but also it is considered, on the balance of probabilities, that it does subsist.

3 Documentary Evidence

3.1 The following sections describe the nature of the evidence to be obtained from each type of document which was examined, and the relative strengths of the evidence as assessed under the s32 HA 1980 criteria (see paragraph **2.2.3**). Relevant documents are summarised in Appendix 5.

3.1.1 Ordnance Survey maps and associated documents: Ordnance Survey (OS) maps generally provide an accurate representation of routes on the ground at the time of the survey, and their preparation by a public military body gives them a high reputation. However, depiction of a way cannot, of itself, be conclusive evidence that it is a highway carrying public rights of way, since that is specifically excluded from the disclaimer on OS maps.

3.2 Records created for the preparation of the first Definitive Map and Statement of public rights of way under the National Parks and Access to the Countryside Act 1949

3.2.1 The first stage in the preparation of the first Definitive Map and Statement was a survey of all the alleged public rights of way in their areas carried out by the parish councils. These surveys were recorded in the form of written survey sheets and accompanying maps. The records contain information as to why the routes were considered to be public rights of way. However, they only represent the opinion of the parish council, and so provide useful supporting, but not conclusive, evidence of the existence of public rights.

3.2.2 The details of the parish surveys were used by the council to prepare a draft Definitive Map and Statement. This was published, and anyone could object to the information shown. Objections were heard by a person appointed by the council, and any further objection to the subsequent decision could also be heard. Again useful supporting information can be provided by the draft documents and the records of these hearings.

3.2.3 The draft Map and Statement, modified by the decisions made by the council, were published as the provisional Map and Statement. Landowners had a further opportunity to object to the details shown, and such objections were considered at the Quarter Sessions. Again supporting information can be provided by the provisional documents and records of the Quarter Sessions proceedings.

3.2.4 The provisional Map and Statement modified as a result of the Quarter Sessions decisions were published as the final Definitive Map and Statement. These provided conclusive evidence in law of the particulars which they contained. However, under s53 WCA 1981, it is possible to show that the particulars are incorrect.

3.3 Records of the maintenance of ways – List of streets under the Highways Act 1980

3.3.1 Section 36(6) of the Highways Act 1980 requires every highway authority to make and keep up to date, a list of streets within its area which are highways maintainable at public expense. The Act does not specify the detail to be included in the list e.g status, width and no requirement for the list to be accompanied by a map.

3.3.2 If evidence can be found in the records it can be strong evidence that the way was considered as a public way, although it may not always be straightforward to link a reference to a way to a present-day route of specific position.

3.4 Title Deeds and Conveyances

3.4.1 In deciding whether a highway has been created, it is necessary to consider the intention of the landowner at the time of creation. The throwing open of a way only to persons of a particular class will not therefore create a public highway. Title deeds may provide evidence of the reputation of the way if the owner of the land considered a way over his land to be public and deed maps can provide evidence of the physical existence of the

ways depicted on them. Together they may be considered particularly strong evidence of reputation.

4.0 Assessment of the documentary evidence for the status of the claimed route submitted by the applicant

4.1 Ordnance Survey maps dated 1907,1927,1936,1967 & 2002: these indicate the claimed routes physical existence throughout this time, but do not assist in terms of the existence or otherwise of public rights and therefore do not provide conclusive evidence concerning the legal status of the route between properties 233 – 235 Leigh Road.

4.2 Land Registry map dated 2004: this indicates the claimed routes physical existence at this time, but does not assist in terms of the existence or otherwise of public rights and therefore does not provide conclusive evidence concerning the legal status of the route between properties 233 – 235 Leigh Road.

4.3 Extract of terms of grant contained in the deeds dated 1910: it is written that *'at all times during the said term be used as foot carriage and drift ways by the lessee and his tenants lessees and others deriving any title through him or having or seeking intercourse with him or them as well as the Mortgagee and Lessors their respective heirs and assigns and any person or persons in going to or returning from the said premises'*. The throwing open of a way only to persons of a particular class will not create a public highway. The Council cannot be satisfied that the route between properties 233 – 235 Leigh Road was intended to be dedicated for public use at this time because the terms of grant indicate this was intended to be private.

4.4 Deed plans dated 1910/1911 & 1912: these indicate the route between properties 233 – 235 Leigh Roads physical existence at this time. The important question to be considered in ascribing significance to any map is for what purpose was the map prepared? The deed plan dated 1910/11 does indeed include the word 'road' on the plan. Roads can be public or private and the value of documents is that they can support each other; in this case the terms of grant contained in the deeds dated 1910 which indicate this was intended to be private. They do not provide conclusive evidence concerning the legal status of the route between properties 233 – 235 Leigh Road.

4.5 Extract of terms of grant contained in the land registry document dated 1977: it is written that *'a right of way in common with the vendor and all other persons deriving title under the vendor and all other persons now or hereafter entitled thereto to go pass and repass with or without vehicles at all times and for all purposes over and along estate roads and footpaths now constructed on the Estate of which the Property forms part'*. The Council cannot be satisfied that the route between properties 233 – 235 Leigh Road was intended for dedication for public use at this time because the terms of grant refer to a right of passage along estate roads and footways forming part of the then new Estate known as Broseley Estate. A right of access along estate roads and footways constructed on the Estate of which the Property forms part, appears to have been granted to ensure that residents had a legal right of access along these routes which lead to properties.

4.6 Extract of land registry document ‘transfer of part imposing fresh restrictive covenants’ dated May 1995: this refers to a transfer of land to Brian Collins and Jennifer Collins of 233 Leigh Road. There is nothing written within this document to indicate that the route between properties 233 – 235 Leigh Road was intended for dedication for public use at this time.

4.7 Draft Chronologies – Medieval times to 2014: whilst submitted as supporting evidence, they do not have any legal authority with regards to the status of the route between properties 233 – 235 Leigh Road or the intention of dedicating this for public use and cannot be given any significant weight.

4.8 Extract from the court of appeal Wall v Collins dated July 2007: It is written that *‘the claimant as owner of the property, 231 Leigh Road, aforesaid and the parcel of land (“the back land”) adjoining the same to the east and rear thereof, enjoys in terms of grant contained in the assignment dated 25th February 1911 and made between Ellen Dobb and others (1) Harold Hurst (2) and Robert Morris (3) a right of passage over and along the passageway (“the south road”)’ situated upon the defendants said property to the south of the dwelling’*. The throwing open of a way only to persons of a particular class will not create a public highway. The Council cannot be satisfied that the route between properties 233 – 235 Leigh Road was intended for dedication for public use at this time because the terms of grant indicate this was intended to be private.

4.9 The particulars of a claim between Keith John Wall and Shaun R. Harriss dated 04/12/12: whilst submitted as supporting evidence, this does not have any legal authority with regards to the status of the route between properties 233 – 235 Leigh Road or the intention of dedicating this for public use and cannot be given any significant weight.

5.0 Further Investigations

5.1 The standard reference documents comprising of historical maps and Council records have been consulted in connection with this application are summarised in Appendix 5.

5.2 Provisional and Definitive Maps for Public Rights of Way: the provisional map for rights of way dating from 1952 which was parish specific and produced by Westhoughton UDC; an untitled map dated 1972 and the current definitive map for rights of way with a relevant date being 25/04/1984 do not record the route between properties 233 – 235 Leigh Road as being a public right of way.

5.3 Record cards and Statements for Public Rights of Way: the rights of way record cards dated May 1951, the draft statement accompanying the draft rights of way map dated January 1953, the provisional statement accompanying the provisional rights of way map dated January 1953, the statement accompanying the definitive map for rights of way dated January 1953 and the first review statement dated September 1966 all of which were parish specific and produced by Westhoughton UDC do not make mention of the route as being a public right of way. The new definitive statement with a survey date being 1978 produced by Greater Manchester Council and the current definitive statement with a relevant date being 25/04/84 do not make mention of the route between properties 233 – 235 Leigh Road as being a public right of way.

5.4 List of streets - highways maintainable at public expense: the highway records dated from the 1950's were produced by Westhoughton UDC. The record cards after the handover of the Highway Register from Greater Manchester Council in the mid 1970's, were produced by Bolton Council. Neither of these records make mention of the claimed route between properties 233 – 235 Leigh Road as being a highway maintainable at public expense or being an unadopted highway. Reference made refers to Back Leigh Road from 233 to 237 being unadopted highway.

5.5 The map accompanying the list of streets: produced by the Bolton Council's Highway Authority in the mid 1970's shows the claimed route between properties 233 – 235 Leigh Road marked in red crayon with the map index referring to red as being unadopted highway. There is no legal requirement for the list of streets to be accompanied by a map and this was produced to be viewed by members of the public along with the legal records of the list of streets. There is a conflict between the map and the list of streets, however because the map has no legal status it cannot be given any significant weight.

5.6 Ordnance Survey maps dated 1849,1891-94/1907,1908-10 provided by the land owner and Council held maps: these do not indicate the claimed routes physical existence throughout this time. The 1907 map appears to contradict the physical existence of the route between properties 233 – 235 Leigh Road shown on the 1907 OS map provided by the applicant. However this map does not provide conclusive evidence concerning the legal status of the route. The absence of the claimed route between properties 233 – 235 Leigh Road suggests that there was no physical feature on the ground between 1849 and 1908-10 and that this route did not exist at this time.

5.7 Additional extract of the terms of grant within the deeds dated 1910 provided by the landowner: it is written '*and will at all times during the said term leave and maintain vacant open and unbuilt upon a space of land three yards wide out of and along the whole length of the most easterly side of the plot of land hereby demised in order to form one half of a Back Street of six yards wide on that side and will thereafter when required by the Mortgagee or lessors their heirs or assigns have with good materials in a workmanlike way and in such manner as they shall direct and afterwards at all times thereafter during the said term keep in a good repair and condition*' **and** '*for the Mortgagee and Lessors their respective heirs and assigns and their surveyors and agents and others twice in every year at reasonable times to enter into and upon the said plot of land*'. Together with the previously discussed extract of the terms of grant written within these deeds (paragraph 4.1.3), the Council cannot be satisfied that the route between properties 233 – 235 Leigh Road was intended to be dedicated for public use at this time because the deeds indicate this was intended to be private.

5.8 Extract of the terms of grant contained within the deeds dated 1911 provided by the landowner: it is written '*together with the right for the purchaser his executors administrators and assigns and tenants and occupiers for the time being of the premises thereby assigned and conveyed to pass and re-pass on foot or with horse over and along the route coloured yellow on the said plan (Deed Plan dated 1911) for the purposes of the convenience use and enjoyment of the premises. Hereby assigned and for no other purposes whatsoever*'. It must be noted that some text has not been included in the above paragraph due to the clarity of text within the document provided. However the Council cannot be satisfied that

the route between properties 233 – 235 Leigh Road was intended to be dedicated for public use at this time because the terms of grant indicate this was intended to be private.

5.9 Deed plan dated 1910 provided by the landowner: does not indicate the route between properties 233 – 235 Leigh Road's physical existence at this time. This appears to contradict the physical existence of the route between properties 233 – 235 Leigh Road claimed to be shown on deed plans provided by the applicant and dated 1910/11 and previously discussed in paragraph 4.1.4.

5.10 Deed plan dated 1911 provided by the landowner: indicates the route between properties 233 – 235 Leigh Road's physical existence at this time. As previously discussed in paragraph 4.1.4, it does not provide conclusive evidence concerning the legal status of the route between properties 233 – 235 Leigh Road.

5.11 Deed of grant between Mr & Mrs Morgan and The North Western Electricity Board dated 1976 (of a right to lay and maintain cables at 233 Leigh Road) provided by the landowner: it is written that *'the grantors as beneficial owners hereby grant and the society as mortgagee hereby confirms upto the board and their successors in title and all persons authorised by them full and free right and liberty to break open the surface of the easement land so far as this may be necessary, reinstating the same as soon as possible thereafter to its former state and condition to the satisfaction of the grantor'*. This indicates that the claimed route between properties 233 – 235 Leigh Road was regarded as private at this time.

5.12 Extract of land registry document dated June 1994 provided by the landowner: it is written that *'together with the right of the purchaser his executors administrators and assigns and tenants and occupiers for the time being of the premises thereby and conveyed to pass and re-pass on foot or with horses carts and other vehicles over and along the road coloured yellow on the said plan (Deed Plan dated 1911) for the purposes of the convenient use and enjoyment of the premises thereby assigned and conveyed and for no other purpose whatsoever'*. The Council cannot be satisfied that the route between properties 233 – 235 Leigh Road was intended to be dedicated for public use at this time because the terms of grant indicate this was intended to be private.

5.13 Wall v Collins (2006), England and Wales (Civil Division) Decisions: judgement was made on whether there was a public right of way over South Road (the claimed route between properties 233 – 235 Leigh Road). The summary concluded that there was never a public right of way over South Road.

5.14 Wall v Collins (2009), England and Wales Court of Appeal (Civil Division) Decisions: it was confirmed by his honour judge Hodge that Mr Wall's claim that there were public rights of way over the passageway (the claimed route between properties 233 – 235 Leigh Road), which was rejected by Judge Pelling QC (Wall v Collins 2006), was not open to Mr Wall to contend that the passageway is a public highway.

5.15 The landowners made the following comments: *"from the evidence submitted and the court rulings, the passageway between 233 and 235 Leigh Road has never been designated a public right of way"* (statement dated July 14).

6.0 Comments following consultation

- 6.1** The landowners, adjacent landowner, Westhoughton Town Council, The Council's Footpath Liaison Group, statutory consultees and local councillors have all been consulted. Additional comments have also been received.
- 6.2** Westhoughton Town Council supported the application, however commented that *'the path is near to a pedestrian crossing and the Town Council wishes bollards to be sited at each end of the footpath in order to restrict its use to pedestrians and prevent access by vehicles'*.
- 6.3** Mr Hurst of 235 Leigh Road, Westhoughton, does not support the claim *'we bought our house in 1989 and believe the ginnel in question is for the sole use by houses 231 and 233 only. It is our understanding the ginnel has never been a public thoroughfare and is private land'*.
- 6.4** Mr & Mrs Pomfret 247 Leigh Road, Westhoughton, do not support the claim *'my husband and I are both in our 80s and have lived at the above address for over 60 years and to our knowledge the passageway in question has always been private. Mr Hurst who had the two houses built and lived in 233 was a painter and decorator and used the passageway for his cart, ladders etc. There was a wooden gate across on the roadside end with a metal private notice on'*.
- 6.5** Mrs Clarke 241 Leigh Road, Westhoughton, does not support the claim *'during the brief time it was opened up not so long ago, we had teenagers riding on bikes behind our house not caring that people had cars parked there. Also had cans and food packaging thrown over our wall'*.
- 6.6** The Manchester Ramblers Association supported the application *'The route looks like a well-established one, designed at the time the area was built up, and quite probably on a line existing at the time'*.

7.0 Conclusion

7.1 Investigation of the application did not reveal any new map evidence in support of the existence of the route between properties 233 – 235 Leigh Road prior to 1908-10 as the route is not shown on any OS maps from 1849 to 1908-10 or on the deed plan dated 1910. The first indication of the claimed route's physical existence appears on the deed plan dated 25th February 1911. A deed plan dated 1912 and OS maps dating from 1927, 1936, 1967 & 2002 and a land registry map dated 2004 show the physical existence of the route. Depiction of a way cannot, of itself, be conclusive evidence that it is a highway carrying public rights of way, since that is specifically excluded from the disclaimer on OS maps. The map evidence examined is considered insufficient to be evidence of the existence of an ancient highway or to show the legal status of the route.

7.2 The terms of grant dated 1910, 1911, 1976, 1977 and 1994 indicate that the route between properties 233 – 235 Leigh Road was not considered to be public at these times since there would be no need to grant a private right of access where public rights existed, although public and private rights can coexist. They do not provide sufficient evidence that the route was intended to be dedicated for public use at these times.

7.3 Having consulted the Council's records for Public Rights of Way, no new evidence that the route between properties 233 – 235 Leigh Road is a public right of way has been discovered.

7.4 Having consulted the Council's list of streets, no new evidence that the route between properties 233 – 235 Leigh Road was a highway maintainable at public expense or being an unadopted highway has been discovered.

7.5 No new evidence has been discovered since the claim for a public right of way along the route between properties 233 – 235 Leigh Road was rejected by Judge Pelling QC (Wall v Collins 2006).

7.6 I conclude therefore that, on the basis of the available documentary evidence, the event needed to make a modification order on the basis that it is reasonable to allege on the balance of probabilities that a public right of way subsists has therefore not occurred.

APPENDIX 1

DEFINITIVE MAP MODIFICATION ORDERS – BACKGROUND AND PROCEDURE

1. Definitive Map and Statement

The definitive map and statement is a conclusive record of the status, position and width of public rights of way, and of any limitations on their use. Four categories of public rights of way are shown on the definitive map.

- **“Footpath”** is a highway over which the public have a right of way on foot only.
- **“Bridleway”** is a highway over which the public have a right of way on foot, bicycle, on horseback or leading a horse.
- **“Byway Open to All Traffic”** (or BOAT) is 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 used.
- **“Restricted Byway”** is a highway over which the public have a right of way on foot, on horseback or leading a horse, and a right of way for vehicles but excluding mechanically propelled vehicles.

Although the definitive map and statement is a conclusive record of all public rights of way shown on it, it is not conclusive proof that other rights not recorded do not exist.

Bolton Council as the surveying authority for public rights of way, has a duty under Section 53 of the Wildlife and Countryside Act 1981 to keep the definitive map and statement under continuous review and to modify it by means of a legal order where evidence is discovered which shows that:

- a period of time has expired during which enjoyment of a way by the public raises a presumption that it has been dedicated as a public path [Section 53(3)(b)]
- a right of way which is not shown subsists or is reasonably alleged to subsist [Section 53(3)(c)(i)].
- a highway which is shown ought to be shown as a highway of a different description [Section 53(3)(c)(ii)].
- there is no public right of way over any land shown as a highway of any description [Section 53(3)(c)(iii)].

Certain specified events can trigger that process and one of these is an application under Section 53 of the 1981 Act for a definitive map modification order (DMMO). Section 53(5) enables any landowner, occupier or member of the public to apply for a DMMO to modify the definitive map and statement.

Claims may be made for routes to be added to the definitive map on the basis of evidence from historical documents and/or evidence of public use, either for a continuous period of 20 years, as provided for by Section 31 of the Highways Act 1980 or for a shorter period of time under Common Law.

It should be clearly understood that DMMOs are solely concerned with correctly recording the public rights that already exist over a route, not about whether they should be created or

taken away. The legislation only permits the question of if the claimed right exists and if it does, its route and status, on the basis of historical documentary and/or user evidence. The suitability of a way for users who have the right to use it, or the nuisance that they are alleged to cause, or likely to cause, are matters that cannot be taken into account. Applications for DMMOs cannot be used to change or show only the routes and public status considered desirable, practical, sustainable or convenient.

It is also very important to appreciate that once public rights of way have been brought into existence, by whatever means, they remain indefinitely and can only be extinguished or altered by a legal order. So, in cases where historical documentary evidence proves that a public right of way was created some time ago, those public rights will still exist, even if the route is no longer suitable for the purpose for which it was created, or has been impassable for many years. This is the meaning of the maxim, *"Once a highway always a highway"*, taken from Harvey v Truro District Council (1903) in which it was ruled that *"mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not be used would preclude the public from resuming the right to use it if and when they think proper"*.

2. Statute Law

Both at Common Law and under Section 31 of the Highways Act 1980 the public's enjoyment of the way must have been *"as of right"* in order to form the basis of implied dedication. *"As of right"* was interpreted in Mersham v Couldson and Purley UDC (1937) as acts done openly, not secretly, not by force and not with the permission of the affected landowner(s). However the House of Lords held in R v Oxfordshire CC ex parte Sunningwell Parish Council (1999) that the subjective state of mind of the user does not have to be proved, meaning that it is not necessary for the public to believe that they had a right to use the way to establish that their use was *"as of right"*.

Deciding on who *"the public"* are can sometimes be difficult. In general it should not include people working or related to the landowner over whose land the claimed route passes, or people who had the permission or licence of the landowner(s) to use the route.

Under Section 31 of the Highways Act 1980, not all the claimants need to have used the way for the full period of 20 years, but the claimant's evidence collectively must show 20 years public use. The use must also be consistent and uninterrupted.

The 20 year period of public use, after which a route is *"deemed"* to have been dedicated as a public right of way, is counted back from the date on which the public's right to use the route was first brought into question. In order to bring the public's right into question, the landowner must challenge it by some means sufficient to bring it to the attention of the public, e.g. through the erection of a fence or locking a gate across the route, erecting signs and notices, or challenging users.

Although 20 years uninterrupted use by the public establishes a presumption that a route has been dedicated to the public, this can be contradicted by evidence showing that the landowner did not intend to dedicate public rights during that time.

Evidence of interruption of the public's use of the way, would have to be shown to have been both effective in preventing public use and also clearly known to the public. Turning back the occasional stranger will not be a sufficiently positive act - at least where the way continues to be used by locals; although notices clearly displayed and maintained on a way, indicating it is private and not a public right of way can prove sufficient evidence of an intention by a landowner not to dedicate.

Section 31(6) of the Highways Act 1980 further enables landowners to protect themselves against claims based solely on public use by depositing a map, statement and statutory declaration with the County Council showing which rights of way they acknowledge to be public on their land.

How and when public rights are brought into question has been clarified in Godmanchester Town Council -v- Secretary of State (2007) and Drain -v- SoS (2007) which held that a landowner's actions in rebutting dedication have to be overt and clearly brought to the attention of the public; however such actions only necessarily have to occur during the relevant twenty years period and not for the entire duration of it.

Another factor that can thwart a claim for a route by presumed dedication is if the land over which the claimed route passes is exempt from the terms of the Highways Act 1980. For instance, land that is covered by other legislation that prevents the acquisition of public rights, such as land owned by the Crown Estate and Forestry Enterprise.

Evidence of the existence or non-existence of a public right of way can also take the form of documentary evidence, i.e. evidence from historical documents and maps. The weight to be given to documentary evidence is a matter of judgement in each case but will depend upon such matters as the antiquity of the document, the status of the person by whom it was compiled, the purpose for which it was prepared and the custody in which it has been kept and from which it is produced. (Highways Act 1980, Section 32).

3. Common Law

A public right of way can also be created by the dedication by the landowner of a route across their land for the use by the public at large, coupled with acceptance and use by the public as of right. Dedication may also be inferred at common law where acts by the landowner conclusively point to an intention to dedicate, such as surfacing and signing a route and making it more accessible for public use. This was clarified in Eyre V New Forest Highway board (1892) where it was ruled that creation occurs when the landowner "*either says in so many words, or so conducts himself as to lead the public to infer that he meant to say: 'I am willing that the public should have this right of passage'*". The duration of public use is still important but there is no fixed minimum period of use that must be satisfied in order to prove an inference of dedication at common law.

4. Procedure

The procedure for the making and determination of an application are set out in Schedule 14 of the Wildlife and Countryside Act 1981. Anyone can make an application but it must be submitted in the prescribed way, which includes submitting to Bolton Council a Certificate of Service of Notice to confirm that notice of the application has been served on the affected landowner. The applicant must also submit documentary and/or evidence of user to support

their application, or alternatively, a list of the supporting evidence advising where it can be located.

Once Bolton Council has received the Certificate of Service of Notice it has a duty to investigate the application and consult with every other local authority concerned, i.e. district, parish, town councils. A decision on the application should be made as soon as reasonably practicable. Where a decision has not been made within 12 months of receiving an application, the applicant can appeal to the Secretary of State who after considering the application may, or may not, direct Bolton Council to determine the application within a specified time.

If after examining an application, researching the supporting evidence and taking account of representations from interested parties, it is concluded that on the balance of probabilities the claimed public rights have been shown to subsist, (or public rights shown on the definitive map have been wrongly shown, or should not be shown at all) a report containing an analysis and a recommendation on the application is sent to the applicant, parish council, every landowner and occupier and any adjacent landowners, local councillors (if requested), the Borough solicitor allowing 4 weeks for comment. A final decision concerning the application is then sought.

If a recommendation that an order be made is approved, a DMMO will be made and advertised on site (of the route in question) and in a local newspaper. If no objections are received - or Bolton Council manage to negotiate the withdrawal of any that are - the order can be confirmed and the claimed route is then added to the definitive map, or upgraded, downgraded, or removed, dependent on the terms of the DMMO.

Bolton Council does not have the authority to ignore duly made objections so if objections are submitted to a DMMO that cannot be resolved, Bolton Council cannot confirm it. When this happens the DMMO must be referred to the Secretary of State who will appoint an independent inspector to decide whether to confirm the order, either by written representations between the objectors and Bolton Council, or convening a hearing or local public inquiry.

If a recommendation to refuse an application is approved by Bolton Council, the statutory procedure includes the right for an applicant to appeal to the Secretary of State. In such cases the Secretary of State after consideration of the application and objections, can in exceptional circumstances, direct Bolton Council to make and advertise a DMMO. If Bolton Council has been directed by the Secretary of State to make and advertise a DMMO after it has determined not to do so, and objections are made which result in a public inquiry, Bolton Council may adopt a neutral stance or even oppose the DMMO.

For further information "A Guide to Definitive Maps and Changes to Public Rights of Way" published by Natural England is available to download from the internet.

APPENDIX 2



Bolton
Council

HIGHWAY AND ENGINEERING
DELIVERY SERVICES
PUBLIC RIGHTS OF WAY

Title
Route between properties 233 - 235 Leigh Road

ENVIRONMENTAL SERVICES

Malcolm J. Cox, MBA, BSc, C Eng, NICE
Director of Environmental Services
The Wellsprings, Civic Centre, Bolton, BL1 1BS

Date

25/06/2014

Scale

1:1250

Drawn

Drg. No.

APPENDIX 3



Looking from the back street
towards Leigh Road (2014).



Looking from Leigh Road
towards the back street (2014).



Looking from the back street
towards Leigh Road (undated)

APPENDIX 4

FORM W.C.A. 5

FORM OF APPLICATION FOR A MODIFICATION ORDER

WILDLIFE AND COUNTRYSIDE ACT, 1981

THE WILDLIFE AND COUNTRYSIDE (DEFINITIVE MAPS AND STATEMENTS) REGULATIONS, 1993 (SCHEDULE 7)

DEFINITIVE MAP AND STATEMENT FOR THE DISTRICT OF
PUBLIC RIGHT OF WAY NO

TO:- Bolton Council

OF:- Environmental Services Department
Public Rights of Way
4th Floor, The Wellsprings Civic Centre,
Bolton,
BL1 1US

NAME (name of Applicant) KEITH JOHN WALL

Of (address of Applicant) 231 LEIGH ROAD, WESTHOUGHTON,
Bolton BL5 2JG

hereby apply for an order under Section 53(2) of the Wildlife and Countryside Act
1981 modifying the Definitive Map and Statement for the area by

~~1. Deleting the *(footpath) (bridleway) (byway open to all traffic)~~

from

to

2. Adding the *(footpath) (bridleway) (byway open to all traffic)

from ~~231~~ LEIGH ROAD

to BARK STREET (BETWEEN NOS. 233 AND 235)

~~3. *(upgrading) (downgrading) to a *(footpath) (bridleway) (byway open to all traffic)~~

from

to

Form W.C.A. 5 cont.

4. ~~*(varying) (adding to) the particulars relating to the~~ *(footpath) (bridleway)
(byway open to all traffic)

from

to

by providing that

and shown on the map annexed hereto.

* Please delete as appropriate.

I/We attach copies of the following documentary evidence (including statements of witnesses) in support of this application:-

List of Documents:

ALREADY IN YOUR POSSESSION
- ESPECIALLY RECENT DOCUMENTS SUBMITTED
A FEW DAYS AGO.

The Public Rights of Way (Register of Applications under Section 53(5) of the Wildlife and Countryside Act 1981) (England) Regulations 2005, requires surveying authorities to make material details of claims, including, (subject to the authority's discretion) the name/s and addresses of applicants, available on a publicly available register. The public may view the register both in hard copy from Council Offices and through the internet. If you would like your personal details, (but not details of your claim) to be withheld from the register then please let us know. This will not affect the validity of your claim in any way.

Dated 12th June 2014

FORM W.C.A. 6

FORM OF NOTICE OF APPLICATION FOR A MODIFICATION ORDER

WILDLIFE AND COUNTRYSIDE ACT

THE WILDLIFE AND COUNTRYSIDE (DEFINITIVE MAPS AND STATEMENTS)
REGULATIONS, 1993 (SCHEDULE 8)

DEFINITIVE MAP AND STATEMENT FOR THE DISTRICT OF.....
PUBLIC RIGHT OF WAY NO

TO: JENNIFER COLLINS (COPY TO BRIAN COLLINS)

FROM: KENT JOHN WALL

NOTICE IS HEREBY GIVEN THAT ON THE 12th DAY OF JUNE 19-2014

I/WE KENT JOHN WALL

OF 231 (LEIGH ROAD) WESBORDHAM, BOLTON BL5 2JC

made application to BOLTON COUNCIL, that the Definitive Map and Statement for the above mentioned District be modified by

~~1. Deleting the *(footpath) (bridleway) (byway open to all traffic)~~

from

to

2. Adding the *(footpath) (bridleway) (byway open to all traffic)

from LEIGH ROAD

to BRICK STREET

(THE "SOUTH ROAD" ON YOUR LAND BETWEEN 233 AND 235 LEIGH ROAD)

~~3. *(upgrading) (downgrading) to a *(footpath) (bridleway) (byway open to all traffic) the *(footpath) (bridleway) (byway open to all traffic)~~

from

to

FORM W.C.A. 6 cont.

4. ~~*(varying) (adding to) the particulars relating to the *(footpath)~~ (bridleway)
(byway open to all traffic)

from

to

providing that

Dated 12/6/14

* Please delete as appropriate



NOTES FOR INFORMATION

This notice has been served on you by the person(s) named above, and not by BOLTON COUNCIL. The Notice is required to be served on you in accordance with the procedure prescribed in the Wildlife and Countryside Act, 1981. It is intended to show that an application has been made to the Council, by the person named overleaf, for a Modification Order to be made to amend the Definitive Map and Statement of Public Rights of Way, on land in which you have an interest.

When the Council is satisfied that the Application has been made in the prescribed manner, you will then be contacted by the Council. Until that time, there is no need for you to take any action in relation to the Notice.

FORM W.C.A. 6

FORM OF NOTICE OF APPLICATION FOR A MODIFICATION ORDER

WILDLIFE AND COUNTRYSIDE ACT

THE WILDLIFE AND COUNTRYSIDE (DEFINITIVE MAPS AND STATEMENTS)
REGULATIONS, 1993 (SCHEDULE 8)

DEFINITIVE MAP AND STATEMENT FOR THE DISTRICT OF.....
PUBLIC RIGHT OF WAY NO

TO: BRIAN COLLINS (WIFE TO JENNIFER COLLINS)

FROM: KETH JOHN WALL

NOTICE IS HEREBY GIVEN THAT ON THE 12th DAY OF JUNE 18 2014

I/WE KETH JOHN WALL

OF 231 LEIGH ROAD, WESTBOUGHTON, BOLTON BL5 2SG

made application to BOLTON COUNCIL, that the Definitive Map and Statement for the above mentioned District be modified by

~~1. Deleting the *(footpath) (bridleway) (byway open to all traffic)~~

from

to

2. Adding the *(footpath) (bridleway) (byway open to all traffic)

from LEIGH ROAD

to BACK STREET

(THE "SOUTH ROAD" ON YOUR LAND BETWEEN 233 AND 235 LEIGH ROAD)

~~3. *(upgrading) (downgrading) to a *(footpath) (bridleway) (byway open to all traffic) the *(footpath) (bridleway) (byway open to all traffic)~~

from

to

FORM W.C.A. 6 cont.

NSL 04/10/14

4. ~~*(varying) (adding to) the particulars relating to the *(footpath) (bridleway),~~
(byway open to all traffic)

from

to

providing that

Dated 12/6/14

* Please delete as appropriate



NOTES FOR INFORMATION

This notice has been served on you by the person(s) named above, and not by BOLTON COUNCIL. The Notice is required to be served on you in accordance with the procedure prescribed in the Wildlife and Countryside Act, 1981. It is intended to show that an application has been made to the Council, by the person named overleaf, for a Modification Order to be made to amend the Definitive Map and Statement of Public Rights of Way, on land in which you have an interest.

When the Council is satisfied that the Application has been made in the prescribed manner, you will then be contacted by the Council. Until that time, there is no need for you to take any action in relation to the Notice.

FORM W.C.A.7

FORM OF CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR A
MODIFICATION ORDER

WILDLIFE AND COUNTRYSIDE ACT, 1981

THE WILDLIFE AND COUNTRYSIDE (DEFINITIVE MAPS AND STATEMENTS)
REGULATIONS, 1993 (SCHEDULE 9)

DEFINITIVE MAP AND STATEMENT FOR THE DISTRICT OF

TO: Bolton Council

OF: Environmental Services Department
Public Rights of Way
4th Floor, The Wellsprings Civic Centre,
Bolton,
BL1 1US

I/We (name of applicant) **KEITH JOHN WALL**

Of (address of applicant) **231 LEIGH ROAD, WESTBOURNHAM,
BOLTON BL5 2JF**

hereby certify that the requirements of paragraph 2 of Schedule 14 to the Wildlife and
Countryside Act 1981 have been complied with.

Details of Modification

**ADDITION OF "SOUTH ROAD" PUBLIC FOOTPATH
TO THE DEFINITIVE MAP (* BETWEEN WALLS
OF 233 + 235 LEIGH
RD, FROM LEIGH ROAD TO BK-5R)**

Name(s) and address(es) of Landowners Notified

**1) BRIAN COLLINS and 2) JENNIFER COLLINS
OF 233 LEIGH ROAD BL5 2JG.**

Method of Service of Notice

TO 233 LEIGH ROAD ON 12/6/14

Dated **12th JUNE** 20 **14**



APPENDIX 5

Communications Received

Mr Wall 231 Leigh Road Westhoughton, letters 31/05/14, 07/06/14, 19/06/14, 23/06/14, 27/06/14, 07/07/14, 17/07/14, 21/07/14, 25/07/14, 30/07/14, 05/08/14, 25/09/14, 27/09/14, 02/10/14, 22/10/14, 27/10/14

Mr Hurst 235 Leigh Road Westhoughton, letter 02-07-14

Mr & Mrs Pomfret 247 Leigh Road Westhoughton, letter 08-07-14

Mrs Clarke 241 Leigh Road, Westhoughton, letter 27/08/14

Westhoughton Town Council e-mail 15/07/14

The Manchester Ramblers Association e-mail 26-06-14

Mr & Mrs Collins statement July 2014

Other evidence taken into consideration

Photographs supplied by Mr Wall, Mr & Mrs Collins and of site visit made by A Smith

Two Draft Chronologies – Medieval times to 2014

Particulars of a claim between Keith John Wall and Shaun R. Harriss (4/12/12)

High Court of Justice transcript - Wall v Collins (2006)

High Court of Justice transcript - Wall v Collins (2009)

Documentary Evidence

Ordnance Survey maps	1849, 1891-94, 1907, 1908-10, 1927, 1936, 1967, 2002
Land Registry map	2004
Deed Plans	1910, 1911, 1912
Deeds	1910, 1911
Land Registry Documents	1977, 1994, 1995
Deed of Grant	1976
Provisional and Definitive Maps for Public Rights of Way	1952, 1972, 1984
Record cards and Statements for Public Rights of Way	1951, 1953, 1966, 1978, 1984
List of Streets – Highways maintainable at public expense	1950's & 1970's
Map accompanying the list of streets	1970's

APPENDIX 2

DEFINITIVE MAP MODIFICATION ORDERS - GUIDANCE ON DECISION MAKING

Modifications require us to look back to discover what has happened in the past, establish the facts and apply the relevant legal tests to decide whether or not a right of way exists. Whether this provides new opportunities for users or creates difficulties for landowners (or ourselves) is irrelevant and must not be taken into account.

This differs from public path orders, which involve creating, closing or diverting paths. With these, the Authority exercise a discretion to make changes to the rights of way network to improve it for the future, or to reduce problems wherever possible or to create new opportunities for path users.

The Wildlife and Countryside Act 1981, part 3, section 53, concerns the making of amendments (modifications) to the definitive map on the basis of evidence alone. The evidence must be considered in isolation to all other factors such as local history, desirability or otherwise, personalities involved, Authority policy, and so on.

The evidence put forward in the report should be sufficient to enable Members to reach a decision.

Modification orders may amend the definitive map, provided that the evidence discovered is cogent and shows that, on the balance of probabilities, a change should be made. The possible changes are:

- (1) **add** to the map rights of way not presently shown,
- (2) **remove** rights of way already on the map,
- (3) **upgrade or downgrade** rights of way already shown on the map or
- (4) **change some details** of a recorded right of way.

The modification process is legally complicated and a significant number of cases have reached the High Court and beyond. The reports prepared for committee by the rights of way staff outline the law relating to each case and endeavour to draw your attention to the significant points. Officers will, of course, be present at the meetings to assist with clarifying any matters connected with these items.

The Authority is acting in a quasi-judicial capacity and must reach a decision based on the evidence presented, weighing such evidence using the test of the 'balance of probabilities'. Although officers have considered the evidence, and made a recommendation to members based on their appraisal, members must themselves consider the evidence and reach their own conclusions.

Members are not required to resolve conflicts in the evidence and there may well be evidence on both sides of the issue. You must weigh up the evidence and, if on balance, it is reasonable to conclude that the evidence shows that change should be made, you should authorise the making of a modification order.

If a modification order is made the public have a right to object to that order. The matter would then be determined by the Secretary of State. Conversely, if the resolution is not to make an order, the applicant also has a right to appeal.