
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 from Main Street to Sparrow Hall Farm, 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. There is a good case in support of the existence of public rights based upon historic evidence, in addition there is a *prima facie* case in favour of their establishment of such rights under Section 31 of the Highways Act 1980.
4. Whilst evidence has been submitted alleging that people were turned off the land and that signs deterring use were erected, these incidents have not been substantiated and indeed are, to a certain extent, contradicted by the statements that nobody was ever seen using the route.
5. Taking into account all of the available evidence there is a good case in support of the existence of public rights over the application route based both upon historic documentary evidence and modern user thus requiring the authority to make the order (Wildlife and Countryside Act 1981, Section 53(3)(c)(i)).

Background

6. In September 1993 Wheldrake Parish Council submitted, to North Yorkshire County Council, an application for a Definitive Map Modification Order, to add a footpath, shown by a broken black line (the application route) on Plan 1 (**Annex 1**) attached to this report to the Definitive Map. In 1996, as a result of Local Government Reorganisation, the application, which had still to be determined, and remained outstanding, was passed to City of York Council as the newly appointed Surveying Authority for the area.
7. 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

8. 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**.

Ordnance Survey Maps

9. From the mid - late nineteenth century onwards, Ordnance Survey maps of the area show the physical existence of the application route, annotated "FP" (Footpath). The most northerly section of the path is however shown running along the field edge rather than diagonally across the field as per the application.

1910 Finance Act Documents

10. The Finance Act Maps show that Low Well Lane and Chapel Lane were excluded from the valuation survey. The remainder of the application route is shown on the Ordnance Survey base map.
11. The accompanying Field Book entries for hereditament 37, in the notes on the second page under "*Charges, Easements, and Restrictions.....*" reference is made to a footpath running through "*fields 173, 174 etc*". These are fields crossed by the application route. The entry for hereditament 131 (Haggwood Farm), under the same section refers to a "*footpath up west side of farm*". The application route is situated on the western boundary of the hereditament. Sums of £30 & £18 are claimed respectively in relation to the existence of above mentioned public rights of way.

Deposited Railway Plans

12. The deposited plans for the Derwent Valley Light Railway, dated May 1899, and their accompanying books of reference record the physical existence of the application route, identifying it as a public footpath in the ownership of Wheldrake Parish Council.

Wheldrake Enclosure Award

13. The Enclosure Award for Wheldrake sets out the path along what is now known as Chapel Lane and Low Well Lane, for access to the well. No continuation of the route is set out.

Original Definitive Map Process

14. The application route appears to have been claimed, in the 1950's, by the Parish Council, under Part IV of the National Parks and Access to the Countryside Act 1949. The route was however subject to objections at the provisional stage of production. Due to the number of outstanding objections in the East Riding area the County Council, at that time were directed by the Minister of Housing and Local Government to proceed to the Definitive Mapping stage by omitting paths subject to objections, with a view to them being considered at a later stage.

User Evidence

15. The application was supported by nine user evidence forms claiming use during the period 1920 - 1993. These forms are summarised in **Annex 4** of this report, and the periods of claimed use summarised on the User Graph in **Annex 5**.

Submissions made on behalf of the Landowner

16. Various submissions have been made both by and on behalf of landowners affected by the application. The landowners and objectors refer to having never seen anyone using the route and that if it was used then those users were trespassing. They also refer to proceedings during the late 1960's in respect of the provisional maps discussed above. None of the submissions provide evidence of acts which would constitute a lack of intention to dedicate on behalf of the landowners. These submissions are summarised and commented upon in **Annex 6**.

Comments on Evidence

Historical Documents

17. The enclosure award provides near conclusive evidence of the existence of the Chapel Lane and Low Well Lane sections of the application route. The 1910 Finance Act records are quite specific as to the routes upon which tax relief was sought, and provides strong evidence that the landowners, at the time considered the routes to be public rights of way. These are then further supported by the deposited railway plans, which, as documents forming part of a parliamentary process and having been open to public scrutiny are also of significant value.

User Evidence

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

Submissions made on behalf of the Landowner

19. The fact that the landowners, and their supporters, claim to have never seen anyone using the application route, does not mean that such use did not take place, indeed there is a body of evidence that confirms that it did. Furthermore if the rights existed historically, which appears to be the case in this instance, then those rights would still exist today, even if subject to little or no use.
20. The objector's reliance upon the proceedings which were undertaken in the 1960's (at provisional map stage) is based upon a misunderstanding of what actually happened at the time. The objections that had been lodged were withdrawn and never determined at that time. In other words no decision was made as to whether or not the claimed public rights existed. That was a matter to be decided at a later date and forms part of the process now under consideration.

Assessment of Evidence

Historical Documents

21. The historical documents, taken as a whole, provide a compelling argument in favour of the existence of a public right of way along the application route. These alone should be sufficient to trigger the Authority's duty to promote a Definitive Map Modification Order.

User Evidence

Common Law

22. If the user evidence and historic documentary evidence are considered together a picture of long uninterrupted use is provided, with dedication of the public rights occurring some time prior to 1899. Dedication by the landowner, and acceptance by the public may therefore be inferred.

Highways Act 1980, Section 31

23. The historic evidence, combined with the more modern user evidence suggests that public rights have existed over the application route for at least 100 years and therefore it should not be necessary to consider the establishment of rights under Section 31 of the 1980 Act. For completeness the issue is however considered below.

Calling into question and 20 year period of user

24. The existence of public rights over the application route does not appear to have been challenged at any particular time, and therefore there is no act of calling into question. Under such circumstances it is possible to calculate the 20 year period of user from the date of the submission of the application for the Definitive Map Modification Order. The relevant period of user would therefore be 1973 to 1993.

Actual use and enjoyment by the public

25. The user evidence forms provide evidence of the use and enjoyment of the route for well in excess of the required twenty years.

Use "As of Right" and without interruption

26. 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.
27. There is no evidence to suggest that use of the route has ever been interrupted during the relevant twenty year period.

Consultation

28. 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.

29. Ward Councillors

Cllr C Vassie – No comments received.

30. 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

31. Option A: If, having considered all of the available evidence the Executive Member decides that public rights are reasonably alleged to subsist, 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) A decision be made regarding the Authority’s position in respect of the confirmation of the Order (i.e. support, or seek non-confirmation)

32. Option B: If, having considered all of the available evidence, the Executive Member decides that the alleged public rights do not exist, they 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

33. 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

34. If it is determined to progress a Definitive Map Modification Order (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.
35. 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.
36. 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. 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

Human Resources

37. There are no human resource implications.

Equalities

38. There are no equalities implications.

Legal

39. 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.
40. 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 DMMO enables any changes to the map and statement to be made.

41. 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.
42. 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

- 43 There are no crime and disorder implications.

Information Technology

- 44 There are no IT implications.

Property

45. There are no property implications.

Other

46. If the definitive map modification order 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

47. 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 22.01.2010

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 Services

Highways Act 1980

Wildlife and Countryside Act 1981

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)

Appendices:

Annex 1: Plan 1: Claimed Public Footpath, Main Street to Sparrow Hall, 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 Evidence/Comments

Annex 7: Legal Tests