
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 Church Lane to Carr Lane, 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: Legislative Tests**).

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. All the available relevant evidence suggests that this has probably never been a heavily used path, but that it is nonetheless a public right of way, which has been subject to use from the mid Nineteenth Century until the latter part of the Twentieth Century. As there is evidence in support of the existence of a public right of way over the application route the authority is required to make the order under the provisions of the Wildlife and Countryside Act 1981, Section 53(3)(c)(i).

Background

4. In September 1993 Wheldrake Parish Council submitted, to North Yorkshire County Council, an application for a DMMO, to add the footpath 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 remained outstanding, was passed to City of York Council as the newly appointed Surveying Authority for the area.

5. In 2002 the Council commenced preliminary investigations into this application 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.
6. A section of the alleged path has now been subject to development and is obstructed by housing. In the event of it being determined that a public right of way does exist, this issue will have to be addressed, probably by way of a public path order to divert the path onto an alignment which preserved through the development process. The fact that the alleged path may now be obstructed is not a lawful consideration in the determination of the application. It is a matter to be dealt with at a later date if it is shown that public rights exist.

Summary of Evidence

Historical Documents

7. 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

8. Ordnance Survey maps for the area consistently show the application route annotated as a footpath.

1910 Finance Act Records

9. The Ordnance Survey base map, used to prepare the 1910 Finance Act documentation shows the physical existence of the application, and that it runs along the northern boundary of (and within) Hereditament No. 84. The accompanying Field Book entry for Hereditament No 84 (Wheldrake Hall) includes, in the notes for Charges, Easements and Restrictions etc, the following "*Footpath across north side of farm. Not much used*". A deduction of £20 was sought in respect of public rights of way.

Original Definitive Map Process

10. 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 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

11. The application was supported by two user evidence forms claiming use during the period 1917 – 1957. These forms are summarised in **Annex 4** of this report, and the periods of claimed use summarised on the User Graph in **Annex 5**.

Representations made by and on behalf of the Landowner

12. The landowners claim that the path was extinguished in the 1960's and that there is no evidence of the establishment of public rights since that time. The submissions made on their behalf are summarised and commented upon in **Annex 6** of this report.

Comments on Evidence

Historical Evidence

13. The combination of Ordnance Survey maps and 1910 Finance Act documents provide good evidence of the existence of a public right of way in the late Nineteenth and early Twentieth Centuries.

User Evidence

14. There is only a limited amount of user evidence, albeit spanning a considerable number of years. This is perhaps understandable as the path was described in 1910 as being "not much used". There is certainly insufficient user evidence to pursue a case based upon modern user either under common law or the provisions of Section 31 of the Highways Act. The user evidence should however still be taken into account along with the historic documentary evidence.

Representations made by and on behalf of the Landowner

15. The submissions made on behalf of the landowners add little to the case either way. They appear to rely upon the false premise that the path has been extinguished, arising out of a lack of understanding of the processes undertaken, and their effect, at that time.

Assessment of Evidence

Historical Evidence

16. The Ordnance Survey maps show that the path physically existed from the mid Nineteenth Century, and whilst such maps carry a disclaimer regarding public rights of way, they still provide some evidence of the repute of the way as a footpath.
17. The 1910 Finance Act records clearly identify a path along the northern boundary of the farm, and this is consistent with the application route. These documents suggest that the landowner accepted the existence of the footpath at that time.

User Evidence

18. As there are only two user witnesses, their evidence is insufficient to be considered to satisfy the "public user" tests under either common law or Section 31 of the 1980 Act. There is therefore no benefit in testing this evidence against

the other legislative criteria. This evidence should however be considered in the context of it being supportive of the reputation of the route being a public right of way. The earliest user, dating back to the 1920's is consistent with the Finance Act records of 1910, suggesting that both landowners and the public shared the view that the route was public at that time.

Representations made by and on behalf of the Landowner

19. The representations made on behalf of the landowner appear to be based upon the false premise that the path was extinguished in the late 1960's. This was not the case, and indeed, the processes being undertaken at that time (production of the Definitive Map) were not capable of extinguishing public rights. This would have required a completely separate legal process, for which no evidence has been discovered.
20. If, as appears to be accepted by the landowners (i.e. for rights to have been extinguished, as they claim, they would first have had to exist), public rights existed prior to the 1960's, in the absence of evidence of lawful closure, those rights will continue to exist today.

Consultation

21. 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.
22. The landowners have consistently maintained an objection to the existence of this path. Any evidence submitted in support of these objections has been included in this report: see above.

Ward Councillors

23. Cllr C Vassie – No comments received.

Political Parties

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

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

Cllr I Gillies (Conservative) – No comments received.

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

Options

25. Option A: If, having considered all of the available evidence the Executive Member decides that public rights are reasonably alleged to 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.
26. Option B: If, having considered all of the available evidence, the Executive Member decides that the alleged public rights do not exist, he 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

27. 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

28. 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.
29. 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.
30. 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 map and statement.

Human Resources

31. There are no human resource implications.

Equalities

32. There are no equalities implications.

Legal

33. 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.
34. 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.
35. Before the Council can make 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, 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.
36. 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

37. There are no crime and disorder implications.

Information Technology

38. There are no IT implications.

Property

39. There are no property implications.

Other

40. 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, in this case the right of way is on foot only.

Risk Management

41. 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

Author:

Joanne Coote
(Definitive Map Officer)
Network Management
(City Development & Transport)
Tel No: 01904 551442

Chief Officer Responsible for the report:

Damon Copperthwaite, Assistant Director
City Development and Transport

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)

Annexes:

Annex 1: Plan 1: Claimed Public Footpath, Church Lane to Carr Lane, 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/Comment.

Annex 7: Legal Tests