

**Decision Session – Executive Member for
Transport**

29 August 2019

Report of the Assistant Director of Transport, Highways and Environment

**Request To Authorise The Making Of A Definitive Map Modification
Order For Yorkfield Lane, Copmanthorpe.**

Summary

1. The Executive Member authorised a definitive map modification order (DMMO) application to be taken out of turn at the 14 March 2019 Decision Session. The initial consultation and review of the available evidence has now been completed and it is apparent that there is sufficient evidence to reasonably allege that a public right of way subsists over the application route. Under these circumstances the Council is required to make a DMMO by section 53 of the Wildlife and Countryside Act 1981.

Recommendation

2. The Executive Member is asked to approve Option A:

Option A. Authorise the making of a DMMO to record those sections of Yorkfield Lane shown on the map at annex 2 as restricted byways.

- i. If no objections are received, or any objections that are received are subsequently withdrawn, the Order made in accordance with the above be confirmed; or,
- ii. If objections are received, and are not subsequently withdrawn, the Order is referred to the Secretary of State for determination.

Reason: Each type of evidence supporting the application meets the statutory test of reasonably alleging that a public right of way subsists over the land and, when taken as a whole, meets the statutory test for confirmation.

Background

3. The route in question was identified as a possible PRow in 2000-2001 during the council's research into "lost ways" around the city. However, because the route was not within the area of the former County Borough of York no further action was taken at that time.
4. In August 2005 Copmanthorpe Parish Council made application for an order under section 53 of the Wildlife and Countryside Act 1981. This application sought to record Yorkfield Lane as a BOAT.
5. The application was supported by the local inclosure award where the route was awarded as an occupation road. It gave access to land lying to the east of the village.
6. The application was also supported by fifteen user evidence forms.
7. Initial research shows Yorkfield Lane depicted on all the historic Ordnance Survey (OS) maps the council has access to. Although by the time the OS surveyors arrived in 1851 the lane had already been crossed by the York and North Midland Railway. This line later becoming the east coast main line.
8. The Executive Member authorised this application to be taken out of turn at the 14 March 2019 Decision Session.

Consultation

9. An initial consultation was carried out between 5 April 2019 and 3 May 2019. No objections were received as a consequence of that consultation.
10. The one affected land owner officers can identify for the lane did make contact with the Council and is currently evaluating a range of options with regard to the small piece of land they own.
11. Network Rail submitted an extract of the 1836 deposited railway plan and a further railway plan and reference book from 1900. Both documents relate to the section of the railway directly affected by the DMMO route. They are considered in detail below.

Options

12. Option A. Authorise the making of a DMMO to record those sections of Yorkfield Lane shown on the map at annex 2 as restricted byways.
- i. If no objections are received, or any objections that are received are subsequently withdrawn, the Order made in accordance with the above be confirmed; or,
 - ii. If objections are received, and are not subsequently withdrawn, the Order is referred to the Secretary of State for determination.

Reason: Each type of evidence supporting the application meets the statutory test of reasonably alleging that a public right of way subsists over the land and, when taken as a whole, meets the statutory test for confirmation.

13. Option B. The Executive Member does not authorise the making of a DMMO and the applicant is informed that their application has been rejected.

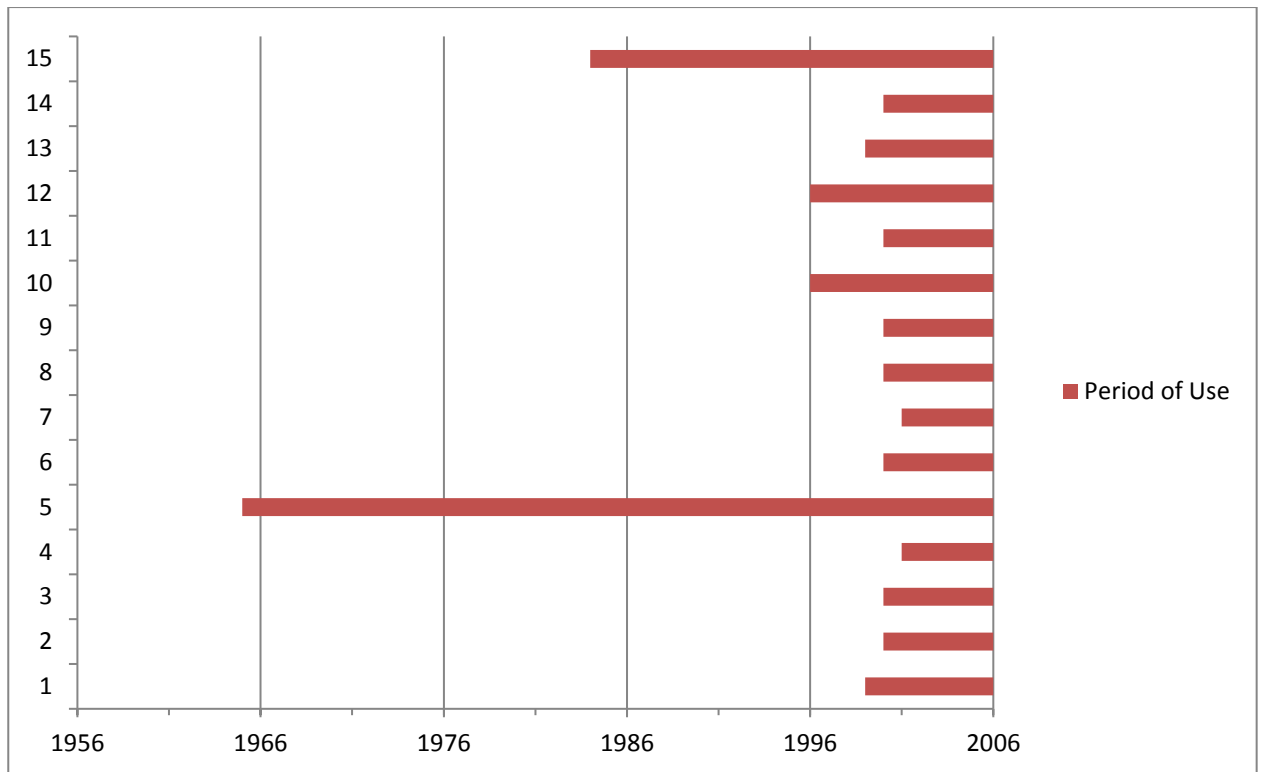
Reason: This is not recommended, because the evidence does reasonably allege the existence of public restricted byways over the land. In addition it gives the opportunity to the applicant to appeal this decision to the secretary of state. If CYC did reject this application any appeal made to the secretary of state is likely to be successful. This would result in CYC being directed to make an order.

Analysis

14. The application is supported by both documentary evidence and user evidence.

User evidence

15. The application is supported by fifteen user evidence forms alleging use between 1965 and 2006 as shown in the chart below:



16. The application has been considered under Section 31 of the Highways Act 1980. Section 31(1) sets out that that any way that is used by the public at large as of right (i.e. without force, stealth or permission) and without interruption for a period of twenty or more years is deemed to have been dedicated as a public right of way (PRoW).
17. This period, known as the relevant period, is calculated back from the date of the first challenge to the public's use of the route. Usually such a challenge would be the blocking of the route to prevent access by, for example, locking a gate. In this case none of the user evidence shows any such challenges being made. Under these circumstances the relevant period is calculated from the date of submission of the application. This means that the relevant period is 1986 to 2006.
18. The information contained within the user evidence indicates the route was used openly (without stealth). There is no suggestion that fences were ever broken down to gain access (without force). Furthermore, there is no evidence that suggests any of the fifteen users giving evidence had ever received permission to use the way from any of the affected land owners (without permission). Therefore the use appears to be "as of right" as demanded by the legislation.

19. Finally, whilst all the users live within the vicinity of the route, they do appear to be representative of the public at large, thereby satisfying that criterion set out by the legislation.
20. In addition to the tests set out above, the use by the public must be of such a character that the land owners are made aware that the public is asserting a right against them. Analysis of the user evidence shows that three people used the way daily and one further person used the route at least once per week. Three people used the route on a monthly basis with the remaining eight using the route less frequently. Four of the users giving evidence also claim using the way on a pedal cycle as well as on foot.
21. This indicates that the use of the way was sufficiently high to reasonably allege that a right of way exists over the route but is not sufficient, in isolation, to show that public rights exist on the balance of probabilities.
22. Furthermore, only two of the fifteen users giving evidence claim to have used the route for twenty or more years. In circumstances where only a small number of individuals have used a way for the whole relevant period, the use made by the public as a whole can be considered. As can be seen from the graph above most of the people giving evidence used the way in the second half of the relevant period.
23. Again this is sufficient to reasonably allege that a right of way exists over the route but is not sufficient, in isolation, to show that public rights exist on the balance of probabilities.
24. Owners of land used by the public can defeat a claim of deemed dedication of a PRow by demonstrating that they had no intention to dedicate the way to the public. They must communicate this lack of an intention to dedicate to the public by some means.
25. The Council has received no evidence that any of the affected land owners took steps to prevent the public acquiring a right of way over the land.

Documentary evidence

26. The Copmanthorpe Inclosure Award of 1843 set out the application route as a private carriage road known as "York Field Occupation Road" with a width of 25 feet.

27. The Award went on to direct that 2 residents of the parish were to be appointed as “surveyors of the private carriage roads and public drains” each year. The 2 surveyors were directed by the Award to use the revenue generated from the sale of the herbage from the verges of the private carriage roads “..in or towards the repairs of the said private carriage roads and public drains and of the bridges...”
28. Inclosure awards use the terms “public” and “private” in specific ways and “private” does not carry the meaning that a modern reader of the award would ascribe to it. It is generally accepted that substituting the word “private” with the word “local” results in a meaning that is closer to that intended by the inclosure commissioners.
29. Furthermore, by examining where the Award places the expense of maintaining any highways set out it, it is often possible to determine whether the route was intended for everyone in the parish or just those land owners who directly benefitted from the creation of the way.
30. The Award indicates that the application route was intended to be maintained by the sale of a parish asset (the herbage from the verges) for the benefit of the parishioners as a whole, rather than being maintained only by those land owners that used the lane as access to their land.
31. Modern designations of highways do not allow for this rather nuanced approach to maintenance; they are maintained at either public or private expense.
32. Whilst the Award does not explicitly place the burden of maintenance on the parishioners as a whole, it does make it clear that the maintenance responsibility does not lie solely with owners of the immediately adjacent land (those who would directly benefit from the application route). This means the maintenance liability cannot have been private.
33. Furthermore, the Award does not specify a particular group of users for whom the occupation road was open.
34. Therefore, as the application route was not maintained at private expense and no specific group of users were identified, there must be at least a reasonable allegation that it was maintained at what today would be interpreted as public expense and that any of the residents of

Copmanthorpe could use the route. This would then constitute a public right of access over the application route.

35. Network Rail have submitted an extract of the maps for what is now the east coast mainline drawn up by the York and North Midland Railway Company in 1836. The map appears to show a route coincident with the application route which suggests that it existed before the inclosure award was made. However, as no book of reference has yet been found for this map it is not possible to know what view the railway had of the application route.
36. In addition to the 1836 records, Network Rail have also provided copies of the railway plans and book of reference for the upgrade of the railway carried out by the North Eastern Railway in 1900. In these records the application route is clearly noted as an occupation road and depicted on the map.
37. Both collections of railway documents demonstrate that the route existed on the ground although they make no mention of any public rights of way. The physical existence of the application route is also confirmed by all the Ordnance Survey (OS) maps consulted by the Council. In isolation both the railway documents and the OS maps are sufficient to allege that a public right of way exists over the application route.
38. Each of the 4 discrete types of evidence (user, inclosure, railway records, and OS maps) is sufficient on its own to allege that a public right of way exists over the route. This means that the statutory test set out by the Wildlife and Countryside Act 1981 has been met.
39. Consequently, CYC is required to make a DMMO seeking to record the route on the definitive map. As the Copmanthorpe Inclosure Award details the application route as an occupation road, the most appropriate status for the public right of way is restricted byway. This is due to the Natural Environment and Rural Communities Act 2006 stopping up all rights for mechanically propelled vehicles in 2005 unless certain exceptions apply. None of the exceptions apply in this case.

Council Plan

40. As set out in the Council Plan 2015-19 “Our purpose is to be a more responsive and flexible council that puts residents first and meets its statutory obligations” by taking this DMMO out of turn the council is

fulfilling one of its statutory obligations and demonstrating that it is putting residents first.

Implications

Financial

41. If the DMMO is opposed it will need to be submitted to the secretary of state for determination.
42. Determination by the secretary of state may lead to a local public inquiry. The cost of a public inquiry being approximately £5000.
43. If the Order is confirmed by the secretary of state the authority will have to accept that the route is maintainable at the public expense. This will not, as such, be a new obligation, more the recognition of an existing, but previously unrecorded liability.

Human Resources (HR)

44. There are no human resource implications

Equalities

45. There are no equalities implications

Legal

46. City of York Council is the Surveying Authority for the purposes of the WCA 1981, and has a statutory duty to ensure that the Definitive Map and Statement for its area are kept up to date.
47. 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 using legal orders known as DMMOs.
48. Before the authority can make a DMMO to add a route to the definitive map it must be satisfied that the public rights over the route in question are reasonably alleged to subsist. Where this test has been met, but there is a conflict in the evidence, the authority are obliged to make an order in order to allow the evidence to be properly tested through the statutory order process.
49. DMMOs, such as the one being considered within this report, do not create any new public rights they simply seek to record those already in existence.

50. Issues such as safety, security, desirability etc, 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

51. There are no crime and disorder implications

Information Technology (IT)

52. There are no IT implications

Property

53. There are no property implications

Other – Maintenance Implications

54. The evidence indicates that the public rights over Yorkfield Lane were established prior to the commencement of the Highways Act of 1835, therefore as an ancient highway it is maintainable at public expense and should be recorded as such on the List of Streets Maintainable at Public Expense. There will therefore be an ongoing future maintenance liability to Highway Maintenance Services. The intention would be to maintain it fit to the standard required for the status that is recorded on the definitive map.

Risk Management

55. In compliance with the authority's Risk Management Strategy, option A and option B are subject to the same internal budgetary pressures (financial) because the processing of DMMO applications is a statutory duty of the council.

Councillor Responses

56. To be added when received.

Contact Details

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Report
Approved



Date 15.08.19

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Wards Affected: Copmanthorpe.

For further information please contact the author of the report

Background Papers:

Highways Act 1980

Wildlife and Countryside Act 1981

Previous report to the Executive Member

<https://democracy.york.gov.uk/ieListDocuments.aspx?CId=738&MIId=10865>

Annexes

Annex 1: Location map

Annex 2: Route map

List of Abbreviations Used in this Report

DMMO – Definitive map modification order

PRoW – Public right of way

OS – Ordnance survey

BOAT – Byway open to all traffic