



**PUBLIC FOOTPATH ACASTER MALBIS 9 & PUBLIC FOOTPATH
BISHOPTHORPE 3 MODIFICATION ORDER 2019**

STATEMENT OF CASE

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PLANNING INSPECTORATE REFERENCE: [To be advised]

Introduction

1. This document comprises the Statement of Grounds and Statement of Case of the Council of the City of York for the order Public Footpath Acaster Malbis 9 & Public Footpath Bishopthorpe 3 Modification Order 2019 (“the Order”). The Council is the order making authority (“the OMA”).
2. The order is the subject of one objection from Bishopthorpe Parish Council (see appendix 2).
3. The OMA has been unable to secure the withdrawal of this objection to the Order and consequently is referring it to the Secretary of State for determination.

Factual Background

4. The route shown in the Order (“the Order Route”) runs from public footpath Acaster Malbis 3 to the maintainable highway known as Ferry Lane in Bishopthorpe. The Order Route is noted within the order as public footpath Kexby 19.
5. The OMA received several applications to record part or all of the Order Route between 1994 and 2006. The applicant in all cases was Bishopthorpe Parish Council. The applications were supported by user evidence forms.
6. The OMA made the Order on 10 October 2019 and the statutory consultation ran between 28 October 2019 and 9 December 2019 during which one duly made objection was received by the OMA.

Legal Framework

7. Section 53(2) of the Wildlife & Countryside Act 1981 (“WCA 1981”) requires surveying authorities to keep definitive maps and statements under review. This provision states as follows:

“As regards every definitive map and statement, the surveying authority shall –

a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.”

8. The OMA is the relevant “surveying authority”.

9. The order was made on the grounds that an event set out in section 53(3)(c)(i) of the WCA 1981 had occurred. This provision states as follows:

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.”

10. Section 55(3) of the Wildlife & Countryside Act 1981 (“WCA 1981”) requires that for formerly excluded areas:

“...the surveying authority shall prepare for that area a map and statement such that, when they have been modified in accordance with the provisions of the Part, they will serve as the definitive map and statement for that area.”

11. As regards to relevant evidence section 31(1) of the Highways Act 1980 (“HA 1980”) states:

“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 of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

12. Section 31(9) of the HA 1980 expressly states that a highway (and so a public footpath) can be established at common law, as well as pursuant to the statutory test in section 31(1):

“Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less than 20 years, or being presumed or proved in circumstances in which it might have been presumed or proved immediately before the commencement of this Act.”

13. Therefore, in relation to user evidence, the requisite period for the purpose of meeting the requirements of s53(3)(c)(i) WCA 1981 can be either of the following:

- i. 20 years, such that the relevant tests set out in section 31 of the HA 1980 have been met (the “Statutory Test”)

or

- ii. A period of use such that an intention to dedicate the land as a public right of way can be demonstrated (the “Common Law Test”)

See: para 4.4 of Rights of Way Circular 1/09 and para 53 of Planning Inspectorate Advice Note 9.

The Evidence

User evidence

14. The order is supported by thirteen user evidence forms attesting to the use of the Order Route by thirteen people between 1931 and 1994 (see appendix 5).

15. All thirteen users claim use of the route for a period of twenty or more years (see appendix 5 for a graph illustrating the use period).
16. All thirteen people claim use of the Order Route on foot.
17. Two users claim to have used the route on foot every week. Four users claim to have used the route every month. The remaining seven people used the Order Route less frequently.
18. No user reports coming across gates, stiles or other obstructions when they were using the Order Route. Nor do they report seeing any signs along the Order Route.
19. No users report ever having been challenged by any of the land owners or tenants during the 63 years use claimed by the user evidence statements.
20. In addition none of the users record ever having received permission from a land owner or tenant to use the Order Route.
21. The width of the route, where reported, was variously recorded between two feet and eight feet.

Documentary evidence

22. No documentary evidence was submitted with any of the DMMO applications.
23. The Order Route appears on every old Ordnance Survey map the OMA has available along with all the aerial photographs that cover the area around the Order Route (see appendix 15 and appendix 16).

Consideration of the evidence

User evidence

24. User evidence can be considered under section 31 of the Highways Act 1980 (“the Statutory Test”) or under the Common Law Test.

The statutory test

25. Under section 31 of the Highways Act 1980 any route that is used by the public for a period of 20 or more years (“the Statutory Period”) becomes a public right of way

(PRoW) unless the land owner can demonstrate they had no intention to dedicate as a PRoW.

26. The relevant 20 year period under consideration is defined by the submission of the first DMMO application in 1994; this being the first credible event that called the public's right to use the route into question.

27. This sets the Statutory Period that relevant evidence must fall in as 1974 – 1994.

28. All thirteen users fall within the Statutory Period and are all people evidencing use of the Order Route on foot. Therefore, the OMA believes any rights established through use would be for pedestrians only.

29. Establishment of a PRoW through use requires a number of conditions to be met. First, the use must not be made by force. Second, the use must be open. Third, the use must be done without permission from the land owner. These three conditions taken together are referred to "as of right" use.

30. In addition to being as of right, the use must also be of sufficient quantity that the owner of the land is aware that the public are asserting a right of way over the Order Route.

31. Finally, the route must be used by the public at large, not a particular group.

Use by force

32. There is no suggestion in the evidence from the users or the objector that the Order Route was ever accessed by force.

Use by stealth

33. There is no suggestion in the evidence from the users or the objector that any actions were taken to attempt to conceal the use of the Order Route.

Use by permission

34. There is no suggestion in the evidence from the users or the objector that use of the Order Route was done with permission.

35. The OMA is satisfied that there are thirteen users who can claim as of right use for the full Statutory Period.

Frequency of use

36. As set out at paragraph 17 above, the user evidence forms show that the Order Route was used by almost half of the people at least every month.

37. None of the available documentary evidence contradicts the implication of the user evidence that the Order Route was used during the Statutory Period.

38. Taken in isolation, the OMA is not satisfied that the frequency of use alleged by the thirteen people would be sufficient to alert a land owner to the fact a right was being asserted over their land.

39. However, examination of all the photographs clearly show a very well used route (see appendix 17 and appendix 18).

40. Taking the user evidence together with the photographic evidence the OMA is satisfied that, on the balance of probabilities, the owners of the land were aware the public was asserting a right of way over the land.

Use by the public at large

41. The diversity of the user evidence is sufficient to demonstrate that, on the balance of probabilities, the Order Route was used by the public at large.

42. As a result the OMA is satisfied that the Statutory Test set out in Section 31(1) of the Highways Act 1980 has been met and that, on the balance of probabilities, a right of way for pedestrians exists over the Order Route.

Evidence indicating a lack of intention to dedicate

43. No evidence indicating a lack of intention to dedicate the Order Route has been adduced. The OMA has not been able to find any evidence of a lack of intention to dedicate.

Documentary evidence

44. The Order Route is shown on all the old Ordnance Survey (“OS”) maps available to OMA including those predating the OS disclaimer about public rights of way (see appendix 15).
45. The Order Route is variously noted as “Towing Path” or “Path” the former being generally found on the older maps.
46. Like the photographs, the OS maps support the existence of a path on the ground.

Common Law dedication

47. Dedication of a PRoW at common law can happen in two ways: explicit dedication by the land owner, or inference of dedication through long, unopposed as of right use by the public. In both cases the public need to accept the route so dedicated. This is usually demonstrated by use of the route
48. The OMA has found no evidence of explicit dedication of the Order Route.
49. The user evidence and old OS maps indicate that the route has been in existence since at least 1851 with documented use happening since 1931.
50. That being said OMA considers that, while the available evidence supports the existence of the Order Route as a public footpath, there is insufficient evidence to indicate dedication at Common Law on the balance of probabilities.

Evidence refuting dedication at Common Law

51. No evidence refuting dedication of the Order Route at Common Law has been found by either the applicant or the OMA.

Comment on the objection

52. The single duly made objection was received from Bishopthorpe Parish Council. The full text of the objection can be found at appendix 2. The OMA’s comments on the objections can be found in the sub paragraphs following the summary of the objection.

53. The objection of Bishopthorpe Parish Council was made on the ground that the OMA was wrong to have omitted the part of the route shown in their application that runs through St Andrew's Church Bishopthorpe.

- a) As the objection does not relate to the Order under consideration the OMA respectfully asks the Inspector to consider setting the objection aside using s15 (7) (2a) of the Wildlife and Countryside Act 1981.
- b) That being said, the OMA considers that the Parish Council's position has some merit and as such a brief over view of the excluded part of the application route is set out at the end of this statement of case.

Conclusion

54. The OMA's view is that there is sufficient evidence to support the existence of the Order Route as a public footpath on the balance of probabilities.

55. Therefore the OMA respectfully asks the Secretary of State to confirm the Order.

The Council of the City of York

October 2021

The route through St Andrew's Church, Bishopthorpe

- i. The information relating why the OMA omitted part of the application is set out in the report presented to the Executive Member for Transport, a copy of which can be found at appendix 19.
- ii. In response to this report and the OMA's decision the Parish Council submitted a number of pieces of evidence to support their position that the OMA was wrong to omit the section through the church. These, along with other documents giving a contrary position, can be found at appendix 20.
- iii. The OMA's decision to omit the section of the application route through St Andrew's Church has also been subject of a Schedule 14 appeal. This appeal was

rejected because an order was made in response to the application. The documents relating to the appeal can be found at appendix 21.

- iv. As this is the first time the OMA has been in this position it is not sure what options the Inspector may consider they have at their disposal.
- v. If the Inspector would like copies of any evidence set out in the report mentioned at paragraph i. above but not included as part of this statement of case, the OMA would be more than happy to provide them.