

Decision Session - Executive Member for
Transport and Planning

7 December 2016

Report of the Director of Economy and Place

Definitive Map Modification Order (DMMO) to add a footpath to the Definitive Map and Statement: Askham Fields Lane, Askham Bryan.

Summary

1. A definitive map modification order (DMMO) application has been received: the evidence in support of the application is 20 User Evidence Forms (UEFs), and two colour photographs of Askham Fields Lane prior to 1982. In 1982 Askham Fields Lane was subject to the North Yorkshire County Council (York Outer Ring Road) (Classified Roads) Side Roads Order which stopped up all highway rights along the Lane. The claimed route is located along the original alignment of Askham Fields Lane (Annex 1: Location Plan). The Planning Inspectorate produces guidance to assist in the interpretation of the Wildlife and Countryside Act 1981 (Annex 2: WCA 81 Definitive Map Orders: Consistency Guidelines). Evidence of user that supports a definitive map modification order application must have been by '*the public*': 'the public' for example does not include visiting a friend, visiting an acquaintance, a tenant of the college, or employee of the landowner (inclusive of wider family members).
2. In this case, the evidence of user in support of the application has proved challenging to investigate because as the claimed route lies within the boundary of Askham Bryan Agricultural College, there has not been a clear distinction between use by 'the public', students/visitors who have express permission, residents with private rights, and those who have implied permission. It is incumbent upon the authority to test the evidence that supports a DMMO application: 12 of the 20 evidence of user forms are considered to be non-qualifying because use is by licence, therefore, they are not classed as 'the public'.

The remaining 8 evidence of user forms have been completed by a very limited number of local people and the claim based on user evidence alone is finely balanced. Further information/evidence regarding use of the lane has been sporadically received which has necessitated a continuing review of the evidence and its impact on the evidence as a whole, and has led to the legislative criteria of 'reasonably alleged' being met, the report, therefore, recommends that the Authority makes the Order.

Recommendations

3. The Executive Member is asked to consider:

1) Option A – The Authority makes an Order. This option is recommended.

Reason: The supporting evidence meets the threshold criteria of 'reasonably alleged'.

2) Option B – The Authority does not make an Order. This option is not recommended.

Reason: The supporting evidence meets the legislative criteria, and the Authority has a duty to make an Order.

Background

4. A DMMO application was received in May 2014 under the provisions of section 53 of the Wildlife and Countryside Act 1981. The claimed route commences at its junction with York Road, proceeds in a southerly direction, to its junction with the A64, and is known as Askham Fields Lane. (Annex 1: Location Plan). The application relies upon 20 EUFs (Annex 3) to support the claim that a public right of way 'subsists or is reasonably alleged to subsist' (section 53(3)(c)(i)).

This user evidence must be considered against the requirements of section 31 of the Highways Act 1980 (as set out in the Legal Implications below). There will be no presumption of dedication unless the claimed route has been actually enjoyed by **'the public'** as of right and without interruption for the requisite 20 year period. The burden of proving this falls to the applicant. The period of 20 years referred to above is to be calculated retrospectively from the date when the right of the public to use the way is brought in question.

In determining the application, matters relating to suitability; condition of the route; desirability, or nuisance are irrelevant, and cannot be taken into account.

Prior to the receipt of the DMMO, Askham Bryan Agricultural College applied to the planning authority: City of York Council, to construct a new Animal Management building which will be the home to Askham Bryan Wildlife and Conservation Park. The park incorporates part of Askham Fields Lane: the southern section of the claimed route. It appears that the planning application process drew attention to the possibility that the claimed route would be affected following the construction of the new facility. A DMMO application was received in May 2014 bringing the status of the route into question for the purposes of section 31 of the Highways Act 1980. The relevant 20 year period is therefore from 1994 to 2014.

In the case of a non-determination of a DMMO application by the surveying authority, the applicant can apply to the Secretary of State for a direction requiring the surveying authority to determine a claim if it has not done so within 12 months of the date of receipt of the application: this option is detailed in the DMMO application pack covering letter dated 12th March 2014. There has been no application to the Secretary of State to direct the authority, therefore, the DMMO application would have progressed in date order with other applications which have been received but not yet determined, in accordance with the authority's Statement of Priorities.

Consultation

5. Pre-order consultation has taken place with the prescribed bodies and utility companies: no additional information has been forthcoming. Further contact with users who support the application and the landowner's representative with the request to clarify some details stated either within their evidence of use forms, or information connected to the application.

Options

6. The Authority, as the surveying authority, is required to make a decision on the definitive map modification order application received. There are two options:

Option A – To authorise the Assistant Director of Governance and ICT to make a Definitive Map Modification order to add a footpath to the Definitive Map and Statement.

This option would accord with the interpretation of relevant guidance of statutory legislation regarding the analysis of evidence of user by the public.

Option B – Not to authorise the Assistant Director of Governance and ICT to make a Definitive Map Modification order to add a footpath to the Definitive Map and Statement.

This option would not be in accord with the interpretation of relevant guidance of statutory legislation regarding the analysis of evidence of user by the public.

Analysis

7. A DMMO should be made if evidence shows that a public right of way 'subsists or is reasonably alleged to subsist'. The evidence in support of the application is of claimed public use and the application has been considered under section 31 of the Highways Act 1980.

Qualifying UEFs claim use of the route in excess of 20 years up to 32 years. Whilst it is not necessary for all claimants to demonstrate continued use throughout the relevant 20 year period, they must demonstrate that the use has been made by **'the public'** continually during that full period. The issues that arise in relation to the statutory test are: whether there is evidence of the use of the route by a sufficient number of people and with sufficient frequency to represent use by **'the public'**. If so, whether the public used the route for a full period of 20 years as of right and without interruption, and whether there is sufficient evidence that during the 20 year period, the owner of the land over which the route passes did not intend to dedicate a public right of way. The Definitive Map Officer has corresponded with the College representative to ascertain whether any rebuttal evidence is to be presented. Although information has been forthcoming, it is the Officer's opinion that the information is not sufficient to challenge the assertion that public rights 'subsist or are reasonably alleged to subsist'.

Whilst there appears to be no legal definition of the term 'the public' as used in section 31, the application criteria for a definitive map modification order application stipulates that user of the route must have been by '**the public**'. That does not mean that users must have come from all over the country, they will usually be drawn from the local community. Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local people as a whole/the local community. Whether the use is sufficient to represent '**the public**' will vary from case to case. For example if the claimed route lies in a rural, sparsely populated area, usage of public rights of way may well mainly be by a relatively low number of local people. However, as noted in Ross Crail's 2006 Rights of Way Law Review article "The Significance of User Evidence" (Annex 4), users must represent a wider cross-section of the public than just the owners or occupiers of nearby properties and their visitors:

The qualifying user evidence is limited. The Authority has conveyed its opinion on the UEFs to the joint applicants, and who continued to gather evidence in support of the application. The Authority has recently received correspondence from a past Principal of the College who affirms that during their time in post (1984-1996) and states 'there was a footpath on Askham Fields Lane down to the A64 which was used by the Public. To the best of my recollection the Public were allowed to use it and were not challenged in any way.'

It is concluded, that based on the evidence taken as a whole: 8 qualifying UEFs and statement received from a past Principal, there is just sufficient evidence to demonstrate that public rights are 'reasonably alleged' to exist on the claimed route as required by section 31 of the Highways Act 1980.

Option A – To make an Order

This option is recommended. An Order would be made and advertised on site. There will be a period of not less than 42 days for objections to be made. If no objections are forthcoming, then the authority will confirm the Order. However, if objections, are received, and not withdrawn the order must be referred to the Secretary of State.

The Secretary of State will then determine whether to confirm the Order, or not, by means of either written representations, an Informal Inquiry, or a Public Inquiry.

Option B – Not to make an Order

If the Authority decides not to make an Order this would be in contravention of its statutory duty to make an Order if the evidence satisfy's the test that public rights 'subsist or are reasonably alleged to subsist'.

Council Plan

8. This report supports the Local Plan priority:

A council that listens to residents:

'Our purpose is to be a more responsive and flexible council that puts its residents first and meet its statutory obligations'.

'We will be transparent in all we do, including being clear with communities and partners about the scale of the financial challenges we face'.

It is a statutory duty for the authority to process a duly made DMMO application. In determining the application the authority has written to those that submitted user evidence forms to clarify the details within, before final analysis, whilst being mindful of, and adhering to, existing statutory legislation.

Implications

9. **Financial**

If the decision to make an Order to add the footpath to the definitive map and statement (Option A), the authority will be required to advertise the Order in a newspaper received within the area. The cost of placing an advert will be approximately £1000. If objections to the advertised Order are received and not withdrawn, the order must be sent to the Secretary of State for determination. This will result in the Order being determined by either, written representations; an informal hearing; or a Public Inquiry being held. In each case there are financial implications on the authority with respect to staff time; processing the Order; advertising the Order; preparing the Order for the Secretary of State; preparing the Order

for written representations and facilitating a Public Inquiry. The cost to the authority for a hearing or public Inquiry would be in the region of £2000 to £6000. Notwithstanding the above, the costs to the council of making an Order or not, are not relevant are not relevant to the legislation and can therefore not be taken into account when determining an application.

Human Resources (HR)

There are no HR implications

Equalities

If the authority decides not to make an Order, the legislation enables the applicants to make an appeal to the Secretary of State.

A Community Impact Assessment has been carried out (Annex 5). The impact is considered to be positive, subject to meeting the legislative criteria: evidence of user that supports a DMMO application must have been by **'the public'**, and they must represent a wider cross-section of the public than just the owners or occupiers of nearby properties.

- **Legal**

The evidence needs to be tested against the criteria laid out in Section 31 of the Highways Act 1980, and a determination make an Order if it is considered that a public footpath subsists or is reasonably alleged to subsist. Section 31 states:

(1) Where a way over any land, other than a way of such a 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 a right ad without interruption for a full period of 20 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 20 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 over which any such way as aforesaid passes:

- (a) Has erected in such a manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
- (b) Has maintained the notice after the 1st January 1934, or any later date on which it was created the notice, in the absence of proof to the contrary intention, is sufficient to negate the intention to dedicate the way as a highway.

Should it be considered that the user evidence submitted in support of the application shows that the route has been used as of right for a period of 20 years or more to meet the statutory tests as set out in sections 31(1) and (2) of the Highways Act 1980, it is necessary to consider whether there is evidence of no intention to dedicate by the landowner during the relevant period in accordance with section 31(3).

If, an Order is made, and subsequently receives an objection and which remains unwithdrawn, the Order is required to be sent to the Secretary of State for determination. If an Informal Hearing or Public inquiry is convened, the authority will be required to facilitate any hearing or inquiry.

If, an Order is not made, the applicants may serve notice of appeal on the Secretary of State and the authority: this must be done within 28 days of service of notice of the decision on the applicant. If the Secretary of State allows the appeal, the authority will be directed to make an Order. Therefore, officers must inform the applicant of the authority's decision, and the appeal process and relevant timescales.

- **Crime and Disorder**

When determining a definitive map modification order application, issues such as safety and security, whilst genuine concerns are not allowed to be taken into consideration.

- **Information Technology (IT)**

There are no IT implications.

- **Property**

There are no property implications.

- **Other**

There are no other known implications.

Risk Management

10. The risk to the authority is a potential legal challenge. The basis on which a challenge could be made is that the evidence of use in support of the Order does not represent a wider cross-section of the community.

Contact Details

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**Report
Approved**

Date 21
November
2016

Specialist Implications Officer

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Wards Affected: Rural West York Ward

For further information please contact the author of the report

Background Papers:

Definitive Map Modification Order file: Askham Fields Lane, Askham Bryan.

Annexes

Annex 1: Location Plan and DMMO application plan

Annex 2: The Planning Inspectorate WCA 81 Definitive Map Orders: Consistency Guidelines, Section 5

Annex 3: Evidence of User forms

Annex 4: Crail, R. (2006) 'The significance of user evidence.' Rights of Way Law Review, section 9.2, pp. 1 – 5. [Available on application from Officer]

Annex 5: Community Impact Assessment