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**Decision Session – Executive Member for Transport and Planning                      7 February 2019**

Report of the Corporate Director of Economy and Place

**Definitive Map Modification Order application to record a public footpath in woodland adjacent to Windmill Lane, Heslington**

**Summary**

1. An application for a Definitive Map Modification Order (DMMO) seeking to record a public footpath through Mill Plantation adjacent to Windmill Lane has been investigated. The result of this investigation is that the evidence available to the council is sufficient to allege that the way subsists as shown on the map at Annex 2.

**Recommendation**

2. The Executive Member is asked to:
  - 1) Authorise the making of a DMMO to record the route through Mill Plantation as a public footpath as shown on the map at Annex 2.

Reason: The available evidence meets the statutory test of reasonably alleging that a public right of way subsists over the land.

**Background**

3. The DMMO application was received by North Yorkshire County Council in 1989. When City of York Council (CYC) came into being in 1996 this application was passed to CYC for determining.
4. The application was supported by eleven user evidence forms that allege uninterrupted use between 1959 and 1989.
5. The land crossed by the application route is owned by the University of York and the York St. John Endowment.

6. At the time the application was made North Yorkshire County Council received some correspondence from solicitors acting for the University of York. They asked to view the evidence supporting the application which was refused by the County Surveyor. However, no objection was lodged at that time.
7. Attempts have been made to contact the applicant by letter but no response has been received. This is not surprising because it was 29 years ago that the application was made.
8. Regardless of whether or not the applicant can be found, the evidence has been placed before CYC and, as Highway Authority, it is duty bound to investigate these applications in line with the current statement of priorities. This means that DMMO applications made by the public are dealt with in chronological order, oldest first.
9. Although finely balanced, the evidence before CYC does meet the test that the public right of way is reasonably alleged to subsist.

### **Consultation**

10. An initial consultation has been carried out with Heslington Parish Council, the affected land owners, user groups, and the relevant ward councillors.
11. York University have responded with three letters and a plan of an easement adjacent to the woodland.
12. No other formal replies have yet been received from any party but a representative York St. John Endowment has contacted the council to discuss the application. It is York St. John Endowment and York University who own all the land affected by the DMMO application.

### **Options**

13. Option A. The Executive Member authorises the making of a DMMO to record the way as a public footpath.

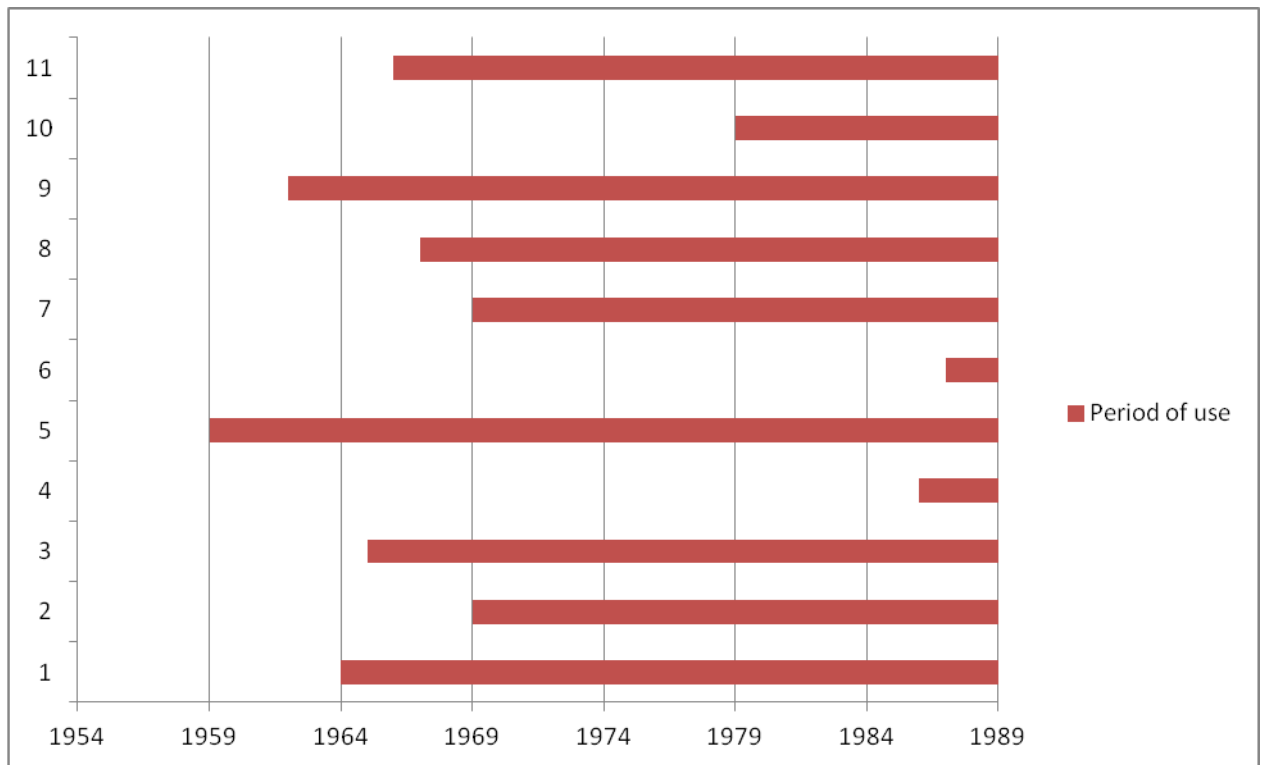
Reason: This is the recommend option because, although finely balanced, the evidence does reasonably allege the existence of a public footpath over the land.

14. 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, although finely balanced, the evidence does reasonably allege the existence of a public footpath 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**

15. The application is supported by eleven user evidence forms that allege continuous use from 1959 to 1989 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 1969 to 1989.

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 eleven 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 seven people used the way daily and a further two used the route at least once per week. The remaining two used the route less frequently. The use of the way was sufficiently high to make a well worn path through the woodland. Consequently, it seems unlikely that either of the land owners would have been unaware of the use.
21. 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.
22. The letters adduced by the University of York indicate that prior to 1989 the university had asked the applicant to stop waling their dogs on university land. The applicant did not confirm this in the evidence they provided.
23. Furthermore, the University has also asserted that they erected fences and notices. It is not clear from their communication whether these related to the path under consideration or to the university’s land adjoining the path. However, no evidence substantiating these assertions has been provided by the university nor is any reference made to signage or fences in the user evidence.

24. In addition, the university has provided a plan shows an easement abutting the woodland where the application route runs. In providing this plan they have indicated that such a service easement usually has controls applied. There is no indication what these controls might be or how the public were informed the controls were affecting their right to use the application route.
25. This conflict in the evidence before the council indicates that the use of the way was not as uncontentious as the user evidence might indicate. However is not sufficient to eliminate the possibility that public rights do exist of the way.
26. Consequently the evidence available does reasonably allege that a public right of way exists over the land in question. However, it is probably not sufficient to demonstrate that the way exists in the balance of probabilities. The existence of public rights in the balance of probabilities is the test CYC must apply before confirming an unopposed DMMO.
27. If further relevant evidence is received during the public consultation that follows the making of the order, and no duly made objections are received, the matter will be placed before the Executive Member again. This is to allow the member to decide whether or not the totality of available evidence meets the higher statutory test for confirmation.
28. If a duly made objection to the order is received, regardless of any additional evidence being adduced, CYC are required to submit opposed orders to the secretary of state for determining. Under these circumstances, a report will be placed before the Executive Member for Transport and Planning to determine what stance CYC will adopt towards the order when it is submitted
29. If, for whatever reason, the way through the woodland is not recorded as a PRow, none of the foregoing prevents new evidence being gathered and a second DMMO application being made.
30. The above notwithstanding, the issue to be decided at this stage is whether there is sufficient evidence to show that public rights subsist, or are reasonably alleged to subsist on the route shown on the plan at Annex 2. If the Executive Member believes the evidence meets this test then CYC is required to make an order to record the route on the definitive map.

## Council Plan

31. 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 submitting this DMMO to the secretary of state the council is fulfilling one of its statutory obligations.

## 32. Implications

### **Financial:**

The making and confirmation of an unopposed DMMO requires that two statutory notices are placed in a local newspaper. This will cost in the region of £1500.

If the order attracts objections then CYC are required to send the opposed order to the secretary of state for determination. Depending on how the secretary of state chooses to determine the additional cost to CYC will be between £2000 and £5000.

Notwithstanding the above, the costs to the council of making a DMMO, are not relevant within the legislation and can therefore not be taken into account when determining an application.

**Human Resources (HR):** There are no human resource implications

**Equalities:** There are no equalities implications

### **Legal:**

City of York Council is the Surveying Authority for the purposes of the WCA 1981, and has a duty to ensure that the Definitive Map and Statement for its area are kept up to date.

If 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.

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.

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.

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:** There are no crime and disorder implications

**Information Technology (IT):** There are no IT implications

**Property:** There are no property implications

### **Risk Management**

33. In compliance with the authority's Risk Management Strategy, Option A is subject to internal budgetary pressures (financial). Option B is subject to a greater budgetary pressure (financial) because of the possibility the additional work defending the decision to reject the application. It is highly likely that CYC would be directed to make the DMMO in the event of an appeal.

### **Councillor Responses**

34. Councillor D'Agorne made the following comment, "Support the proposal for the route to be registered on the Definitive Map."
35. Councillor Fenton made the following comment, "I support Option A - the making of a DMMO to record the way as a public footpath."
36. Councillor Pavlovic made the following comments on behalf of the Hull Road Ward councillors:

"Please consider this a joint submission from the Hull Road Ward Councillors as requested.

I understand that the original request relating to this footpath dates back to 1989 and therefore evidence of use is required for the period 1969-1989 as well as supporting evidence of more recent use.

Following a visit to the Windmill Lane estate, including Sails Drive and Quant Mews on Saturday 12th January, having printed off the maps attached to your email, I was able to ask a number of residents whether they used the footpath and for how long. Many, if not most residents have used the footpath through the woodland as shown on the map, most on a regular basis, particularly for dog walking.

Of particular relevance regarding the timescale I have received an email (attached) from a resident at 59 Windmill Lane who has used the footpath since 1985 and one at 73 Windmill Lane who has used it since he was 5 years old in 1947. He will provide a written submission on request.

Never having completed a submission for a right of way before I'm not sure how much additional evidence you would like me to provide, I have list of residents spoken to with house numbers who have used the footpath after 1989."

37. Councillor Pavlovic also passed on a comment he received from a local resident. "I live at 59 Windmill Lane and moved there in 1985. I have walked on the footpath through the woods regularly since we moved into our house and both my children played safely in the wood from when they were very young. I feel that the wood is very important for the Lane, it is a green space to be at peace in and I love how the various bulbs planted by residents over the years have now become naturalized. This stretch of woodland is also important because it is a corridor that connects St Nicholas' Nature Reserve with the open countryside to the South of York."



## Contact Details

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### Chief Officer Responsible for the report:

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**Report**  **Date** 24.01.19  
**Approved**

### Specialist Implications Officer(s) List information for all

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**Wards Affected:** Rural West York.

**For further information please contact the author of the report**

**Background Papers:** None

## 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  
WCA 1981 – Wildlife and Countryside Act 1981