

**Decision Session – Executive Member for
Transport**

25 July 2019

Report of the Corporate Director of Economy and Place

**Definitive Map Modification Order Application to record a public
footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

Summary

1. An application for a definitive map modification order (DMMO) seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3 has been investigated. The result of this investigation is that the evidence available to the council is sufficient to allege that part of the way subsists as shown on the map at appendix 2.

Recommendation

2. The Executive Member is asked to:

Option A. Authorise the making of a DMMO to record the route from Ferry Lane to Acaster Malbis 3 (B to C to D as shown on the map at appendix 2) as a public footpath, reject the 2006 application because it was not duly made and only relates to the consecrated land, and inform the applicant of their right to appeal.

Reason: The available evidence meets the statutory test of reasonably alleging that a public right of way subsists over the land over the land affected by B to C to D.

Background

3. City of York Council (CYC) and North Yorkshire County Council before it have received a total of two duly made DMMO applications to record various parts of this route. The first was received in 1994 (“the 1994 application”) and the second application was submitted in 2004 (“the

2004 application”).CYC also received a third application in 2006 (“the 2006 application”) but it does not appear to have been supported by any evidence and therefore was not duly made. Consequently this application must fail and be rejected. This is because schedule 14(1)(a) of the Wildlife and Countryside Act 1981 requires that all applications must be accompanied by copies of the evidence on which they rely.

4. The 1994 application was for the route A to B to C on the map at appendix 2. The 2004 application was for the route A to B to C to D on the map at appendix 2.
5. As both duly made applications were submitted by Bishopthorpe Parish Council and encompass some, or all, of the same route, it is sensible to deal with them concurrently.
6. The two duly made applications (the 1994 and 2004 applications) are supported by 51 evidence forms that allege uninterrupted use between 1930 and 2001.
7. As a result of the length of the way, the land crossed by the application route is owned by a large number of land owners including the church and the parish council.
8. These applications have generated a large quantity of correspondence and attempts have been made to resolve them through creation agreements with the land owners. However, none of these have come to fruition.

Consultation

9. An initial consultation has been carried out with Bishopthorpe Parish Council, the affected land owners, user groups, and the relevant ward councillors.
10. One response supporting the application has been received from the Ramblers.
11. Replies from both the Byways and Bridleways Trust and the York RI Sailing Club have registered no objection to the proposal.
12. The Charity of Thomas Annotson replied to the consultation that they had no evidence that either supported or refuted the existence of public rights over the application route.

13. The St. Andrews Trust Bishopthorpe have submitted evidence for consideration by the Executive Member that relates to the section between A and B on the map at appendix 2. These detail the ownership of the land up to 1998 and the presence of signs on that section of the route.

Options

14. Option A. Authorise the making of a DMMO to record the route from Ferry Lane to Acaster Malbis 3 (B to C to D as shown on the map at appendix 2) as a public footpath, reject the 2006 application because it was not duly made and only relates to the consecrated land, and inform the applicant of their right to appeal.

Reason: This is the recommended option because the evidence does reasonably allege the existence of a public footpath over the land affected by B to C to D.

15. Option B. The Executive Member does not authorise the making of a DMMO and the applicant is informed that all their applications have been rejected.

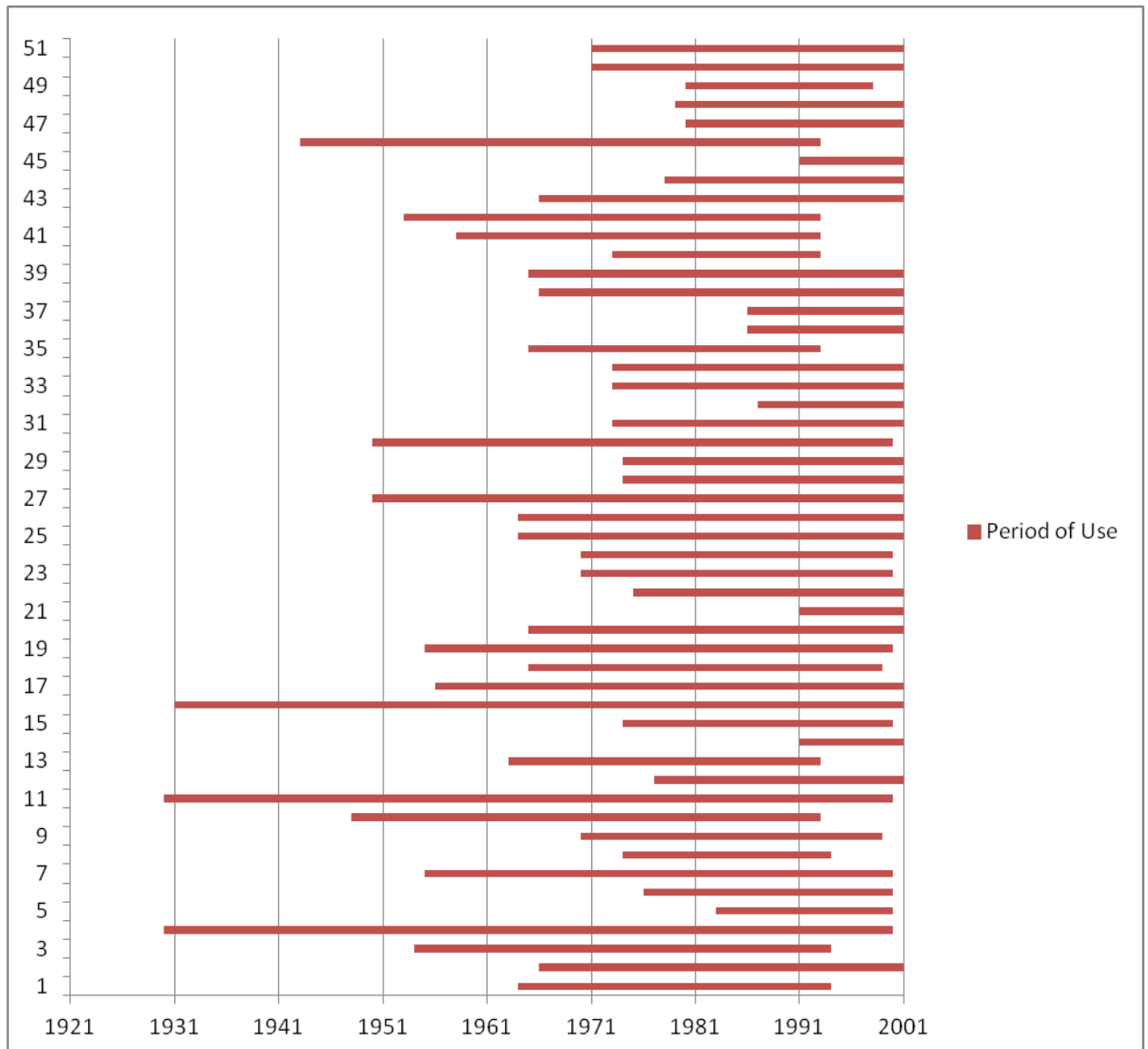
Reason: This is not recommended, because the evidence before the council does reasonably allege the existence of a public footpath from B to C to D on the map at appendix 2. In addition it gives the opportunity to the applicant to appeal this decision to the secretary of state. If CYC did reject this 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.

16. Option C. The Executive Member authorises the making of a DMMO over the whole route (from A to B to C to D on the map at appendix 2 in respect of the 1994 and 2004 applications).

Reason: This is not recommended because the evidence before the council shows that the land between A and B is consecrated and public rights of way cannot be established over consecrated ground. Therefore the requirements of section 31(1) of the Highways Act 1980 do not apply to the section of the application route between A and B on the map at appendix 2.

Analysis

17. The application is supported by 51 user evidence forms that allege continuous use from 1930 to 2001 as shown in the chart below and examined at para 20.



18. The applications have been considered under Section 31 of the Highways Act 1980. Section 31(1) which 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).
19. 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 first application. This means that the relevant period is 1974 to 1994.

20. Examination of the user forms highlights that not all the evidence adduced applies to the full application route (A to B to C to D). 38 of the forms only apply to the route through St Andrew's Church shown as A to B on the map at appendix 2. Eleven forms referred to walking the river side path and appear to indicate use of the full application route. It was not possible to determine which route was used by the remaining two people who completed user forms. Consequently it will be necessary to apply the legislation separately to the two routes being evidenced.
21. The information contained within both groups of user evidence indicates the route was used openly (without stealth). There is no suggestion that either group ever broke down fences to gain access (without force). Furthermore, there is no evidence that suggests either of the two groups of users giving evidence had ever, before 1994, 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.
22. 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.
23. 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 six people claim to have used the way daily and a further 24 allege use of the route at least once per week. A further eleven people indicate that they used the way on a monthly basis and the remaining ten people claim to have used the route annually. The use of the way was sufficiently high to make a well worn path over the land. Consequently, it seems unlikely that the land owners would have been unaware of the use.
24. Therefore the analysis of the evidence adduced to support the application and the representations made during the consultation appear to demonstrate that the whole application route (A to B to C to D) has been used as of right by the public at large to such a degree that any affected land owner would have been aware that a right was being asserted

against them. This seems to lead to the inevitable conclusion that a public right of way is reasonably alleged to subsist over the whole application route (A to B to C to D).

25. However, the above notwithstanding, section 53 of the Wildlife and Countryside Act 1981 requires the council to examine all the available evidence.
26. Examination of the old Ordnance Survey maps available to the council shows that a path from B to C to D has existed from 1851. On the earlier maps this was noted as being the Ouse towing path. Significantly the towing path did not continue past St Andrew's Church and the Archbishop's Palace. Those towing barges towards York were required to cross the river to the Fulford side using the Bishopthorpe Ferry.
27. The oldest evidence that a path existed running between A and B is a map from 1968 that shows a path beginning on Chantry Lane that passed to the north side of the old St. Andrew's Church and then continued south along the bank of the river to Ferry Lane where it joined the existing riverside path that dates back to at least 1851. The map available to the Council from 1958 does not show the path from Chantry Lane to Ferry Lane.
28. The relevant period for user evidence is 1974 to 1994. As the path was shown on a map from 1968 this provides confirmation that a physical feature existed on the ground that would have allowed the public to pass from Chantry Lane to Ferry Lane during the relevant period.
29. That notwithstanding, the St Andrew's Church land was owned by the Church of England until 1998 when it passed to the St. Andrew's Trust. Even though the ownership of the land has changed it remains consecrated ground and internments may still happen under certain circumstances.
30. St Andrew's Church was founded in the thirteenth century and has been closely associated with the Archbishop of York ever since. This means that the land affected by both applications (the route shown running between A and B) has been consecrated ground for approximately 800 years.
31. When land is consecrated it is set apart from "all that is common and profane" (profane in the sense of not sacred) and the land used as a burial ground forever. Once this happens, the legal character of the land

in question changes to one that cannot support a right of way arising at common law.

32. Section 31(1) of the Highways Act 1980 enshrines the principle that where a way is used for a period of twenty or more years without any steps being taken to prevent the public's use, the way becomes a public right of way. However the terms of section 31(1) contain an important caveat:

“Where a way over any 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...”

33. As noted at paragraph 31 above, once land is consecrated it is set apart from ordinary (“profane”) land and as such cannot give rise to a public right of way at common law. This position has been considered by the courts on a few occasions, notably the Consistory Court heard the St. Martin Le Grand, York (1988) case (relating to a private easement) and the Court of Appeal heard *Oakley v Boston* (1976) (access over glebe land). In both cases the courts found that existence of a lost grant* made by the church could not be presumed.
**A lost grant is a presumed explicit dedication of a public right of way that was made at some point in the past but cannot now be found.*
34. Consequently, whilst a way physically existed and was used by the public from at least 1968, section 31(1) does not apply. This means that the public's use of A to B was not as of right. This is because the land was consecrated during all of the relevant period so it was of such character that it could not give rise to a public right of way at common law.
35. The remainder of the route (B to C to D) was not consecrated and section 31(1) does apply. The evidence available does reasonably allege that a public right of way subsists over this part of the application route.
36. 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.
37. Other than the information about the consecrated status of the land affected by the order route between A and B, 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.

38. 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 over the route B to C to D shown on the plan at appendix 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

39. 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.

Implications

Financial

40. 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.
41. 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.
42. 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)

43. There are no human resource implications

Equalities

44. There are no equalities implications

Legal

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

46. 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.
47. 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 so as to allow the evidence to be properly tested through the statutory order process.
48. 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.
49. 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

50. There are no crime and disorder implications

Information Technology (IT)

51. There are no IT implications

Property

52. There are no property implications

Risk Management

53. 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 for route B to C to D in the event of an appeal.

Councillor Responses

54. Comment from Councillor Galvin (Bishopthorpe Ward), "as Ward member I support option A, route B-C-D. It would not be good to have a definitive footpath between A and B as it is consecrated ground."

Contact Details

Author:

Russell Varley

Definitive Map Officer
Rights of Way
Tel No. 01904 553691

Chief Officer Responsible for the report:

James Gilchrist

Assistant Director Transport Highways and
Environment

Report
Approved



Date 15.07.19

Specialist Implications Officer(s)

Financial

Jayne Close
Accountant
01904 554175

Legal

Sandra Branigan
Senior Solicitor
01904 551040

Wards Affected: Rural West York.

For further information please contact the author of the report

Background Papers:

Highways Act 1980
Wildlife and Countryside Act 1981
Natural Environment and Rural Communities Act 2006
Grange Lane DMMO case file

Annexes

Appendix 1: Location map
Appendix 2: Route map

List of Abbreviations used in this Report

CYC – City of York Council
DMMO – Definitive map modification order
PRoW – Public right of way
WCA 1981 – Wildlife and Countryside Act 1981