
Decision Session
Executive Member for City Strategy

2 February 2010

Report of the Director of City Strategy

Public Rights Of Way – Application for Definitive Map Modification Order, Alleged Public Footpath, Ings Bridge to Storwood, Wheldrake

Summary

1. This report seeks to assist the Executive Member in determining whether or not to make a Definitive Map Modification Order (DMMO) to add the route (shown by a broken black line on Plan 1 (**Annex 1**)) to the Definitive Map, as a Public Footpath. In determining this issue it is important to consider the available evidence against the requirements of the legislation (see **Annex 7**).

Recommendation

2. It is recommended that the Executive Member approves Option A and authorises the making of a DMMO to add the route as a Public Footpath to the Definitive Map.

Reason

3. Taking the evidence as a whole there is a prima facie case in favour (i.e. there is a reasonable allegation) of the establishment of public footpath rights over the application route
4. The depositions made by the landowners in 1975 and 1992 would appear to be incomplete because they were not followed up by the required Statutory Declarations. Clarification on whether such declarations were made has been sought, on numerous occasions from the landowners, but no information has been forthcoming. It is therefore only reasonable to conclude that they were not made. As a result the 1975 and 1992 depositions do not serve to have their desired effect, and do not demonstrate sufficient lack of intention to dedicate public rights to overturn the prima facie case made in their favour.
5. No other evidence demonstrating sufficiently overt acts, demonstrating a lack of intention to dedicate, on the part of the landowner, during the period 1946 - 1966 has been submitted, by or on behalf of the landowners.

6. All the available relevant evidence shows that Public Footpath rights are reasonably alleged to exist thus requiring the authority to make the order (Wildlife and Countryside Act 1981, Section 53(3)(c)(i)).

Background

7. The existence or otherwise of public rights over the application route has been ongoing for some considerable time, and at least since the mid 1970's when the issue was the subject of discussions by Cottingwith and Wheldrake Parish Council's. This resulted in the collection and submission of user evidence forms with a view to the matter being considered as part of a future review.
8. In 1983 the Definitive Map review procedure was overhauled and replaced by new procedures introduced by the Wildlife & Countryside Act 1981.
9. In May 1988 Wheldrake Parish Council submitted, to North Yorkshire County Council, an application for a Definitive Map Modification Order, to add the bridleway, shown by a broken black line (the application route) on Plan 1 (**Annex 1**). Then in 1996, as a result of Local Government Reorganisation, the application, which had still to be determined, and which remained outstanding, was passed to City of York Council as the newly appointed Surveying Authority for the area.
10. In 2002 the Council commenced preliminary investigations into this, and a number of other similar applications made by Wheldrake Parish Council. Whilst these investigations were substantially completed at that time, the applications were never formally determined. Therefore, more recently, and in order to bring these matters to a close, the previously considered evidence was checked and ratified so as to allow the matter to be brought to a conclusion.

Summary of Evidence

Historical Documents

20. As part of the investigations a range of documents have been consulted, and these are listed in **Annex 2** of this report. Where the documents are considered to have some evidential value in this case, they are further summarised within the report, with more detailed comments included in **Annex 3**. Copies of the documents discussed in **Annex 2** are included in the bundle of evidence attached to this report and referenced accordingly.

Ordnance Survey Maps

21. The Ordnance Survey maps for the area show the existence of an embankment along the side of the old course of the River Derwent, which appears to also coincide with the application route. Some maps also show paths or tracks leading onto the embankment

The Swing Bridge at Storwood

22. In a letter dated 8 December 1977 the British Waterways Board wrote to Humberside County Council regarding the Swing Bridge at Storwood. This letter suggests that the bridge was crossed by a public right of way, and problems

were encountered with the bridge being “*frequently swung over onto the Storwood bank so that pedestrians approaching Storwood from Wheldrake Ings are unable to cross the canal*”

23. The letter goes on to confirm that this particular bridge was actually paid for by the County Council at a cost of approximately £15,000.

User Evidence

24. The application was supported by 45 witnesses who completed user evidence forms claiming use during the period 1920 – 1994. Some of these witnesses completed forms in the 1970’s others in the 1980’s. These forms are summarised in **Annex 4** of this report, and the periods of claimed use summarised on the User Graph in **Annex 5**.
25. It has not been possible to undertake any form of substantive witness interview due the length of time that has passed since the forms were completed. By and large they provide evidence of long uninterrupted use of the application by the public.

Evidence of Previous Landowners/Occupiers

26. Various members of the Popplewell family who previously tenanted and owned land on the Ings have submitted user evidence forms, and state that they always considered the route to be a public right of way. Sir John Dunnington-Jefferson who also previously had a landowning interest in the Ings also filled out a user evidence form confirming that the way was considered to be public. This evidence is summarised in **Annex 4** along with the user evidence.

Representations made by and on behalf of the Current Landowners

27. The current landowners deny the existence of any public right of way along the Order Route. They refer to depositions, made pursuant to Section 31 (6) of the Highways Act 1980 and its predecessor legislation, denying the existence of public rights in 1975 and again in 1992. They have also provided evidence of the erection of signs and of challenges to users etc, mainly in the 1980’s and 1990’s. Various issues are also raised with regard to the conservation status of the land. The submissions made by, and on behalf of the landowners are summarised in **Annex 6**.

Comments on Evidence

Historical Documents

28. Caution must be exercised when considering the Ordnance Survey maps in this particular case because of the co-existence of the embankment on the same alignment. The correspondence from the British Waterways Board, combined with the fact that public funds were expended on providing the Swing Bridge at Storwood, would strongly suggest that the path “*approaching Storwood from Wheldrake Ings*” was considered, at that time to be public.
29. There is however insufficient documentary evidence to pursue a purely documentary based case, however this evidence should still be taken into consideration along with the user evidence.

User Evidence

30. In common with many cases of this nature across the country, the fact that the application is being determined some nineteen years after it was made, is problematic so far as the continued availability of witnesses is concerned. The evidence of the four witnesses who were interviewed should be given more weight than that of the witnesses who were not, which can only be taken as read.

Representations made by and on behalf of the former landowners

31. Use of the application route, by the former landowners, and occupiers, during their periods of ownership/occupancy, is unlikely to constitute user that is "*as of right*" and should not therefore be taken into account, in such a context, when considering the user evidence. It is however, very good evidence to show that during their periods of occupancy, and perhaps more importantly their periods of ownership the application route was considered to be, and accepted as, a public right of way. This is quite significant evidence.

Representations made by and on behalf of the current landowners

32. Issues such as nature conservation, suitability and the practicalities of land management etc, whilst genuine concerns, are not matters that can lawfully be taken into account as part of the decision making process.
33. The depositions, made in 1975 and 1992 would appear to be incomplete because they were not followed up by the required Statutory Declarations. As a result they do not serve to have their desired effect, and do not therefore demonstrate sufficient lack of intention to dedicate public rights.
34. The assertion that signs were erected on the Ings Bridge, circa 1966, has been substantiated by the landowners, by the production of various pieces of correspondence. These signs would appear to challenge public user and would, in all probability call into question the existence of public rights. If this is the case the relevant 20 year period under Section 31 of the Highways Act 1980 would be 1946 to 1966.
35. No other evidence of sufficiently overt acts, on the part of the landowners, to demonstrate any lack of intention to dedicate during the period 1946 to 1966 has been forthcoming. The landowners have however suggested that there was no bridge at the end of Ings land prior to circa 1966, but this has not been substantiated, despite requests to that effect. The 1911 Ordnance Survey Map shows a bridge at this location as do the 1767 navigation plans.

Assessment of Evidence

Historical Documents

36. There is insufficient historical documentary evidence available in this case to support the making of a Definitive Map Modification Order. The evidence which is available should therefore be considered in context to the user evidence.

User Evidence

Common Law

37. The user evidence forms suggest continued public pedestrian user, as of right, and without any interference from circa 1920 until about circa 1966, when use may have first been challenged, by the erection of signs. Use over such a long period of time must have come to the attention of the landowners, and indeed they confirm not only that such was taking place, but that they accepted that the route was a public right of way. Under such circumstances, unless there is any evidence of contrary intention, it may be possible to infer dedication on the part of the landowners. The second part of the equation, public acceptance is demonstrated again by the user evidence and the public expenditure on the Swing Bridge.

Highways Act 1980 Section 31

Calling into question and 20 year period of user

38. From the available evidence it would appear that the existence of public rights was called into question by the erection of signs on the Ings (Wheldrake) Bridge circa 1966. The relevant twenty year period would therefore be 1946 - 1966.

Actual use and enjoyment by the public

39. A substantial amount of user evidence (Appendix 3) has been submitted in support of this application, although it is more supportive of footpath, rather than bridleway rights. This evidence, which has to be taken as read, due to most witnesses no longer being available to confirm their evidence, suggests actual use and enjoyment of the route by the public, throughout the period discussed above.

Use "As of Right" and without interruption

40. For use of a path or way to be "as of right", it must be use without force, without secrecy and without permission. There is no need for the user to believe they are exercising a public right of way. The evidence submitted in support of the application would appear to meet this test for both of the periods (1920 to 1966 and 1946 to 1966) discussed above.
41. There is no evidence to suggest that use of the route has ever been interrupted (within the meaning of the legislation) during the relevant twenty year period. Interruptions to user as a result of flooding do not fall within the meaning of interruption (within the meaning of the 1980 Act) due to there being no intent to prevent usage.
42. References to users being challenged and possibly turned back by, or on behalf of the landowners, during the relevant periods, have not been substantiated by the production of actual evidence.

Consultation

43. Consultations have been carried out in accordance with the Parliamentary Rights of Way Review Committee's Code of Practice on consultation, which includes consultation with user groups etc. The Parish Council and landowners have also been consulted.
44. The landowners have submitted objections and representations. These are discussed, and any evidence considered, within the report.

Ward Councillors

Cllr C Vassie – No comments received.

Political Parties

Cllr S Galloway (Lib Dem) – No comments received.

Cllr R Potter (Labour) – '*Happy to support the modifications*': comments received 30th December, 2009.

Cllr I Gillies (Conservative) – No comments received.

Cllr A D'Argone (Green Party) – No comments received

Options

45. Option A: If, having considered all of the available evidence, and in the absence of any evidence to the contrary the Executive Member decides there is sufficient evidence to raise a reasonable allegation in support of the existence of public footpath rights:

- a) under common law based upon user between 1920 and 1966
- b) under the provisions of Section 31 of the Highways Act between 1946 and 1966

that the alleged public rights do exist, the Executive Member should resolve that:

- a) The Director of City Strategy be authorised to instruct the Head of Legal Services to make a Definitive Map Modification Order to add a public footpath, along the route A – B on Plan 1 attached to this report, to the Definitive Map;
- b) If no objections are received, or any objections that are received, are subsequently withdrawn, the Head of Legal Services be authorised to confirm the Order made in accordance with (a) above; or
- c) If any objections are received, and not subsequently withdrawn, the Order be passed to the Secretary of State for confirmation.
- d) The East Riding of Yorkshire Council be invited to make a corresponding Order for the section of the route within their area.

46. Option B: If, having considered all of the available evidence, the Executive Member may decide that the alleged public rights do not exist, the Executive Member should resolve that:

- a) The application to modify the Definitive Map be refused.
- b) The applicant be advised of their right to appeal.

Corporate Priorities

47. If it is determined that the available relevant evidence shows that a right of way subsists or is reasonably alleged to subsist and is added to the map the benefits of doing so would link into the Council's Corporate priorities. A public right of way is sustainable, car free and provides access to health and recreation opportunities thus contributing to the priorities of making York a Sustainable and a Healthy City.

Implications

Financial

48. If it is determined to progress a DMMO it will have to be advertised in the local press. The cost of advertising the order would be in the region of £1500. If an order is made, and no objections are received the order will be confirmed and re-advertised, again at a cost of £1500.
49. If objections to the order are received, and not withdrawn, the outcome of the order will be decided by the Secretary of State, possibly by means of a Public Inquiry. The cost of a Public Inquiry being approximately £5000.
50. If the order is confirmed by either the Council or the Secretary of State the authority has to accept that the route is maintainable at the public expense inclusive of the existing bridge (metal frame and wood decking spanning in excess of 20 metres) that crosses the River Derwent. Acceptance is not as such a new obligation but is part of the Council's statutory duty to keep that map up to date and formally record the rights of the public where those rights exist but are not yet shown and recorded in the definitive map and statement.

Human Resources

51. There are no human resource implications.

Equalities

52. There are no equalities implications.

Legal

53. City of York Council is the surveying authority for the purposes of the Wildlife and Countryside Act 1981, and has a statutory duty to ensure that the Definitive Map and Statement for its area is kept up to date.
54. If, and when, the Authority discovers evidence to suggest that the Definitive Map and Statement needs updating, it is under a statutory duty to make the necessary changes. A Definitive Map Modification Order (DMMO) enables any changes to the map and statement to be made.
55. Before the Council can make the a DMMO to add a route to the definitive map, as is the subject of this report, it must be satisfied that, taking into account the available evidence, that a right of way can reasonably be alleged to exist. If it can, the authority must make the order. If objections are received during the process and not withdrawn the order must be forwarded to the Secretary of

State. The Secretary of State will appoint an Inspector who will test the evidence and determine the outcome of this application.

56. DMMO's do not create any new public rights of way they seek to record those already in existence but not formerly recorded in the definitive map and statement. Issues for example such as safety, security and desirability whilst being genuine concerns cannot be taken into consideration. The DMMO process requires an authority to look at all the available evidence, both documentary and user, before making a decision.

Crime and Disorder

57. There are no crime and disorder implications.

Information Technology

58. There are no IT implications.

Property

59. There are no property implications.

Other – Maintenance implications

60. If the DMMO process concludes that public rights do exist the public footpath becomes maintainable at the public expense and should be recorded as such on the List of Streets Maintainable at Public Expense. The Council, as the highway authority for public rights of way, has a duty to maintain the public footpath to a standard that allows use by lawful traffic: the right of way is on foot only.

Risk Management

61. In compliance with the Council's Risk Management Strategy, Options A is subject to internal budgetary pressures (financial). There are no risks associated with Option B.

Contact Details

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**Report
Approved**



Date 22.10.2010

Wards Affected:

Wheldrake

All

For further information please contact the author of the report.

Background Papers:

Evidence evaluated and background report prepared by Consultant: Robin Carr Associates, Public Rights of Way Management and Consultancy Service

Wildlife and Countryside Act 1981

Highways Act 1980

Rights of Way: A Guide to Law and Practice, Fourth Edition, by John Riddall and John Trevelyan.

England and Wales Court of Appeal (Civil Division) Decisions: R v Secretary of State for Wales ex parte Emery (1997)

Annexes:

Annex 1: Plan 1: Claimed Public Footpath, Ings Bridge to Storwood, Wheldrake

Annex 2: List of documents consulted

Annex 3: Summary of Documentary Evidence

Annex 4: Summary of User Evidence

Annex 5: Graph showing Periods of Claimed User

Annex 6: Summary of Objector's/Landowners Evidence/Comments

Annex 7: Legal Tests