

## **Annex 1**

**Plan 1: Claimed Public Footpath, Church Lane to Carr Lane,  
Wheldrake**



## **Annex 2**

### **List of documents consulted**

*Annex 2*

**Documents Consulted**

Enclosure Award, Map and Act  
Tithe Plan and Apportionment  
1910 Finance Act records  
Ordnance Survey Maps  
Rights of Way Act 1932 Depositions  
NPACA 1949 Maps and Documents  
Local Authority Files  
Quarter Sessions records  
Parish Council Records  
Other Highway Authority records  
Local Historical Maps  
Deposited Plans  
Estate Records  
Deeds  
Aerial Photographs

## **Annex 3**

### **Summary of Documentary Evidence**

**Summary of Documentary Evidence**

*Annex 3*

Tab	Page	Description	Document Content	Comments
5		Ordnance Survey Maps	Ordnance Survey maps show the physical existence of the route, annotated FP or Foot Path.	Ordnance Survey maps carry a disclaimer to the effect that the showing of any path track or way is not evidence of the existence of public highway rights. The surveyors were however required to make reasonable enquiries with regard to the status of things they showed on their maps. These documents therefore provide very good evidence of the physical existence of the topographical features they show.
6	1,2, 15-18	1910 Finance Act records	The route is included in hereditament No 84  The Filed Book for hereditament No 84 includes a claim for a reduction of £20 in respect of public rights of way or user and the notes refer to the path subject to the claim being "across the northern end of the farm, not much used".	The OS base maps, upon which the Finance Act information is transposed, show that the application route runs along the northern boundary of the land holding. This would suggest that the route that is the subject of claim for tax relief is the current application route. This is good evidence in support of the existence of public rights of way in 1910.  The fact that the path is noted as being "not much used" in 1910 does not detract from its status. If rights existed in 1910 they will still exist today, unless extinguished through due legal process. Public rights cannot simply lapse as a result of a lack of use.  If the path was "not much used" in 1910, and if use did not increase, or perhaps even decreased over time, it may however explain why the current landowners are not aware of its existence.
9		Records relating to the original Definitive Map process	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.  It was then 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 to proceed to the Definitive Mapping stage by omitting paths subject to objections, with a view to them being considered at a later stage.	The fact that the application route was claimed by the Parish Council in the 1950's provides good evidence that the route was considered to be a public right of way at that time by local people. This is good evidence in support of the existence of public rights.  The landowners' objection to the recording of the route at Provisional stage clearly indicates that he/she disagreed with the Parish Council's view on this matter.  The fact that the Council omitted the route from its Definitive Map, as a result of the direction issued by the Minister, is NOT evidence that public rights do not exist. The matter was never actually brought to any conclusion, and technically speaking still remains outstanding.

## **Annex 4**

### **Summary of User Evidence**

**Summary of User Evidence**

Tab	Page	Name	User Evidence Form	Witness Interview	Other Correspondence	Period of Use	No of Years Use	Member of Public	User As of Right	User without Interruption	Other Information
12	1	G G Beilby	✓		✓	1917 – 1957	40	✓	✓	✓	Used the path about twice a month during the summer months as part of a recreational walk
12	3	F Fairburn	✓			1920 - 1950	30	✓	✓	✓	Used the path every Sunday to go to the Ings to fish or to swim. There was a stile at the corner of Wheldrake Hall Farm; at the Carr Lane end of the path; and a hand gate on Church Lane.  The path was used by the whole village for pleasure and was probably the most commonly used path in the village. It was used get to the Ings to collect milk from the cows kept there.

## **Annex 5**

**Graph showing Periods of Claimed User**

Wildlife & Countryside Act 1981  
 Application for Definitive Map Modification Order  
 Church Lane to Carr Lane, Wheldrake

*Annex 5*

**Periods of Claimed User**

Tab	Page	Name	Period of Use	1910	1920	1930	1940	1950	1960
12	1	G G Beilby	1917 - 1957						
12	3	F Fairburn	1920 - 1950						

## **Annex 6**

### **Summary of Objector's Evidence/Comment**

Summary of Objector's Evidence/Comments

Tab	Page	Name	Objection	Comments
18	21	J V Gratton & Sons Letter from J V Gratton & Sons to NYCC received August 1993	Has farmed the land for 37 years (prior to 1993) and during that time has never seen anyone walk the route	The fact that the landowners have not seen anyone using the path, does not mean that such use has not taken place. However the evidence in this particular case suggests that rights were in existence, and the path was used, albeit only lightly, before the current, owners specified time period. Of perhaps greater evidential value are the 1910 finance records where it would appear the landowners claimed tax relief in respect of the path.
			Anyone who has strayed from acknowledged paths on to the internal system of farm roads has been asked to leave	If the landowners have not seen anyone using the application route, they cannot have turned them back and asked them to leave. It is therefore doubtful whether this can be considered to be evidence of interruption or lack of intention to dedicate.
			Old residents of the village, who have lived there for over 50 years cannot remember the path being used.	This appears to be contradicted by the user evidence, which suggests that certainly some older residents were aware of, and used the path.
			Have a large dairy heard and allowing public access to field would be unacceptable and users would have to negotiate 2 gates and 14 electric fences	This is not a relevant consideration and cannot be taken into account as part of the decision making process. If public rights exist access provisions will have to be made.
18	2	Acorus Rural Property Services on behalf of J V Gratton & Sons Ltd Submission made December 2003	The footpath has never been used in living memory of the owners	There must be some uncertainty as to the accuracy of this statement because the Grattons only acquired the farm in 1957, which is within living memory. Furthermore there is evidence that the path was used in the 1950's.
			The footpath, by anecdotal evidence, was extinguished in the 1960's following a village meeting and this is confirmed by its exclusions from subsequent OS maps.	For the path to have been extinguished, it must have existed in the first instance. There is no evidence of actual or lawful extinguishment of the path, and therefore if rights did exist historically, which appears to be accepted by the landowners, then they will still exist today. The so called extinguishment in the 1960's is, in all probability the removal of the path from the Provisional Map, its status to be investigated at a later date, so as to allow the Definitive Map process to proceed. If this is the case, then the removal of the path would not have extinguished any pre-existing rights.

Wildlife & Countryside Act 1981  
 Application for Definitive Map Modification Order  
 Church Lane to Carr Lane, Wheidrake

Tab	Page	Name	Objection	Comments
			Mr E Brown, aged 75 has lived in the village for the majority of his life and is a founder member of the local historical society. He recalls the footpath being removed from the Definitive Map in the 1960's because it was not being used.	This witness is clearly mistaken because the path has never been recorded on the Definitive Map. It was claimed by the Parish Council, and was shown on the Draft and Provisional Maps. It was removed from the provisional map due to objections, over its existence being lodged. These objections were however, never resolved, the matter being left to be dealt with at a later date, which until now it never has been.
			Mr & Mrs C Gratton and their family moved to Garth Cottage in 1958 and shortly after this (1957) Mr JV Gratton purchased Wheidrake Hall. They occupied the cottage until 1988. During that 30 year period they never saw or heard of anyone trying to use the path. They also recall the village meeting when the path was extinguished.	There is no evidence to support the "extinguishment" theory. It is a misunderstanding of the actual processes which took place.
			Mr T Johnson was employed at Wheidrake Hall Farm between 1988 and 1994. He does not recall seeing anyone using the application route.	See comments above
			Other former employees who worked at the farm between 1990 and 1999 do not recall seeing anyone using the application route.	There is no suggestion of any claim based upon modern user. The claim is based upon the historical existence of the path, which the landowners appear to acknowledge.
			The present owner Mr Johnathan Gratton and his wife do not recall having ever seen anyone trying to use the path.	See comments above
			Historical evidence, which the landowners suggests confirms the existence of the path prior to its extinguishment may be found on a variety of Nineteenth & Twentieth Century maps. The path is not shown on maps post 1960 when it was extinguished.	See comments above
				The landowners appear to accept that a public rights of way existed prior to 1960. If this is the case, which is a matter they do not appear to dispute, but actually rely upon, then in the absence of any legal extinguishment, those rights will still exist today. There is no evidence to support the "extinguishment" theory. It is a misunderstanding of the actual processes which took place.

Wildlife & Countryside Act 1981  
Application for Definitive Map Modification Order  
Church Lane to Carr Lane, Wheeldrake

Tab	Page	Name	Objection	Comments
			If anyone had walked the path in the last 40 years they would have encountered various obstacles relating to the management of the land	There is no suggestion of any claim based upon modern user. The claim is based upon the historical existence of the path, which the landowners appear to acknowledge.

## **Annex 7**

### **Legal Tests**

## Annex 7 - Legislative Tests

### Test to be Applied

1. When considering an application for a DMMO to add a public right of way to the Definitive Map the burden of proof initially rests with the applicants to prove their case. If a *prima facie* case in favour of the application is established, the onus then falls upon anyone opposing the application to provide evidence in rebuttal. The standard of proof is the civil test of 'on the balance of probability'.
2. If, having taken into account all of the available relevant evidence, the Authority is satisfied that, the alleged rights subsist or are reasonably alleged to subsist the Authority has a duty to make a DMMO. Such an Order can however, only be confirmed if, on the balance of probability, the alleged rights can be shown to actually subsist.

### Evidential Tests

#### Highways Act 1980, Section 31

3. Section 31 of the Highways Act 1980 states:

*"(1) Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."*

*"(2) The period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise."*

*"(3) Where the owner of the land, which any such way as aforesaid passes has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway"*
4. Section 31(1) has two 'limbs' the first provides that proof of twenty years continuous user "as of right" endorses a claim that a highway exists; the second (sometimes referred to as 'the proviso') provides that proof of a lack of intention to dedicate the way as a highway defeats the claim.
5. Section 31 is further supplemented by Section 32 of the Highways Act 1980, which states:

*"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 or other relevant document, which is tendered in evidence, and shall give 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 complied, and the custody in which it has been kept and from which it is produced."*

Common Law

6. Before public rights can be asserted under the Common Law, a landowner must be shown to have intended to dedicate the right of way over his land. The question of dedication is purely one of fact and public user is no more than evidence, which has to be considered in the light of all available evidence. Public use will not, therefore, raise the inference of dedication where the evidence, in its totality, shows that the public right of way status was not intended.
7. At Common Law, there is no specified period of user, which must have passed before an inference of dedication may be drawn. It is necessary to show, in order that there may be a right of way established, that the route has been used openly, "as of right", and for so long a time that it must of come to the knowledge of the owners of the fee that the public were so using it as of right.
8. If the landowner has done exactly what would be expected from any owner who intended to dedicate a new highway, the time may be comparatively short. However, as a matter of proof at Common Law, the greater the length of user that can be demonstrated, the stronger the inference of dedication will (usually) be.
9. Factors such as desirability, suitability, financial viability, need or even public safety, whilst genuine concerns cannot lawfully be taken into account, when making a decision. Therefore, whilst there may be some genuine concerns about the anti-social behaviour occurring along part of the alleged public right of way, it cannot lawfully be taken into account when determining the application to modify the Definitive Map.