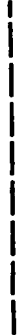



## **Annex 1**

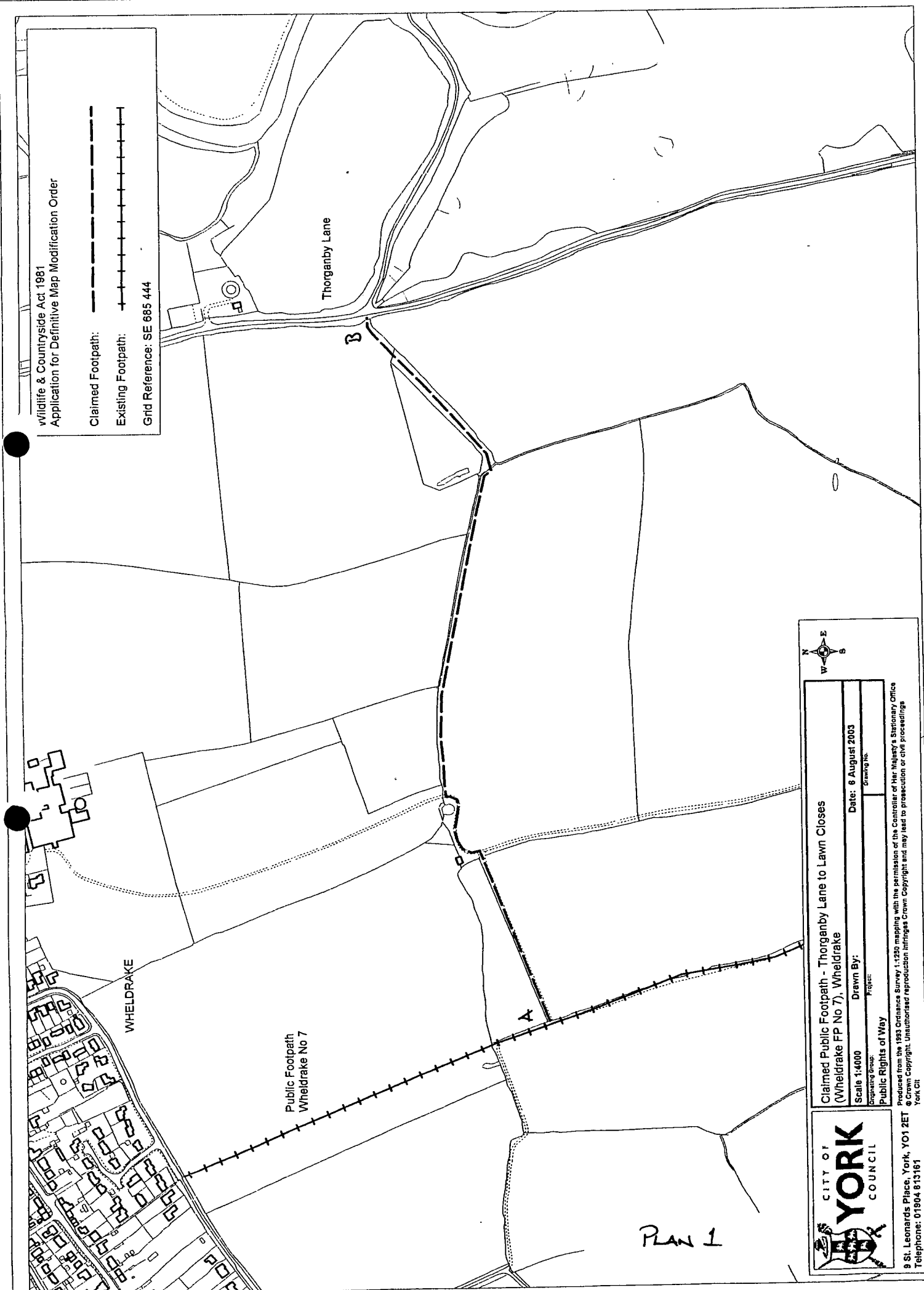
**Plan 1: Claimed Public Footpath, Thorganby Lane to Lawn  
Closes (Public Footpath No.7), Wheldrake**

Wildlife & Countryside Act 1981  
Application for Definitive Map Modification Order

Claimed Footpath: 

Existing Footpath: 

Grid Reference: SE 685 444



Claimed Public Footpath - Thorganby Lane to Lawn Closes  
(Wheldrake FP No 7), Wheldrake

Date: 6 August 2003

Drawn By:   
Project:   
Drawing No:   
Engineering Group:   
Public Rights of Way

Scale 1:4000



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9 St. Leonards Place, York, YO1 2ET  
Telephone: 01904 813161

Plan 1

## **Annex 2**

### **List of documents consulted**

**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

**Ann x 3**

**Summary of Documentary Evidence**

*Annex 3*

**Summary of Documentary Evidence**

Tab	Doc	Description	Document Content	Comments
5		Ordnance Survey Maps	Ordnance Survey maps show the physical existence of part of the route (Susscars Lane), but do not attribute it any specific status. The remainder of the route is not shown.	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.

## **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
13	1	C Burgess	✓	✓		1987 - 1992	25	✓	✓	✓	<p>Interviewed as part of 2002 Investigations</p> <p>There was originally a clear trodden path for much of the way. Used the path to get to Wheldrake Irings for bird watching., and saw others using it too. There were field gates on the route, but they were never locked. There was also a stile at the Thorngaby Road end.</p> <p>Stopped using the path in the early 1990's when challenged by the son-in-law of the landowner. A no trespassers notice was later erected at the eastern end of the path.</p>
13	2	S Bunt	✓			1986 - 1993	7	✓	✓	✓	<p>Witness claims to have known of the path for 7 years and used it 4-5 times a year. Period of use has been taken from time path was known. Used the path for pleasure and remembers field gates along the route, but no evidence of them being locked.</p>
13	3	L Ostergaard	✓	✓		1976 - 1993	17	✓	✓	✓	<p>Interviewed as part of 2002 Investigations</p> <p>When interviewed the witness had no detailed memory of the path but did use it for 17 years and was never stopped or turned back.</p> <p>Period of use has been taken from time path was known</p>
13	4	C Mordue	✓			1971 - 1993	22	✓	✓	✓	<p>Knew of the path for 22 years and used it 3-4 times a year. Period of use has been taken from time path was known. Recalls gates on the route and a stile.</p>



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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
13	5	E Mordue	✓			1971 - 1993	22	✓	✓	✓	Knew of the path for 22 years and used it 3-4 times a year. Period of use has been taken from time path was known. Recalls gates on the route and a stile.
13	6	J Burgess	✓	✓		1967 - 1992	25	✓	✓	✓	Interviewed as part of 2002 Investigations The path was easy to use and there were no notices or obstructions. She visited the ings, usually with her husband and children often. Stopped using the path in the early 1990's when challenged by the son-in-law of the landowner. A no trespassers notice was later erected at the eastern end of the path.
13	7	G Beilby	✓			1963 - 1993	30	✓	✓	✓	Used the route occasionally for pleasure on both foot and horseback. Was never prevented from using the route and recalls the existence of field gates.
13	8	J Cleal	✓	✓		1969 - 1991	22	✓	✓	✓	Interviewed as part of 2002 Investigations Used the path from 1969 to 1991, when she was informed by the landowner that there was no right of way. Prior to this, the path had always been open, but not necessarily obvious on the ground.
13	9	R Dawson	✓			1991 - 2000	9	✓	✓	✓	Used the path once or twice a year until 2000 when barbed wire was placed across the top of the gate that the stern end.

## **Annex 5**

**Graph showing Periods of Claimed User**



## **Annex 6**

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

*Annex 6.*

**Summary of Objector's Evidence/Comments**

Tab	Page	Name	Objection	Comments
19	14	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.
19	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.
			Historical research has not identified the existence of a path on any maps that have been inspected.	With the exception of Suscarrs Lane, which is shown on various maps, this is consistent with the Consultant's findings. Any case in support of an Order is considered to be user based, and not reliant upon documentary evidence
			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 has never known the route to be a footpath.	This does not, in any way detract from the fact that people have given evidence of their actual use of the claimed path. It is not evidence that rights do not exist.

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Tab	Page	Name	Objection	Comments
			Mr P Wox owns land adjacent to the land through which the claimed path runs and he never recalls seeing people walking the claimed route.	The fact that a neighbouring landowner has not seen anyone using the claimed path does not, by any stretch of the imagination, mean that such use did not take place.
			Mrs A Gratton moved to Garth Cottage in 19658 and lived there until 1988 and never saw anyone using the claimed route	The fact that the landowners and their family do not recall seeing anyone using the path does not mean that such use did not take place. This does not constitute evidence of a landowner's lack of intention to dedicate.
			Mr A Gratton worked on the farm from the 1960's to 1989 and he does not recall seeing people using the path.	See comments above
			Former employees who worked at the farm between 1990 and 1999 do not recall seeing anyone using the application route.	See comments above
			The present owner Mr Johnathen Gratton and his wife do not recall having ever seen anyone trying to use the path.	See comments above

## **Annex 7**

### **Legal Tests**

## 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.