

**Decision Session- Executive Member for
Transport & Planning**

14 July 2016

Report of the Director of City and Environmental Services

**Definitive Map Modification Order (DMMO) application to add a
footpath to the Definitive Map and Statement: Hoisty Field, Fulford.**

Summary

1. A definitive map modification order application has been received, supported by 19 evidence of user forms (UEFs). The claimed route is located at Hoisty Field, Fulford (Annex 1: Location Plan). The Planning Inspectorate produces guidance to assist in the interpretation of the Wildlife & 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', representative of the people as a whole or the community in general.
2. In this case, the user evidence supplied in support of the application by a very limited number of local people is insufficient to be regarded as use by the public. The report therefore recommends that the Authority declines to make an Order on the basis that the application criteria has not been met.

Recommendations

2. The Executive Member is asked to consider:
 - 1) Option A - The Authority does not make an Order. This option is recommended.

Reason: The supporting evidence of use does not meet the application criteria.
 - 2) Option B – The Authority makes an Order. This option is not recommended.

Reason: The making of an Order lies outside the application criteria for a definitive map modification order that is supported by evidence of user.

Background

A DMMO application was received in January 2012 under the provisions of section 53 of the Wildlife and Countryside Act 1981. The claimed route commences at its junction with Public Footpath No.8 Fulford Parish, and proceeds in a generally northerly direction to exit onto Landing Lane (Annex 1: Location Plan). The application relies upon 19 UEFs (Annex 3) to support the claim that a public right of way subsists or is reasonably alleged to subsist.

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 continually for the requisite period, on the balance of probabilities. The burden of proving this falls to the applicant. In determining the application, matters relating to suitability and condition of a route and possible need or nuisance are irrelevant and cannot be taken into account.

Prior to the receipt of the DMMO application, the land over which the claimed public footpath crosses, had been sold, and the new landowner has since carried out fencing works to secure the boundary. It appears that this has brought the status of the route into question for the purposes of section 31 of the Highways Act 1980.

In the case of non-determination of a DMMO application by the surveying authority, the applicant can apply to the Secretary of State for a direction requiring the local authority to determine a claim if it has not done so within 12 months of the date of receipt of the application. In this instance, the Secretary of State has directed the authority to determine the DMMO Order. If, there had been no direction from the Secretary of State, the DMMO Order 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

4. 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 has taken place with the request to clarify some details stated within their use of evidence forms.

A signed copy of a statement from the landowner's representative has been received from solicitors on behalf of the landowner and is attached at Annex 7.

Options

5. 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 – Not to authorise the Assistant Director of Governance and ICT to make a Definitive Map Modification 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 – 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

6. A Modification Order should be made if evidence shows that a public right of way exists. The evidence in support of the application is of claimed public use and the application has been considered under section 31 Highways Act 1980.

The UEFs claim use of the route in excess of 20 years. Whilst it is not necessary for all claimants to demonstrate continuous use

throughout the 20 year period, they must demonstrate that the use has been made by the public continually during that period. The main issue in this case is whether the evidence demonstrates use “by the public”.

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. This 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:

Attached at Annex 5, is a location plan, indicating the residential addresses of 12 users who support the application: of the other users, one resides in Huntington, 4 reside in Essex and 2 in Surrey. Most of the users live in close proximity to the claimed route: the majority of these property addresses are situated at the southern end of Fulford village. Additionally, 10 of the 19 UEFs submitted are from individuals who live at the same 5 postal addresses.

The available user evidence is very limited in view of the location of the route in the immediate vicinity of a residential area. It is considered that use by such a limited range of individuals is not use by the public representative of the people as a whole, or the community in general. The very small number of individuals who claim to have used this route ‘as of right’ does not suggest that the route has a reputation within the immediate area as a public right of way or that the path has actually been used by the public.

It is concluded that there is insufficient user evidence to demonstrate that the public footpath rights exist on the claimed as required by section 31 of the Highways Act 1980.

5.

Option A – Not to make an Order

If the authority decides not to make an Order, the applicant 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. The Secretary of State will appoint an Inspector to consider the appeal. If the Secretary of State allows the appeal, the authority will be directed to make an Order

Option B – To make an Order

Bearing the above information in mind, this option is not recommended as it would go against the interpretation guidance of current statutory legislation on the subject of user evidence. However, if the decision is to make an Order, it would be advertised. 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 by means of either written representations, an Informal Inquiry, or a Public Inquiry .

Council Plan 2015 - 2019

7. 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 residents first and meets 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 clarify the details within, before final analysis, whilst being mindful of, and adhering to, existing statutory legislation.

Implications

8. Financial

If the decision is to make an Order to add the footpath to the definitive map and statement (Option B), 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, the Order must be sent to the Secretary of State for determination. This will result in the Order being determined by either, written representations; a local 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 hearing or 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 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 applicant to make an appeal to the Secretary of State.

A Community Impact Assessment has been carried out (Annex 6). The impact is considered to be positive, subject to meeting the legislative criteria, in that evidence of user that supports a definitive map modification order 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 to make

an order if it is considered that a public footpaths 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 and 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 a 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 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 of a contrary intention, is sufficient evidence 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) Highways Act 1980, it will be necessary to further 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, the Order is required to be sent to the Secretary of State for determination. If a local hearing or public inquiry is convened, the authority will be required to facilitate any hearing or public inquiry.

If, an Order is not made, the applicant 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

9. 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

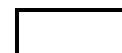


Date 4 July 2016

Specialist Implications Officer(s)

Legal- Sandra Branigan
551040

Wards Affected: Fulford



For further information please contact the author of the report

Background Papers:

Definitive Map Modification Order application file: Hoisty Field, Fulford.

Annexes

Annex 1: Location plan

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

Annex 3: User Evidence 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: **THIS ANNEX IS EXEMPT** Location of residential properties

Annex 6: Community Impact Assessment

Annex 7: Signed statement from landowners representative