
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 from Thorganby Lane to Lawn Closes (Public Footpath No 7), 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**).

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. Taken at face value, the tests set out within Section 31 (see page 3, Evidential Tests) of the Highways Act 1980 would appear to have been satisfied, at least to the extent of there being a reasonable allegation over the existence of the alleged footpath. In addition there would appear to be a *prima facie* case in favour of the establishment of public rights over the application route. No evidence has been submitted by, or on the behalf of, the landowners to demonstrate sufficiently overt acts, directed at users of the application route, which constitute a lack of intention to dedicate.

Background

4. In September 1993 Wheldrake Parish Council submitted, to North Yorkshire County Council, an application for a Definitive Map Modification Order, to add the footpath, shown by a broken black line on Plan 1 attached to this report (the application route). 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, 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.

Summary of Evidence

Historical Documents

6. 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**.

Ordnance Survey Maps

7. Ordnance Survey maps for the area show the physical existence of Susscars Lane, which is shown as a bounded lane and named. The remainder of the application route is not shown.

User Evidence

8. The application was supported by eight user evidence forms, and a further form was submitted during the current investigation. These forms claim use during the period 1963 – 2000. These forms are summarised in **Annex 4** of this report, and the periods of claimed use summarised on the User Graph in **Annex 5**.

Submissions made on behalf of the Landowner

9. In 2003 a submission was made on behalf of the landowners. The submission claims that the application routes not shown on various maps; reports that numerous people with knowledge of the area have never seen anyone using the application route, or have never known it to be a footpath; and that the route has been impassable for many years. The submission concludes that this evidence demonstrates that public rights do not exist. The submission is summarised, with comments in **Annex 6** of this report.

Comments on Evidence

Historical Evidence

10. The Ordnance Survey Maps certainly confirm the physical existence of the Susscars Lane section of the application route as being an historic feature in the landscape, however such 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.

User Evidence

11. In common with many cases of this nature across the country, the fact that the application is being determined some sixteen years after it was made, is problematic so far as the continued availability of witnesses is concerned. The evidence of the four witnesses who were interviewed should be given more weight than that of the witnesses who were not, which can only be taken as

read. Caution must also be exercised in the interpretation of the user evidence forms as some witnesses state how long they have known the path, but then have not gone on to say during which years they actually used it.

Submissions made on behalf of the Landowner

12. The submissions made on behalf of the landowner are of minimal evidential value. The fact that various maps do not show the application route does not preclude its existence; nor does the fact that various people have not seen the application route used, preclude such use actually taking place. In addition the seasonal ploughing and cropping of the route would not prevent the establishment of public rights. Finally, and perhaps of most importance, the submission provides no evidence of any acts demonstrating a lack of intention to dedicate.

Assessment of Evidence

Historical Evidence

13. The recording and depiction of the Susscars Lane section of the application route on the Ordnance Survey mapping may be considered to be consistent with it being a public right of way however, equally as an apparent cul-de-sac lane, in a rural location, this may suggest otherwise. This evidence, on its own, is certainly insufficient to meet the legislative tests. It should however be considered alongside, and in support of the user evidence to demonstrate the use and reputation of the route as a public right of way.

User Evidence

Common Law

14. The user evidence suggests public user, "as of right" over a long period of time (1963 to 2000), but the extent of the use is only occasional. Whilst this would not prevent an implication of dedication arising, pursuing a case under common law dedication is not recommended.

Highways Act 1980, Section 31

Calling into question and 20 year period of user

15. Three of the user witnesses claim to have been challenged, by the landowner, when using the application route during the period 1991-3, the latter date of which coincides with the submission (1993) of the application for the Definitive Map Modification Order. The Parish Council also noted, at the time of the application that notices prohibiting use of the route had recently been installed.
16. Direct and personal challenges by a landowner are perhaps the most difficult to pin point because, unlike fencing a path off, each challenge requires effort on the part of the landowner, and is often only witnessed by the two parties involved. The erection of notices, which appears to have occurred circa August/September 1993, is a far more effective means of challenging use.
17. The application route does not appear to have been subject to high levels of use, nonetheless half those who claim to have used it were challenged during the period 1991 – 3.

18. If the earliest of these dates is accepted, then the required 20 year period of user would be 1971 – 1991; if the latter (which includes the erection of notices) is accepted, then the period will be 1973 – 1993. The evidence submitted in support of the application covers the full twenty year period in both instances.

Actual use and enjoyment by the public

19. All of the witnesses who submitted evidence in support of the application claim to have actually used the path, and would fall within the general definition of being members of the public. Whilst the user evidence that has been submitted represents the minimum level of user, it still only gives a picture of occasional use. Such levels of use may however, still be acceptable in relatively rural locations such as this.

Use “As of Right” and without interruption

20. For use of a path or way to be “as of right”, it must be use without force, without secrecy and without permission. There is no need for the user to believe they are exercising a public right of way. The evidence submitted in support of the application would appear to meet this test.
21. Whether use of the route has been subject to “interruption” is open to question. In this context the term “interruption” does not mean a short period of time where nobody used the route, it refers more to acts of interruption by a landowner, such a preventing use, or turning people back. There must also be the necessary intent on the part of the landowner. If the earlier challenge date of 1991 is accepted, then there is no evidence of interruption, however of the latter date of 1993 is accepted, then the witnesses who claim to have been challenged, if they did not then continue with their use, in 1991 and 1992 would have been interrupted in their use, thus not fulfilling the full period of 20 years user.

Consultation

22. 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, and the latter indicated an objection to the application. Any evidence arising from the consultations has been included in this report.

Ward Councillors

Cllr C Vassie – No comments received.

Political Parties

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

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

Cllr I Gillies (Conservative) – No comments received.

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

Options

23. Option A: If, having considered all of the available evidence the Executive Member decides that public rights are reasonably alleged to subsist, 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 (**Annex 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.
 - (d) A decision be made regarding the Authority's position in respect of the confirmation of the Order (i.e. support, or seek non-confirmation)
24. Option B: If, having considered all of the available evidence, the Executive Member decides that the alleged public rights do not exist, they should resolve that:
- (a) The application to modify the Definitive Map be refused.
 - (b) The applicant be advised of their rights of appeal.

Corporate Priorities

25. 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

26. If it is determined to progress a Definitive Map Modification Order (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.

27. 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.
28. 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

Human Resources

29. There are no human resource implications.

Equalities

30. There are no equalities implications.

Legal

31. 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. 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 Definitive Map Modification Order (DMMO) enables any changes to the map and statement to be made. 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
32. Before the Council can make the 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, that a right of way can reasonably be alleged to exist. If it can, the authority must make the order.
33. Taken at face value, the provisions of Section 31 (see page 3, Evidential Tests) of the Highways Act 1980 would appear to be satisfied, and there would appear to be a prima facie case in favour of the establishment of public rights over the application route. Where there is possible evidence of lack of intention to dedicate, it appears to coincide with the dates of challenge and it may therefore be outside the relevant time periods. The matter is further compounded by the limited number of witnesses who are still available to confirm their evidence. No evidence has been submitted by, or on the behalf of, the landowners to demonstrate sufficiently overt acts, directed at users of the application route, which constitute a lack of intention to dedicate. The only evidence of such acts is contained within the user evidence forms relating to challenges, and the submission by the Parish Council, which refers to deterrent signs. However these are the same acts that appear to call into question the existence of the alleged rights, thus triggering the provisions of Section 31 of the Highways Act 1980. If this is the case, these acts may have occurred too late to prevent public rights being established.

34. An Order cannot however be confirmed unless those rights are shown, on balance of probability to subsist. A situation can therefore arise where an Authority is obliged to make an Order, even though that Order may not be capable of confirmation. Despite such a situation arising, if the rights are reasonably alleged to subsist, the Authority cannot refuse to make an Order despite knowing that it will be incapable of confirmation. This would appear to be such a situation.

Crime and Disorder

35. There are no crime and disorder implications.

Information Technology

36. There are no IT implications.

Property

37. There are no property implications.

Other

38. If the definitive map modification order 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: the right of way is on foot only.

Risk Management

39. 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

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**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)

Appendices:

Annex 1: Plan 1: Claimed Public Footpath, Thorganby Lane to Lawn Closes (Public Footpath No.7), 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/Comments

Annex 7: Legal Tests