



CITY OF  
**YORK**  
COUNCIL

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

**STATEMENT OF CASE APPENDICES**

## Appendices index

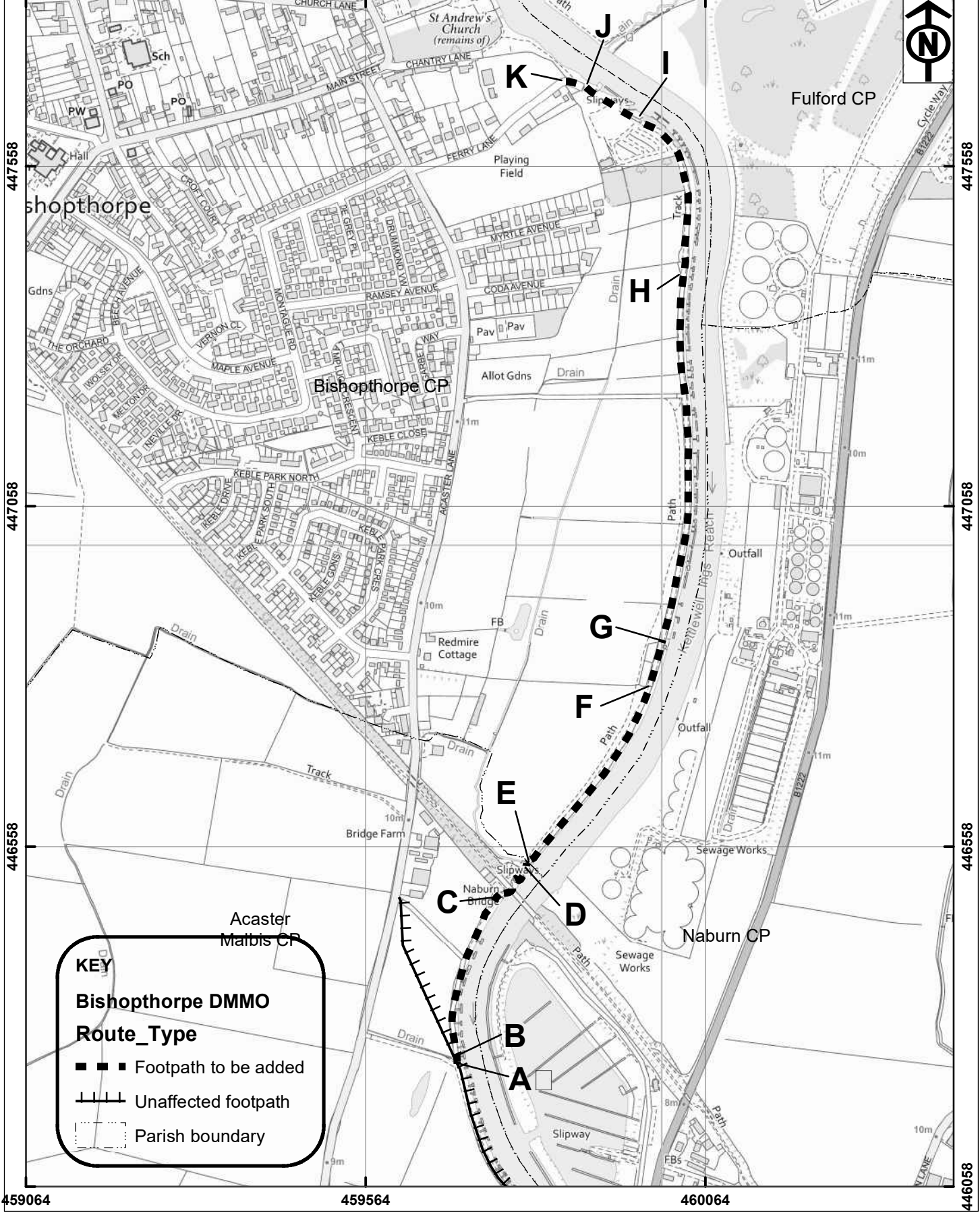
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## **Appendix 1**

### **Copy orders**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

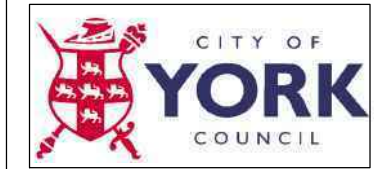


**KEY**

**Bishopthorpe DMMO**

**Route\_Type**

- ■ ■ Footpath to be added
- — — Unaffected footpath
- ⋯⋯⋯ Parish boundary



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

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

Scale 1:7,500	Drawn By:RJV	Date:15/10/19
Public Rights of Way	Reference:	Drawing No.

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**THE COUNCIL OF THE CITY OF YORK**

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE COUNCIL OF THE CITY OF YORK (PART OF THE FORMER NO 2 AREA OF  
THE COUNTY OF THE WEST RIDING OF YORKSHIRE) DEFINITIVE MAP AND  
STATEMENT**

**PUBLIC FOOTPATH ACASTER MALBIS 9 & PUBLIC FOOTPATH BISHOPTHORPE 3  
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Interim Assistant Director - Legal & Governance  
City of York Council  
West Offices  
Station Rise  
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This Order is made by The Council of the City of York under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to the authority that the Council of the City of York (Part of the former No 2 Area of the County of the West Riding of Yorkshire) Definitive Map and Statement require modification in consequence of the occurrence of an event specified in Section 53(3)(c)(i). This is due to 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.

The authority has consulted with every local authority whose area includes the land to which the Order relates. The Council of the City of York hereby Order that:

1. For the purpose of this Order the relevant date is 8 October 2019.
2. The Council of the City of York (Part of the former No 2 Area of the County of the West Riding of Yorkshire) Definitive Map and Statement shall be modified as described in Part I and Part II of the Schedule and shown on the Map attached to the Order.
3. This Order shall take effect on the date it is confirmed and may be cited as the Public Footpath Acaster Malbis 9 & Public Footpath Bishopthorpe 3 Modification Order 2019.

**THE COMMON SEAL** of **THE COUNCIL OF THE CITY OR YORK** was hereunto affixed

this 10<sup>th</sup> day of October 2019

in the presence of:



Cadle

An Authorised Officer

No. In Seal Register: 11855

**SCHEDULE  
PART I**

**Modification of Definitive Map  
Description of path or way to be added**

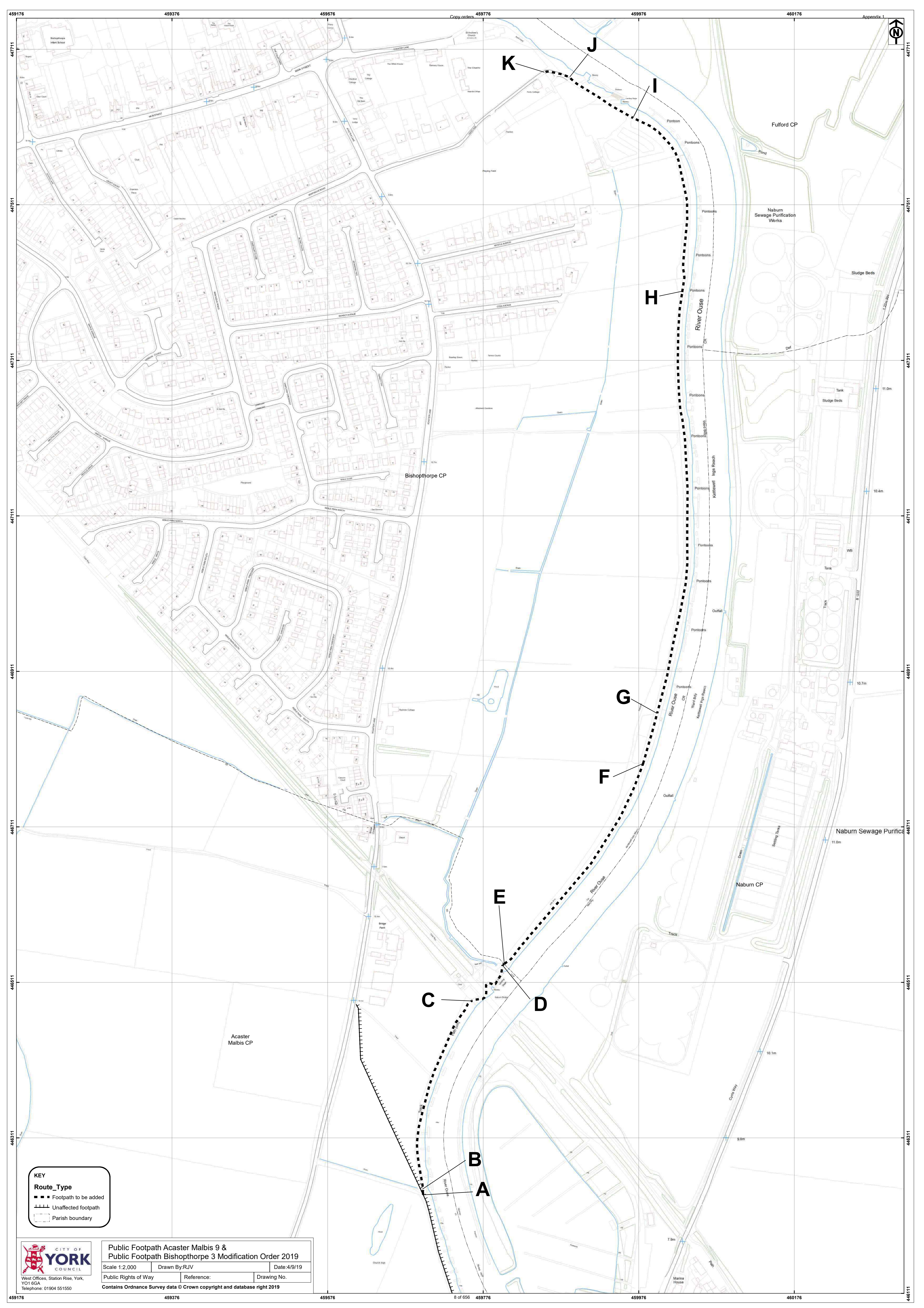
<u>Section of footpath as shown on the attached Map</u>	<u>Description</u>
<p><b>Acaster Malbis 9</b> Indicated on the Order Map and marked as <b>A – B – C – D – E</b></p>	<p>Commencing at grid reference (GR) SE 5969 4623 (POINT A) on public footpath Acaster Malbis 3 the 3 metre wide grass surfaced footpath heads north for approximately 3 metres to GR SE 5969 4623 (POINT B) where it crosses a stile from where the 3 metre wide grass surfaced footpath continues generally north east for approximately 262 metres on the western bank of the River Ouse to a stile at GR SE 5976 4648 (POINT C) from where the 1 metre wide earth surfaced path continues generally north east along the western bank of the River Ouse for approximately 75 metres crossing a concrete slipway then passing beneath the former railway bridge known as Naburn Bridge then crossing a second concrete slipway then reaching a 1 metre wide gap at GR SE 5980 4653 (POINT D) from where the 3 metre wide grass surfaced footpath continues north east for approximately 3 metres to the Bishopthorpe Parish boundary at GR SE 5980 4653 (POINT E) where it meets public footpath Bishopthorpe 3.</p>
<p><b>Bishopthorpe 3</b> Indicated on the Order Map and marked as <b>E – F – G – H – I – J – K</b></p>	<p>Commencing on the Acaster Malbis Parish boundary at its junction with public footpath Acaster Malbis 9 at grid reference (GR) SE 5980 4653 (POINT E) the 3 metre wide grass surfaced footpath heads north east along the western bank of the River Ouse for approximately 319 metres to GR SE 5998 4679 (POINT F) where it passes through a pedestrian gate and the 2 metre wide crushed stone surfaced footpath continues generally north along the western bank of the River Ouse for approximately 68 metres to GR SE 6000 4685 (POINT G) where the path widens to be a 2.5 metre wide crushed stone surfaced footpath continuing north along the western bank of the River Ouse for approximately 544 metres to a 0.8 metre gap beside a vehicle barrier at GR SE 6003 4739 (POINT H) from where the 2.5 metre wide crushed stone surfaced footpath continues generally north west along the western bank of the River Ouse for approximately 257 metres to GR SE 5996 4762 (POINT I) where the surface changes to metalled and the 2.5 metre metalled surface footpath continues north west along the western bank of the River Ouse for approximately 97 metres to SE 5988 4767 (POINT J) where it passes through a 0.9 metre wide gap beside a vehicle barrier following which the metalled surface footpath widens to 4 metres and heads west for approximately 34 metres to SE 5985 4768 (POINT K) where it meets the maintainable highway known as Ferry Lane.</p>

PART IIModification of Definitive Statement  
Variation of Particulars of path or way

Path No.	Grid Reference End Points	Description	Nature of Surface	Length (Km)	Width (M)	Lawful Obstructions And Conditions
9	SE 5969 4623 to SE 5980 4653	Commencing at grid reference (GR) SE 5969 4623 on public footpath Acaster Malbis 3 the 3 metre wide grass surfaced footpath heads north for approximately 3 metres to GR SE 5969 4623 where it crosses a stile from where the 3 metre wide grass surfaced footpath continues generally north east for approximately 262 metres on the western bank of the River Ouse to a stile at GR SE 5976 4648 from where the 1 metre wide earth surfaced path continues generally north east along the western bank of the River Ouse for approximately 75 metres crossing a concrete slipway then passing beneath the former railway bridge known as Naburn Bridge then crossing a second concrete slipway then reaching a 1 metre wide gap at GR SE 5980 4653 from where the 3 metre wide grass surfaced footpath continues north east for approximately 3 metres to the Bishopthorpe Parish boundary at GR SE 5980 4653 where it meets public footpath Bishopthorpe 3.	Grass (SE 5969 4623 to SE 5976 4648)  Earth (SE 5976 4648 to SE 5980 4653)  Grass (SE 5980 4653 to SE 5980 4653)	0.265km (SE 5969 4623 to SE 5976 4648)  0.075km (SE 5976 4648 to SE 5980 4653)  0.003km (SE 5980 4653 to SE 5980 4653)  Total 0.343km	3 metres (SE 5969 4623 to SE 5976 4648)  1 metre (SE 5976 4648 to SE 5980 4653)  3 metres (SE 5980 4653 to SE 5980 4653)	Stile at SE 5969 4623  Stile at SE 5976 4648  Gap at SE 5980 4653



Path No.	Grid Reference End Points	Description	Nature of Surface	Length (Km)	Width (M)	Lawful Obstructions And Conditions
3	SE 5980 4653 to SE 5985 4768	Commencing on the Acaster Malbis Parish boundary at its junction with public footpath Acaster Malbis 9 at grid reference (GR) SE 5980 4653 the 3 metre wide grass surfaced footpath heads north east along the western bank of the River Ouse for approximately 319 metres to GR SE 5998 4679 where it passes through a pedestrian gate and the 2 metre wide crushed stone surfaced footpath continues generally north along the western bank of the River Ouse for approximately 68 metres to GR SE 6000 4685 where the path widens to be a 2.5 metre wide crushed stone surfaced footpath continuing north along the western bank of the River Ouse for approximately 544 metres to a 0.8 metre gap beside a vehicle barrier at GR SE 6003 4739 from where the 2.5 metre wide crushed stone surfaced footpath continues generally north west along the western bank of the River Ouse for approximately 257 metres to GR SE 5996 4762 where the surface changes to metalled and the 2.5 metre metalled surface footpath continues north west along the western bank of the River Ouse for approximately 97 metres to SE 5988 4767 where it passes through a 0.9 metre wide gap beside a vehicle barrier following which the metalled surface footpath widens to 4 metres and heads west for approximately 34 metres to SE 5985 4768 where it meets the maintainable highway known as Ferry Lane.	Grass (SE 5980 4653 to SE 5998 4679)  Crushed stone (SE 5998 4679 to SE 5996 4762)  Metalled (SE 5996 4762 to SE 5985 4768)	0.319km (SE 5980 4653 to SE 5998 4679)  0.869km(S E 5998 4679 to SE 5996 4762)  0.131km (SE 5996 4762 to SE 5985 4768)  Total 1.319km	3 metres (SE 5980 4653 to SE 5998 4679)  2 metres (SE 5998 4679 to SE 6000 4685)  2.5 metres (SE 6000 4685 to SE 5988 4767)  4 metres (SE 5988 4767 to SE 5985 4768)	Pedestrian gate at SE 5998 4679  0.8 metre gap at SE 6003 4739  0.9 metre gap at SE 5988 4767



**KEY**

**Route\_Type**

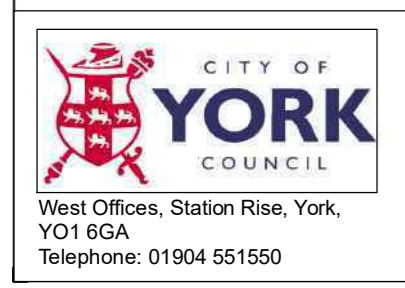
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- Unaffected footpath
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**Public Footpath Acaster Malbis 9 & Public Footpath Bishopthorpe 3 Modification Order 2019**

Scale 1:2,000    Drawn By:RJV    Date:4/9/19

Public Rights of Way    Reference:    Drawing No.

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Appendix 1

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447511

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459976

460176

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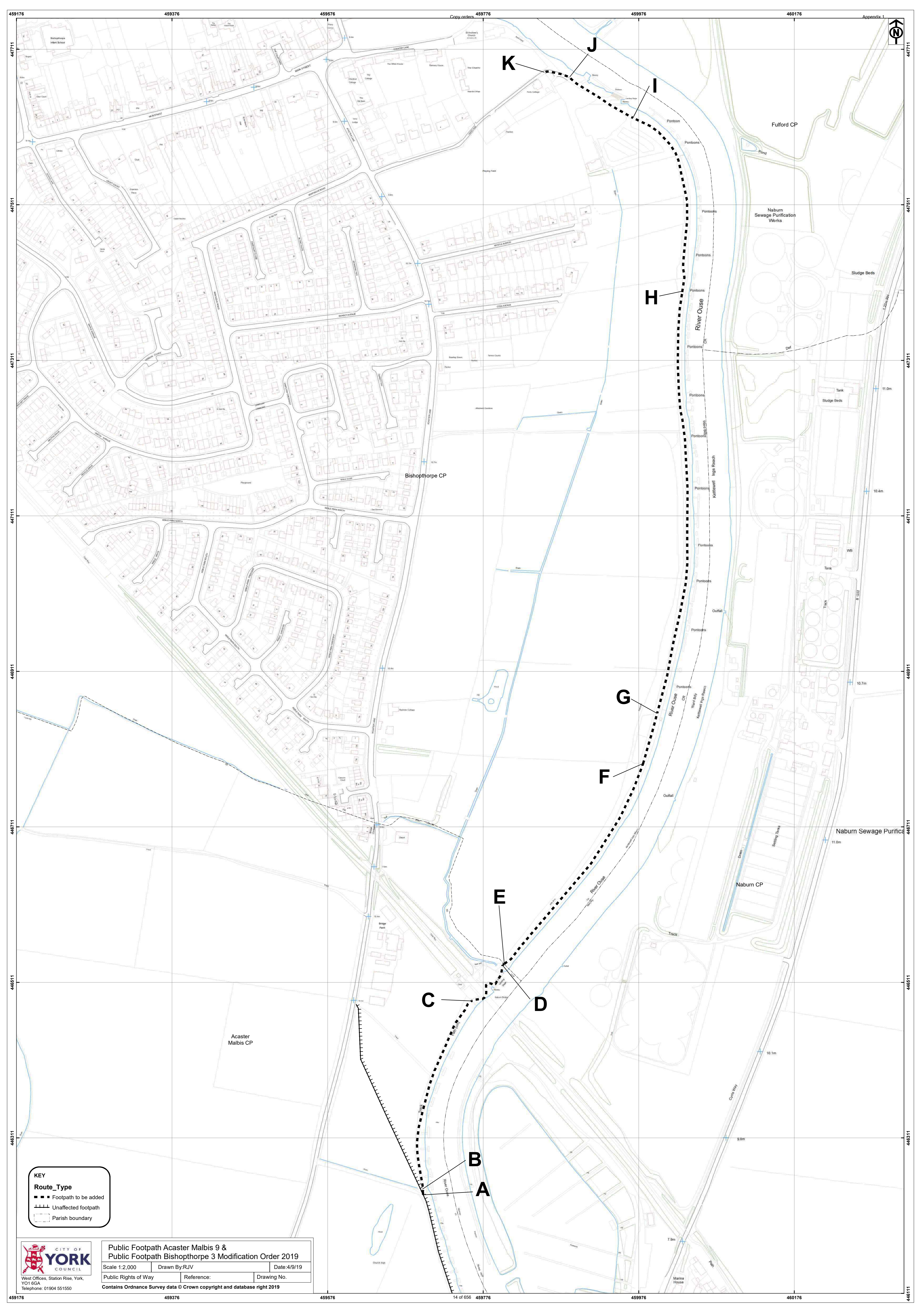
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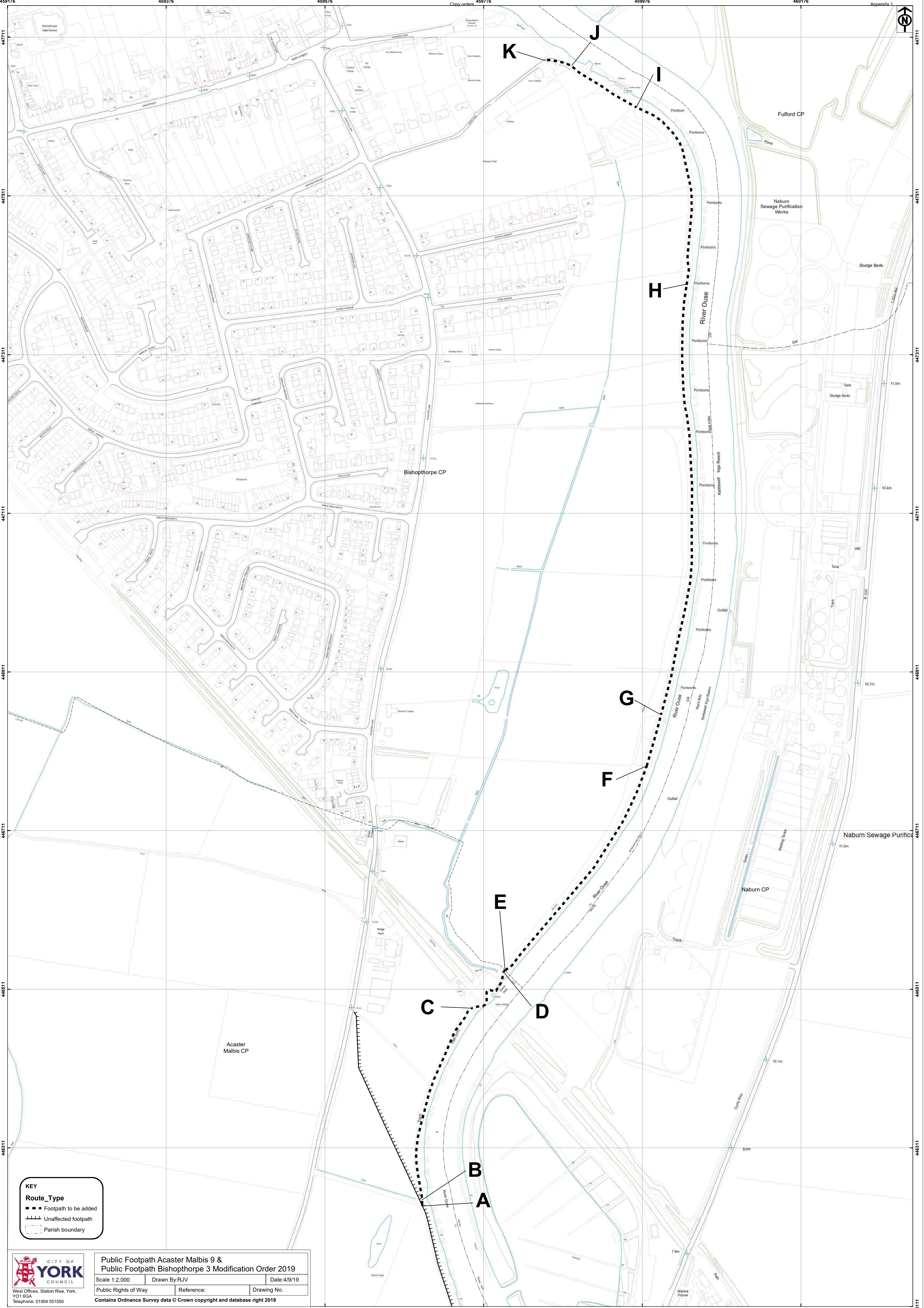
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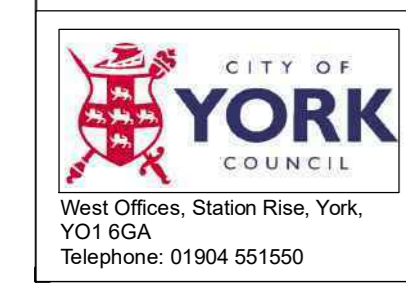
Path No.	Grid Reference End Points	Description	Nature of Surface	Length (Km)	Width (M)	Lawful Obstructions And Conditions
3	SE 5980 4653 to SE 5985 4768	Commencing on the Acaster Malbis Parish boundary at its junction with public footpath Acaster Malbis 9 at grid reference (GR) SE 5980 4653 the 3 metre wide grass surfaced footpath heads north east along the western bank of the River Ouse for approximately 319 metres to GR SE 5998 4679 where it passes through a pedestrian gate and the 2 metre wide crushed stone surfaced footpath continues generally north along the western bank of the River Ouse for approximately 68 metres to GR SE 6000 4685 where the path widens to be a 2.5 metre wide crushed stone surfaced footpath continuing north along the western bank of the River Ouse for approximately 544 metres to a 0.8 metre gap beside a vehicle barrier at GR SE 6003 4739 from where the 2.5 metre wide crushed stone surfaced footpath continues generally north west along the western bank of the River Ouse for approximately 257 metres to GR SE 5996 4762 where the surface changes to metalled and the 2.5 metre metalled surface footpath continues north west along the western bank of the River Ouse for approximately 97 metres to SE 5988 4767 where it passes through a 0.9 metre wide gap beside a vehicle barrier following which the metalled surface footpath widens to 4 metres and heads west for approximately 34 metres to SE 5985 4768 where it meets the maintainable highway known as Ferry Lane.	Grass (SE 5980 4653 to SE 5998 4679)  Crushed stone (SE 5998 4679 to SE 5996 4762)  Metalled (SE 5996 4762 to SE 5985 4768)	0.319km (SE 5980 4653 to SE 5998 4679)  0.869km(S E 5998 4679 to SE 5996 4762)  0.131km (SE 5996 4762 to SE 5985 4768)  Total 1.319km	3 metres (SE 5980 4653 to SE 5998 4679)  2 metres (SE 5998 4679 to SE 6000 4685)  2.5 metres (SE 6000 4685 to SE 5988 4767)  4 metres (SE 5988 4767 to SE 5985 4768)	Pedestrian gate at SE 5998 4679  0.8 metre gap at SE 6003 4739  0.9 metre gap at SE 5988 4767



**KEY**

**Route\_Type**

- Footpath to be added
- Unaffected footpath
- Parish boundary



**Public Footpath Acaster Malbis 9 & Public Footpath Bishopthorpe 3 Modification Order 2019**

Scale 1:2,000	Drawn By: RJV	Date: 4/9/19
Public Rights of Way	Reference:	Drawing No.

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Appendix 1

447711

447511

447311

447111

446911

446711

446511

446311

446111

445911

459176 459376 459576 459776 459976 460176

## **Appendix 2**

### **List of objectors, objections and representations**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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

**NAME AND ADDRESS OF ALL PERSONS MAKING REPRESENTATIONS OR  
OBJECTIONS**

Bishopthorpe Parish Council  
3 Appleton Court  
Bishopthorpe  
York  
YO23 2RY

bpclerk@aol.com

Rights of Way  
City of York Council  
West Offices  
YORK  
YO1 6GA



**Varley, Russell**

---

**From:** Stewart Harrison <sphyork@aol.com>  
**Sent:** 03 December 2019 22:16  
**To:** rightsoway@york.gov.uk  
**Cc:** Varley, Russell  
**Subject:** PUBLIC FOOTPATH ACASTER MALBIS 9 & PUBLIC FOOTPATH BISHOPTHORPE 3

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear Sir,

Bishopthorpe Parish Council would like to object to the path from Chantry Lane Bishopthorpe to Ferry Lane Bishopthorpe being excluded from this application to form a Public Footpath on the grounds that it is consecrated land.

It is debatable whether the path is, or ever has been, consecrated land but the Legal Advisory Commission to the General Synod gave the following advice:

Public Rights of way over land forming part of a churchyard:

"The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated a highway under section 31 of the Highways Act 1980"

Yours faithfully,

Stewart Harrison  
Chairman - Bishopthorpe Parish Council

## **Appendix 3**

### **Notice and advert**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

**NOTICE OF THE MAKING OF A DEFINITIVE MAP MODIFICATION ORDER****THE COUNCIL OF THE CITY OF YORK****WILDLIFE AND COUNTRYSIDE ACT 1981****THE COUNCIL OF THE CITY OF YORK (PART OF THE FORMER NO 2 AREA OF THE COUNTY OF THE WEST RIDING OF YORKSHIRE) DEFINITIVE MAP AND STATEMENT****PUBLIC FOOTPATH ACASTER MALBIS 9 & PUBLIC FOOTPATH BISHOPTHORPE 3  
MODIFICATION ORDER 2019**

The above Order, made on 10 October 2019, if confirmed as made, will modify the definitive map and statement for the area by adding a public footpath between public footpath Acaster Malbis 3 and Ferry Lane, Bishopthorpe (SE 5969 4623 to SE 5985 4768).

A copy of the Order as made and the Order Map may be seen free of charge during normal office hours at City of York Council, West Offices, Station Rise, York, YO1 6GA until 9 December 2019. Copies of the Order and Map may be purchased there at a cost of £1.50, or can be downloaded free from our website [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap).

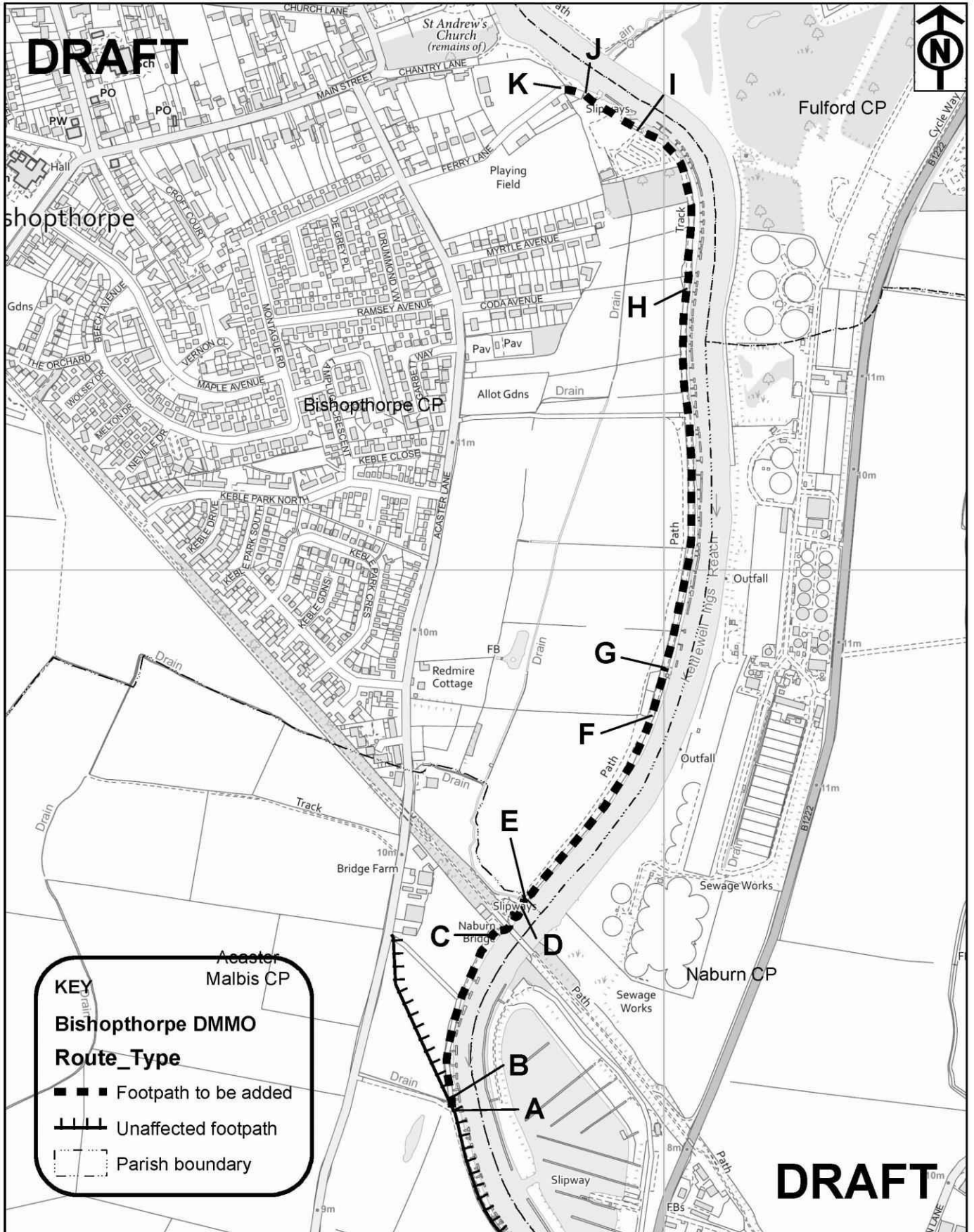
Any representation or objection relating to the Order must be sent in writing to "the Rights of Way Officer, the Council of the City of York, West Offices, Station Rise, York, YO1 6GA", no later than 9 December 2019, stating the grounds on which it is made.

Please note that objections/representations cannot be treated as confidential and will come into the public domain. Copies of any objections or representations received will be disclosed to interested parties, including the Planning Inspectorate where the case is referred to it for determination.

If no representations or objections are duly made to the Order, or to any part of it, or if any so made are withdrawn, the Council of the City of York, instead of submitting the Order to the Secretary of State or part of it if the Authority has by Notice to the Secretary of State so elected under paragraph 5 of Schedule 15 to the Wildlife and Countryside Act 1981 may itself confirm the Order or that part of the Order. If the Order is submitted to the Secretary of State for the Environment, in whole or in part, any representations or objections which have been duly made and not withdrawn will be sent with it.

Dated: 28 October 2019

Suzan Harrington  
Interim Assistant Director - Legal & Governance  
City of York Council  
West Offices  
Station Rise  
York  
YO1 6GA



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

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

Scale 1:7,500

Drawn By:RJV

Date:11/10/19

Public Rights of Way

Reference:

Drawing No.

**Contains Ordnance Survey data © Crown copyright and database right 2019**

**Notice of the making of a Definitive Map  
Modification Order**

**The Council of the City of York**

**Wildlife & Countryside Act 1981**

**The Council of the City of York (part of the  
Former No 2 Area of the County of the  
West Riding of Yorkshire) Definitive Map and  
Statement**

**Public Footpath Acaster Malbis 9 &**

**Public Footpath Bishopthorpe 3 Modification  
Order 2019**

The above Order, made on 10 October 2019, if confirmed as made, will modify the definitive map and statement for the area by adding a public footpath between public footpath Acaster Malbis 3 and Ferry Lane, Bishopthorpe (SE 5969 4623 to SE 5985 4768).

A copy of the Order as made and the Order Map may be seen free of charge during normal office hours at City of York Council, West Offices, Station Rise, York, YO1 6GA until 9 December 2019. Copies of the Order and Map may be purchased there at a cost of £1.50, or can be downloaded free from our website [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap).

Any representation or objection relating to the Order must be sent in writing to "the Rights of Way Officer, the Council of the City of York, West Offices, Station Rise, York, YO1 6GA", no later than 9 December 2019, stating the grounds on which it is made. Please note that objections/representations cannot be treated as confidential and will come into the public domain. Copies of any objections or representations received may be disclosed to interested parties, including the Planning Inspectorate where the case is referred to it for determination.

If no representations or objections are duly made to the Order, or to any part of it, or if any so made are withdrawn, the Council of the City of York, instead of submitting the Order to the Secretary of State or part of it if the Authority has by Notice to the Secretary of State so elected under paragraph 5 of Schedule 15 to the Wildlife and Countryside Act 1981 may itself confirm the Order or that part of the Order. If the Order is submitted to the Secretary of State for the Environment, in whole or in part, any representations or objections which have been duly made and not withdrawn will be sent with it

Dated: 28 October 2019 of 656

Suzan Harrington

Interim Assistant Director - Legal & Governance

## **Appendix 4**

### **Certificate of serving notice and consultation**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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

**STATEMENT**

I am an employee of City of York Council. I certify that, in accordance with the requirements of the Wildlife and Countryside Act 1981 notices have been published, served, posted on site, and made available at a local office.

I also certify that the necessary consultations with other local authorities and statutory undertakers have been carried out.

Signed



Date: 5 May 2021

Russell Varley  
Definitive Map Officer

Rights of Way  
City of York Council  
West Offices  
YORK  
YO1 6GA

## **Appendix 5**

### **User evidence**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

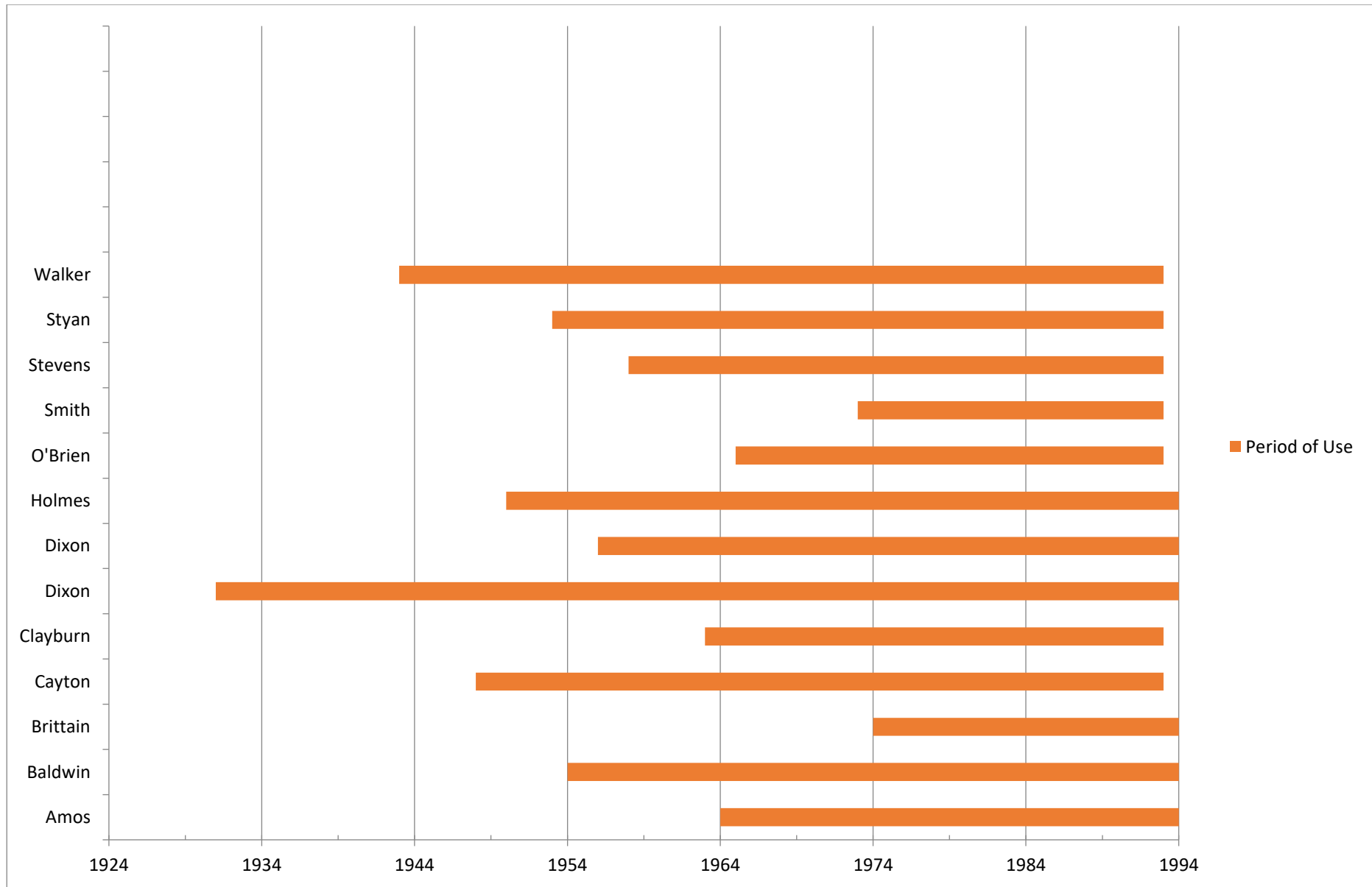
#### **PUBLIC FOOTPATH ACASTER MALBIS 9 & PUBLIC FOOTPATH BISHOPTHORPE 3 MODIFICATION ORDER 2019**



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

User evidence

Appendix 5



# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, Mrs, Miss, Ms    AMOS Christian Names: HAROLD HENRY Age, or if over 21, state over 21:    OVER 21
2	Address: 5 DRUMMOND VIEW BISHOPTHORPE YORK YO 2 1SH
3	Occupation: RETIRED
4	Name or route of path: RIVERSIDE PATH
5	National Grid References (ends of path), or other means of identification: OLD CHURCH YARD TO SWING BRIDGE
6	Parish: BISHOPTHORPE
7	District: SELBY
*8	Type of path: Footpath/Bridleway/Byway open to all traffic
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/No
11	Width of path: 2 ft to 8 ft
12	How long have you known the path: 30 YEARS
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): AS ABOVE
14	How often over the period have you used the path: AS ABOVE
15	For what purpose did you use the path: LEISURE WALKING
16	Have you ever been prevented from or challenged when using the path: NO

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;">2 STILES</p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date 15.02.94 .....

Signature [Signature] .....

Signature of person taking Statement [Signature] .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: <del>Mr</del> , Mrs, Miss, <del>MS</del> BALDWIN ✓ Christian Names: Joyce Age, or if over 21, state over 21: over 21
2	Address: 15 MAPLE AVENUE BISHOPTHORPE
3	Occupation: HOUSEWIFE
4	Name or route of path: RIVERSIDE PATH
5	National Grid References (ends of path), or other means of identification: OLD CHURCH YARD to SWING BRIDGE
6	Parish: BISHOPTHORPE
7	District: SELBY
*8	Type of path: Footpath/ <del>Bridleway/Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: 2ft to 8ft
12	How long have you known the path: over 40 years
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): on foot for walks
14	How often over the period have you used the path: regularly
15	For what purpose did you use the path: walking
16	Have you ever been prevented from or challenged when using the path: NO

- 3 MAR 1994

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc. <p style="text-align: center;">2 Stiles</p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ..... 14<sup>th</sup> Feb. 94 .....

Signature ..... J. Baldwin .....

Signature of person taking Statement ..... *[Signature]* .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: <del>Mr</del> , Mrs, <del>Miss</del> , Ms <i>Brittain</i> Christian Names: <i>Beatrice</i> Age, or if over 21, state over 21: <i>over 21.</i>
2	Address: <i>92 Beech av, Bishopthorpe</i>
3	Occupation: <i>housewife</i>
4	Name or route of path: <i>RIVERSIDE PATH</i>
5	National Grid References (ends of path), or other means of identification: <i>OLD CHURCHYARD to SWING BRIDGE.</i>
6	Parish: <i>BISHOPTHORPE</i>
7	District: <i>SELBY</i>
*8	Type of path: Footpath/ <del>Bridleway/Byway</del> <del>open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del> <i>Yes.</i>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <i>2ft to 8ft.</i>
12	How long have you known the path: <i>20 years</i>
13	Over what period have you used the path on foot, <del>horseback or by motor vehicle</del> , (state which): <i>20 year.</i>
14	How often over the period have you used the path: <i>regularly.</i>
15	For what purpose did you use the path: <i>recreation.</i>
16	Have you ever been prevented from or challenged when using the path: <i>No</i>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;"><i>2 Stiles</i></p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:  <p style="text-align: center;"><i>wanted as public right of way</i></p>	

Date ..... *14th Feb. 1994* .....

Signature ..... *B Britten* .....

Signature of person taking Statement ..... *M Wright* .....

**PLEASE NOTE**

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, <del>Mrs</del>, <del>Miss</del>, <del>Ms</del> <b>CAYTON</b></p> <p>Christian Names: <b>LESLIE FRANK</b></p> <p>Age, or if over 21, state over 21: <b>OVER 21</b></p>
2	<p>Address: <b>5 MONTAGUE ROAD</b> <b>BISHOPSTHORPE</b> <b>TORK T02 1SL</b></p>
3	<p>Occupation: <b>RETIRED</b></p>
4	<p>Name or route of path: <b>RIVERSIDE PATH</b></p>
5	<p>National Grid References (ends of path), or other means of identification: <b>OLD CHURCHYARD TO STONE BRIDGE</b></p>
6	<p>Parish: <b>BISHOPSTHORPE</b></p>
7	<p>District: <b>SELBY DISTRICT COUNCIL</b></p>
*8	<p>Type of path: Footpath/<del>Bridleway</del>/<del>Byway open to all traffic</del></p>
*9	<p>Do you regard the path as public (SEE NOTE 2): YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<del>NO</del></p>
11	<p>Width of path: <b>2 feet to 8 feet</b></p>
12	<p>How long have you known the path: <b>45 YEARS</b></p>
13	<p>Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <b>ON FOOT <del>ALWAYS</del></b></p>
14	<p>How often over the period have you used the path: <b>AS ABOVE</b></p>
15	<p>For what purpose did you use the path: <b>WALKING</b></p>
16	<p>Have you ever been prevented from or challenged when using the path: <b>No</b></p>



17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <i>2 STILES</i>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ... *18-2-94* .....Signature ... *A. J. Clayton* .....Signature of person taking Statement ... *A. J. Logos* .....PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms.	<del>MS.</del> CAYTON
Christian Name (s) :	LESLIE FRANK
Age: (If over 21, you may insert "Over 21")	OVER 21
Address:	5. MONTAGUE ROAD BISHOPTHORPE YORK YO23 2SL
Occupation:	RETIRED
Name or route of Path:	CHANTRY LANE TO FERRY LANE
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of:	BISHOPTHORPE
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic FOOTPATH
Do you regard the route to be a Public Right of Way ?	* Yes / No YES
Is the path well defined ? *Yes / No If "Yes" How?	IT IS PRESENTLY ALL BLOCKED OFF
Width of path (if defined) :	
How many years have you known of the existence of this path ?	70 YEARS
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	1930 to '90s closure.
Have you used the path:	
i) on foot ?	*Yes / No YES
ii) on horseback ?	*Yes / No NO
iii) by motor vehicle ?	*Yes / No NO
iv) by cycle ?	*Yes / No NO
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	REGULARLY
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE + RECREATION
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / No NO
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	FENCE AND GATE AT FERRY LANE END

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

*See enclosed letter.*

\* Delete as appropriate

Signature : *L. J. Kayton*

Date : *4-10-01*

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

Throughout my lifetime  
(until recently) Bishopthorpe  
villagers have enjoyed access to  
the Oad Quarry and a path  
through to Terry Lane. I sang in  
the choir there in the thirties  
and fished in the river as a  
Schoolboy. In the fifties I had  
a boat moored down there, for  
which I paid a mooring fee to  
Bishopthorpe Parish Council. I can  
be of further assistance if I am  
quite willing to be interviewed.

L. H. Bayton

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: <del>Mr, Mrs, Miss, Ms</del> CHAYBURN. <span style="float: right;">x</span> Christian Names: ALICE Age, or if over 21, state over 21: OVER 21.
2	Address: 12, MONTAGNE Rd. BISHOP THORPE YORK YO2. . 1SS
3	Occupation: RETIRED
4	Name or route of path: RIVERSIDE PATH
5	National Grid References (ends of path), or other means of identification: OLD CHURCHYARD to SWING BRIDGE.
6	Parish: BISHOP THORPE
7	District: SELBY
*8	Type of path: Footpath/ <del>Bridleway/Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/NO
*10	Is the path well defined: Yes/NO
11	Width of path: 2ft to 8ft
12	How long have you known the path: 30 yrs.
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which):
14	How often over the period have you used the path: ALL THE TIME
15	For what purpose did you use the path: Walking
16	Have you ever been prevented from or challenged when using the path: No.

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;">2 Stiles</p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ... 14. 2. 94 ...  
 Signature ..... *A. Bayburn* .....  
 Signature of person taking Statement ..... *Marking* .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

Surname: * Mr. <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del> <span style="float: right;">DIXON</span> ✓													
Christian Name (s): GEOFFREY													
Age: (If over 21, you may insert "Over 21") 87 YEARS													
Address: 35 MAIN STREET BISHOP THORPE YORK YO23 2RA													
Occupation: RETIRED													
Name or route of Path:													
National Grid References, at each end of the path, or other means of identifying the route :													
Parish of: BISHOP THORPE													
Type of Path: *Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>													
Do you regard the route to be a Public Right of Way ? * Yes / <del>No</del>													
is the path well defined ? <del>Yes</del> / No If "Yes" How?													
Width of path (If defined) :													
How many years have you known of the existence of this path ? 82 YEARS													
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 70 YEARS 1931-2001													
Have you used the path: <table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i)</td> <td style="width: 40%;">on foot ?</td> <td style="width: 30%;">*Yes / <del>No</del></td> </tr> <tr> <td>ii)</td> <td>on horseback ?</td> <td>*<del>Yes</del> / No</td> </tr> <tr> <td>iii)</td> <td>by motor vehicle ?</td> <td>*<del>Yes</del> / No</td> </tr> <tr> <td>iv)</td> <td>by cycle ?</td> <td>*<del>Yes</del> / No</td> </tr> </table>		i)	on foot ?	*Yes / <del>No</del>	ii)	on horseback ?	* <del>Yes</del> / No	iii)	by motor vehicle ?	* <del>Yes</del> / No	iv)	by cycle ?	* <del>Yes</del> / No
i)	on foot ?	*Yes / <del>No</del>											
ii)	on horseback ?	* <del>Yes</del> / No											
iii)	by motor vehicle ?	* <del>Yes</del> / No											
iv)	by cycle ?	* <del>Yes</del> / No											
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) OCCASIONALLY													
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) PLEASURE													
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details <del>Yes</del> / No													
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs ,Obstructions, etc encountered on the path; or signs about the path or land.													

Name and Addresses of Owners (and Tenants, if tenanted) if known:

/ / / /

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

/ / / /

Any Further Information which you consider to be relevant :

/ / / /

\* Delete as appropriate

Signature : G.S. Dixon

Date : 27<sup>th</sup> Sept 2011

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



## Public Rights of Way - User Evidence Form

Surname: * Mr. <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del> <b>DIXON</b>		
Christian Name (s): <b>ROBERT</b>		
Age: (If over 21, you may insert "Over 21") <b>OVER 21</b>		
Address: <b>11 SIMBANK LANE BISHOP THORPE YORK YO23 2QH</b>		
Occupation: <b>RETAIL BUTCHER</b>		
Name or route of Path:		
National Grid References, at each end of the path, or other means of identifying the route :		
Parish of: <b>BISHOP THORPE</b>		
Type of Path: *Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>		
Do you regard the route to be a Public Right of Way ? * Yes / <del>No</del>		
is the path well defined ? <del>Yes</del> / No If "Yes" How?		
Width of path (If defined) :		
How many years have you known of the existence of this path ? <b>45 YEARS</b>		
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) <b>45 YEARS 1956-2001</b>		
Have you used the path: i) on foot ? *Yes / <del>No</del> ii) on horseback ? * <del>Yes</del> / No iii) by motor vehicle ? <del>Yes</del> / No iv) by cycle ? * <del>Yes</del> / No		
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) <b>OCCASIONALLY</b>		
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) <b>PLEASURE</b>		
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details * <del>Yes</del> / No		
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.		

Name and Addresses of Owners (and Tenants, if tenanted) if known:

[Three diagonal lines indicating redacted information]

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

[Four diagonal lines indicating redacted information]

Any Further Information which you consider to be relevant :

[Three diagonal lines indicating redacted information]

\* Delete as appropriate

Signature : R.A. Dixon

Date : 27<sup>th</sup> Sept 2001

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

**Public Rights of Way - User Evidence Form**

REF. AC/3862, 3871, 3850 / PROW (R) 001 / BISHOPTHORPE

CITY OF YORK  
 DEEDS  
 FORMED  
 - 5 OCT 2001

Surname: *Mr. Mrs. Miss. Ms. <b>HOLMES</b>		
Christian Name (s): <b>JANET</b>		
Age: (If over 21, you may insert "Over 21") <b>OVER 21</b>		
Address: <b>162 BRAMBLE DENE, WOODTHORPE YORK YO24 2RH        (FORMERLY 2 BRIDGE RD. BISHOPTHORPE)</b>		
Occupation: <b>RETIRED</b>		
Name or route of Path: <b>CHANTRY LANE TO FERRY LANE BISHOPTHORPE</b>		
National Grid References, at each end of the path, or other means of identifying the route: <b>RUNS FROM END OF CHANTRY LANE THROUGH OLD CHURCHYARD ALONG THE RIVERBANK TO FERRY LANE WHERE IT JOINS RIVERSIDE PATH TO ACASTER MAUSIS</b>		
Parish of: <b>BISHOPTHORPE</b>		
Type of Path: *Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>		
Do you regard the route to be a Public Right of Way? * Yes / <del>No</del>		
Is the path well defined? *Yes / <del>No</del> If "Yes" How?		
Width of path (If defined): <b>4ft. approx</b>		
How many years have you known of the existence of this path? <b>AT LEAST 50 years.</b>		
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) <b>50 years 1950 - 2000</b>		
Have you used the path:	i) on foot ?	*Yes / <del>No</del>
	ii) on horseback ?	* <del>Yes</del> / No
	iii) by motor vehicle ?	* <del>Yes</del> / No
	iv) by cycle ?	* <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) <b>MONTHLY</b>		
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) <b>PLEASURE</b>		
Have you ever been prevented from, or challenged when, using the path ? * <del>Yes</del> / No If "Yes" please give details		
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <b>WATER GATE AT FERRY LANE END - HAND GATE</b>		

Name and Addresses of Owners (and Tenants, if tenanted) if known:

I DON'T KNOW BUT ALWAYS ASSUMED IT WAS EITHER BISHOPTHORPE PARISH COUNCIL OR THE CHURCH.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : Janet Hobes

Date : 08-10-01

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, Mrs, <del>Miss</del>, Ms O'BRIEN <span style="float: right;">X</span></p> <p>Christian Names: FRANCIS DESMOND</p> <p>Age, or if over 21, state over 21: OVER 21</p>
2	<p>Address: 43, RAMSEY AVENUE BISHOPTHORPE YORK YO2.1SE</p>
3	<p>Occupation: RETIRED</p>
4	<p>Name or route of path: RIVERSIDE PATH</p>
5	<p>National Grid References (ends of path), or other means of identification: OLD CHURCHYARD TO SWING BRIDGE</p>
6	<p>Parish: BISHOP THORPE</p>
7	<p>District: SELBY</p>
*8	<p>Type of path: Footpath/Bridleway/Byway open to all traffic</p>
*9	<p>Do you regard the path as public (SEE NOTE 2): YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<del>NO</del></p>
11	<p>Width of path: 21/8 ft</p>
12	<p>How long have you known the path: 28 YEARS</p>
13	<p>Over what period have you used the path on foot, horseback or by motor vehicle, (state which): APPROX WEEKLY</p>
14	<p>How often over the period have you used the path: AS ABOVE</p>
15	<p>For what purpose did you use the path: PLEASURE WALKING</p>
16	<p>Have you ever been prevented from or challenged when using the path: No</p>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;"><i>2 STILES</i></p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ... *14-2-94* .....

Signature ... *F. D. Brown* .....

Signature of person taking Statement ... *A. S. Rogers* .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, <del>Mrs</del>, <del>Miss</del>, Ms SMITH <span style="float: right;">Freda X</span></p> <p>Christian Names: RICHARD</p> <p>Age, or if over 21, state over 21: over 21</p>
2	<p>Address: 36 WELLS PARK SOUTH BRIGHTFELLO TOWN YO2 1SU</p>
3	<p>Occupation: <del>SOLICITOR</del> OFFICER, TOWN COUNCIL</p>
4	<p>Name or route of path: LIVERSIDE PATH</p>
5	<p>National Grid References (ends of path), or other means of identification: OLD CHURCHYARD TO SWINGY BRIDGE</p>
6	<p>Parish: BISHOPSTORPE</p>
7	<p>District: YORK</p>
*8	<p>Type of path: Footpath/Bridleway/Byway open to all traffic</p>
*9	<p>Do you regard the path as public (SEE NOTE 2): YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<del>NO</del></p>
11	<p>Width of path: 2' 6" 8"</p>
12	<p>How long have you known the path: 20 YEARS</p>
13	<p>Over what period have you used the path on foot, horseback or by motor vehicle, (state which): 20 YEARS, FOOT</p>
14	<p>How often over the period have you used the path: AS ABOVE</p>
15	<p>For what purpose did you use the path: WALKING</p>
16	<p>Have you ever been prevented from or challenged when using the path: NO</p>

17	<p>Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.</p> <p style="text-align: center;"><i>2 STILES.</i></p>
18	<p>Name of owner(s) or tenant(s), if known:</p>
* 19	<p>Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del>/No</p> <p>If "Yes" give dates and particulars of instructions the owner gave about the path, if any:</p>
<p>Any further information:</p>	

Date ... *20. 2. 94* .....

Signature *[Signature]* .....

Signature of person taking Statement *[Signature]* .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.



# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, Mrs, Miss, Ms <b>STEVENS</b> Christian Names: <b>RHODA Beakice</b> Age, or if over 21, state over 21: <input checked="" type="checkbox"/>
2	Address: <b>Ferryfield</b> <b>4. Ferry Lane.</b> <b>Bishopthorpe York YO21 5B.</b>
3	Occupation: <b>Housewife</b>
4	Name or route of path: <b>RIVERSIDE PATH.</b>
5	National Grid References (ends of path), or other means of identification: <b>OLD CHURCH JARD TO SWING BRIDGE</b>
6	Parish: <b>BISHOPTHORPE</b>
7	District: <b>SELBY</b>
*8	Type of path: Footpath/ <del>Bridleway</del> / <del>Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <b>2ft to 8ft.</b>
12	How long have you known the path: <b>35 years</b>
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <b>FREQUENTLY.</b>
14	How often over the period have you used the path: <b>AS ABOVE</b>
15	For what purpose did you use the path: <b>WALKING FOR PLEASURE.</b>
16	Have you ever been prevented from or challenged when using the path: <b>NO</b>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  2 STILES
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: Yes/No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ..... 15. 2. 94 .....

Signature ..... *R B Stevenson* .....

Signature of person taking Statement ..... *Subingle* .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL


## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, Mrs, <del>Miss, Ms</del> <i>Styan</i></p> <p>Christian Names: <i>RODNEY JAMES</i></p> <p>Age, or if over 21, state over 21: <i>OVER 21</i></p>
2	<p>Address:</p> <p><i>29 RAMSEY AVENUE</i> <i>BISHOPTHORPE</i> <i>YORK</i></p>
3	<p>Occupation: <i>REG SALES MANAGER</i></p>
4	<p>Name or route of path:</p> <p><i>RIVERSIDE PATH</i></p>
5	<p>National Grid References (ends of path), or other means of identification:</p> <p><i>OLD CHURCH YARD TO SWINBY BRIDGE</i></p>
6	<p>Parish: <i>BISHOPTHORPE</i></p>
7	<p>District: <i>SEALY</i></p>
*8	<p>Type of path: <del>Footpath/Bridleway/Byway open to all traffic</del></p>
*9	<p>Do you regard the path as public (SEE NOTE 2):</p> <p>YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<del>NO</del></p>
11	<p>Width of path: <i>2/8'</i></p>
12	<p>How long have you known the path: <i>40 YEARS</i></p>
13	<p>Over what period have you used the path on foot, horseback or by motor vehicle, (state which):</p> <p><i>40 YEARS</i></p>
14	<p>How often over the period have you used the path:</p> <p><i>ONCE PER WEEK</i></p>
15	<p>For what purpose did you use the path:</p> <p><i>WALKING OR ANGLING</i></p>
16	<p>Have you ever been prevented from or challenged when using the path:</p> <p><i>NO</i></p>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;">2 STILES</p>
18	Name of owner(s) or tenant(s), if known: <p style="text-align: center;">BISHOPTHORPE PARISH COUNCIL?</p>
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ..... 11.2.94 .....

Signature .....  .....

Signature of person taking Statement .....  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, Mrs, Miss, Ms <b>WALKER</b> <span style="float: right;">x</span></p> <p>Christian Names: <b>BRYNN JOHN JAMES</b></p> <p>Age, or if over 21, state over 21: <b>OVER 21</b></p>
2	<p>Address: <b>30 MONTAGUE RD BISHOP THORPE YORK YO2 1SS</b></p>
3	<p>Occupation: <b>ENGINEERING MANAGER</b></p>
4	<p>Name or route of path:</p>
5	<p>National Grid References (ends of path), or other means of identification:</p>
6	<p>Parish: <b>BISHOP THORPE</b></p>
7	<p>District: <b>SALBY</b></p>
*8	<p>Type of path: Footpath/Bridleway/Byway open to all traffic <b>FOOT PATH.</b></p>
*9	<p>Do you regard the path as public (SEE NOTE 2): YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<del>No</del></p>
11	<p>Width of path: <b>2ft to 8ft.</b></p>
12	<p>How long have you known the path: <b>50 YEARS</b></p>
13	<p>Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <b>ON FOOT</b></p>
14	<p>How often over the period have you used the path: <b>AS ABOVE</b></p>
15	<p>For what purpose did you use the path: <b>RECREATIONAL EXERCISE.</b></p>
16	<p>Have you ever been prevented from or challenged when using the path: <b>NO.</b></p>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;"><i>2 STILES</i></p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: Yes/No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date *18<sup>th</sup> Feb 1994*  
 Signature *B.J. Walker*  
 Signature of person taking Statement *A.L. Rogers*

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## **Appendix 6**

### **Undertaking that notice will be duly served**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

**CONFIRMED/NOT CONFIRMED PROCEEDURE**

The OMA undertakes that in the event the enclosed order is confirmed a notice to that effect with be duly published and served on the relevant prescribed bodies, statutory undertakers and all previously notified parties.

In the event that the enclosed order is not confirmed the OMA undertakes to serve notice of this on the relevant prescribed bodies, statutory undertakers and all previously notified parties.

Rights of Way  
City of York Council  
West Offices  
YORK  
YO1 6GA

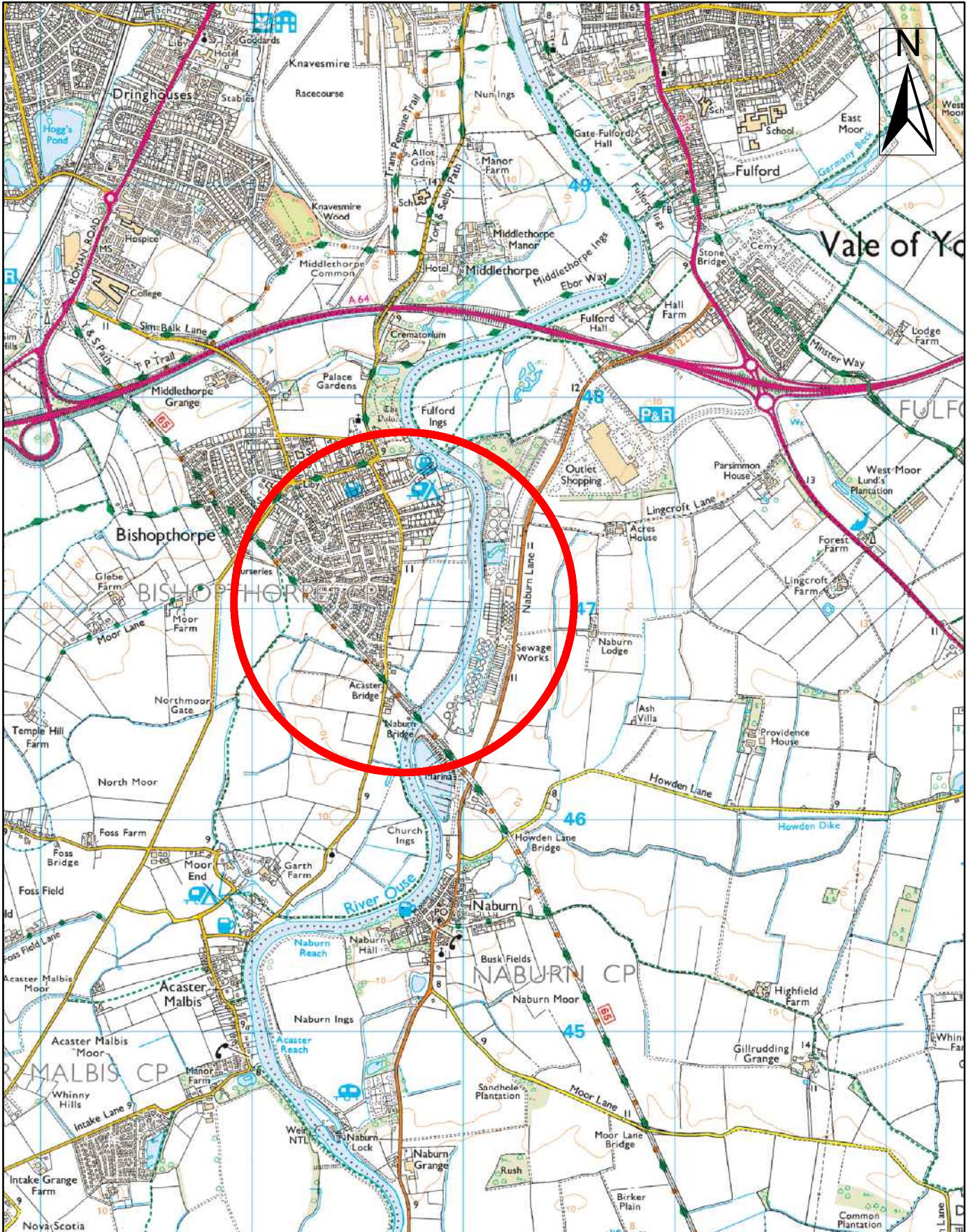


## **Appendix 7**

### **Location map**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## Location of DMMO application

Scale 1:25,000

Drawn By:RJV

Date:17/6/19

Public Rights of Way

Reference:

Drawing No.

**Contains Ordnance Survey data © Crown copyright and database right 2019**

## **Appendix 8**

### **Applicant details**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

**NAME AND ADDRESS OF APPLICANT**

The applicant is:

Bishopthorpe Parish Council  
The Village Hall  
40 Main Street  
Bishopthorpe  
York YO23 2RB

The correspondence address is:

The Clerk to Bishopthorpe Parish Council  
3 Appleton Court  
Bishopthorpe  
York  
YO23 2RY

[bpcclerk@aol.com](mailto:bpcclerk@aol.com)

Rights of Way  
City of York Council  
West Offices  
YORK  
YO1 6GA

## **Appendix 9**

### **Confirmation the OMA is supporting the order**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

**CONFIRMATION OF SUPPORTING THE CONFIRMATION OF THE ORDER**

Following the Decision Session – Executive Member for Transport (City of York Council) the OMA is supporting the confirmation of the order.

Rights of Way  
City of York Council  
West Offices  
YORK  
YO1 6GA

## **Appendix 10**

### **Inspection place**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

**LOCATION WHERE THE DOCUMENTS CAN BE VIEWED**

City of York Council  
West Offices,  
Station Rise,  
YORK  
YO1 6GA

01904 551550

**Opening Hours**

Monday	8.30 am to 5.00 pm
Tuesday	8.30 am to 5.00 pm
Wednesday	8.30 am to 5.00 pm
Thursday	8.30 am to 5.00 pm
Friday	8.30 am to 5.00 pm
Saturday	Closed
Sunday	Closed

Alternatively you can view them online at [www.york.gov.uk/prownotices](http://www.york.gov.uk/prownotices)

Council of the City of York  
West Offices,  
Station Rise,  
YORK  
YO1 6GA



## **Appendix 11**

### **Health & safety questionnaire**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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

## Health and safety at the site questionnaire

The Inspector will visit the site and will need to know what safety equipment and protective clothing to bring. The following questions indicate the type of information the Inspector will need about the site. Please supply any additional information on a separate sheet of paper.

1. Is the site uneven or does it present any other known risks? Is special footwear or any other Personal Protection Equipment required?

The route runs beside the River Ouse and can be muddy in places. Outdoor footwear and clothing are recommended.

2. Is there any likelihood of exposure to pets or other animals which may present a risk to the safety of the Inspector?

The OMA has not seen any animals along the route.

3. Is the site remote and/or can it be seen from other highways or rights of way?

The route is not remote

4. Does the site have a good mobile phone signal or is there easy access to a public telephone should the emergency services be required?

There is mobile telephone coverage.

5. Is the right of way easily accessible? Will arrangements for access by the Inspector need to be made in advance?

The order route is easily accessible from both the Bishopthorpe end and the Acaster Malbis end.

6. Are there any dangerous pieces of equipment or substances stored at any point along the right of way?

The OMA is not aware of any. However, the northern part of the order route is used to provide access to boat moorings along the Ouse so there may be some vehicle movement that the Inspector might encounter

7. If there is any other relevant information which the Inspector should be aware of that is not covered in this questionnaire?

If the Inspector is going to visit the site by car, I suggest they park on Acaster Lane in Bishopthorpe and walk down Ferry Lane to get to the northern end of the route.

## **Appendix 12**

### **Pre order consultation including any replies**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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



Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Byways and Bridleways Trust  
Mallories  
Friars Hill  
Sinnington  
York  
YO62 6SL

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Lady Kirk,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

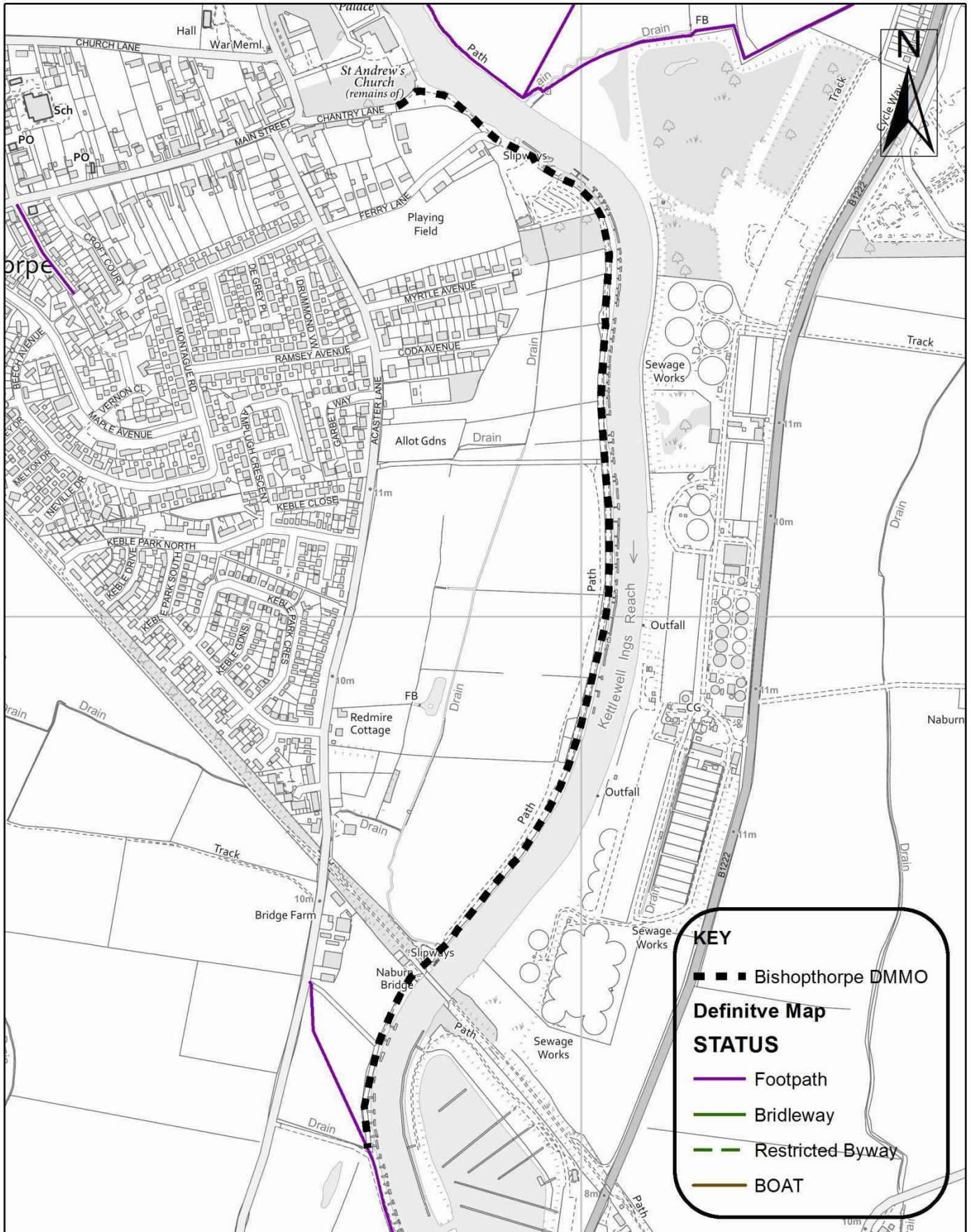
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500	Drawn By:RJV	Date:26/11/18
Public Rights of Way	Reference:	Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

British Driving Society

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Scarlett,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

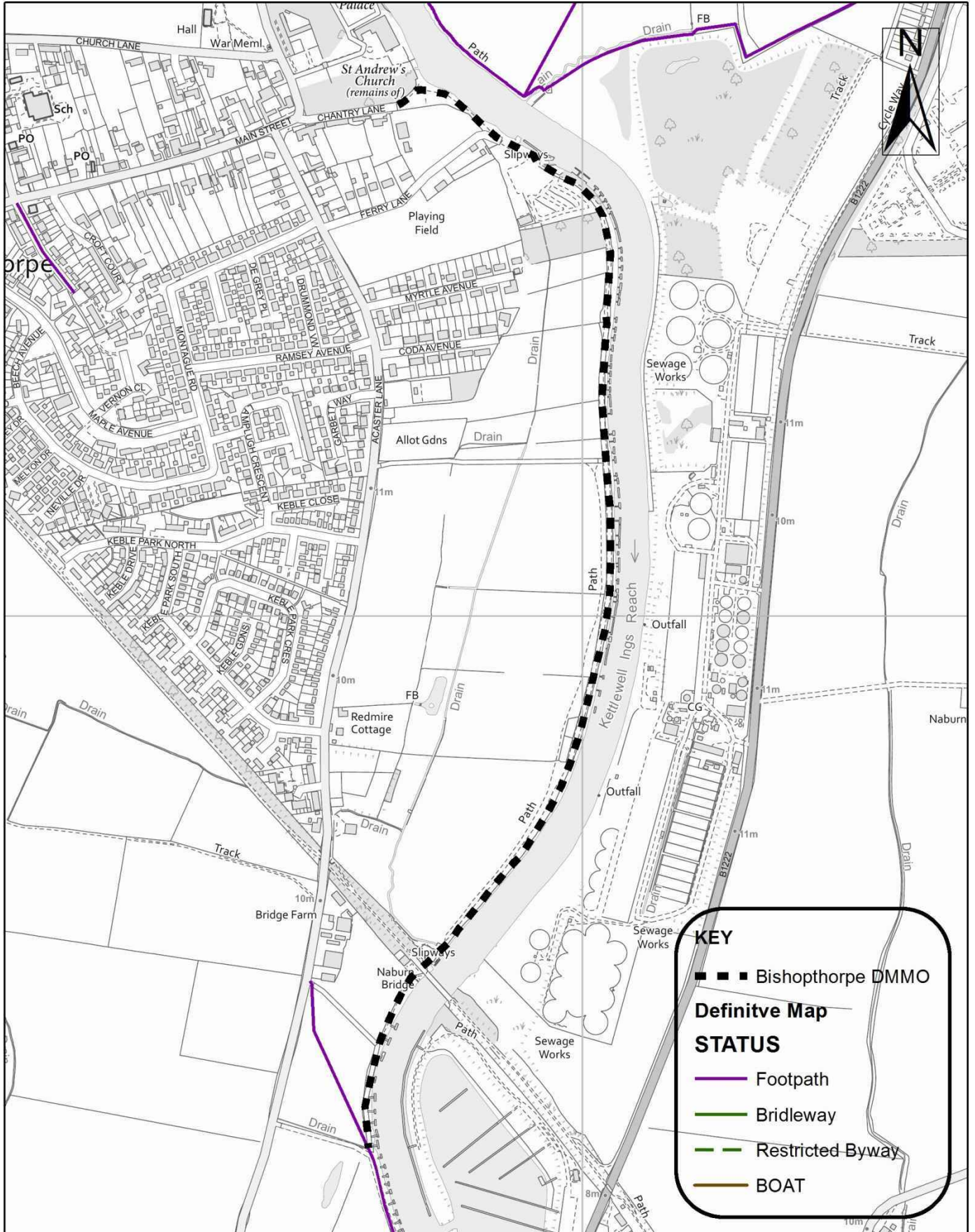
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Yours sincerely

A handwritten signature in black ink, appearing to read 'RV' followed by a flourish.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

British Horse Society  
Burgate Farm  
Harwood Dale  
Scarborough  
YO13 0DS

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mrs Cook,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

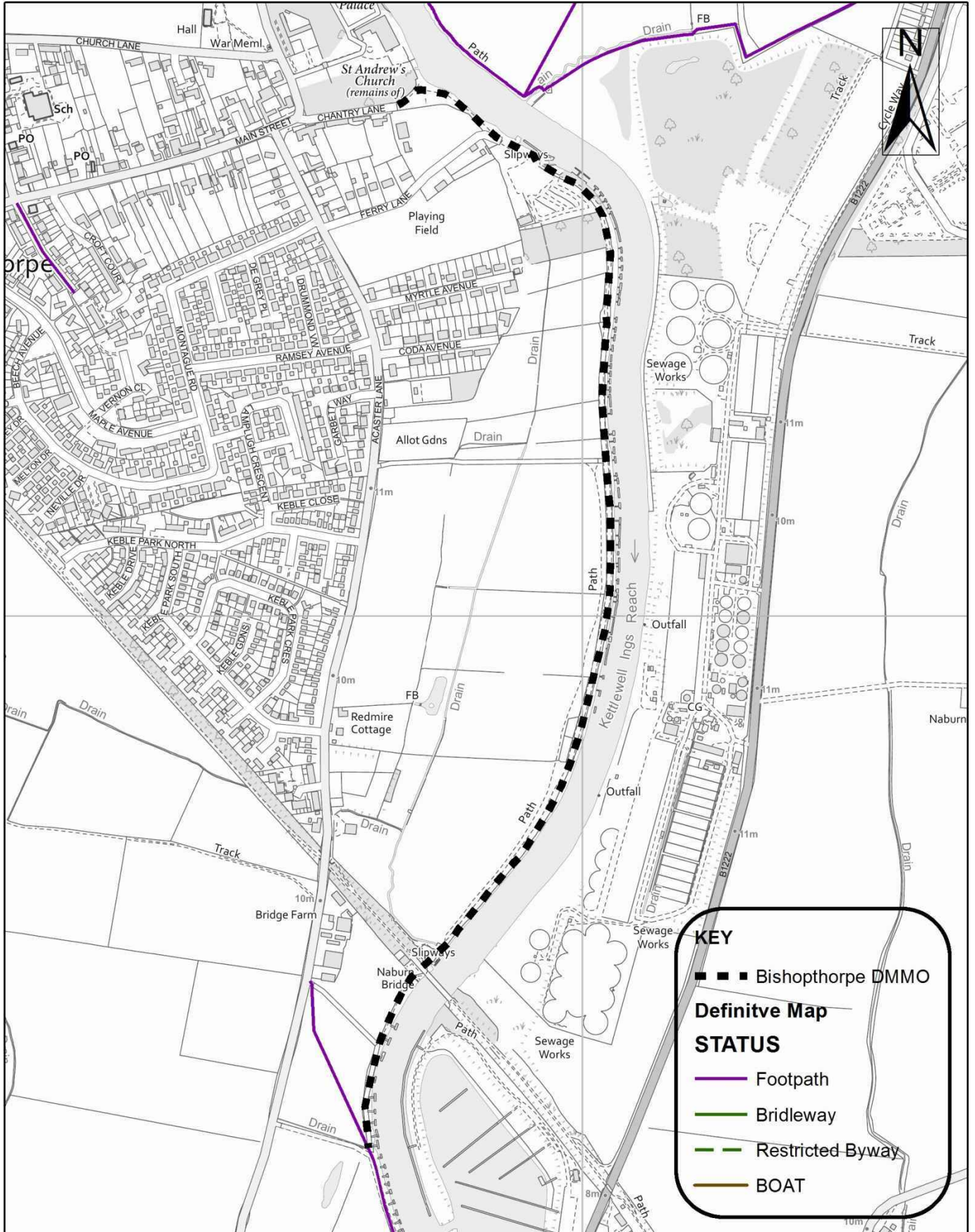
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Yours sincerely

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Russell Varley  
Definitive Map Officer



**KEY**

- ■ ■ Bishopthorpe DMMO

**Definitive Map**

**STATUS**

- Footpath
- Bridleway
- - - Restricted Byway
- BOAT



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

**DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3**

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Ramblers Association  
33 Millgates  
York  
YO26 6AT

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Nunns,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

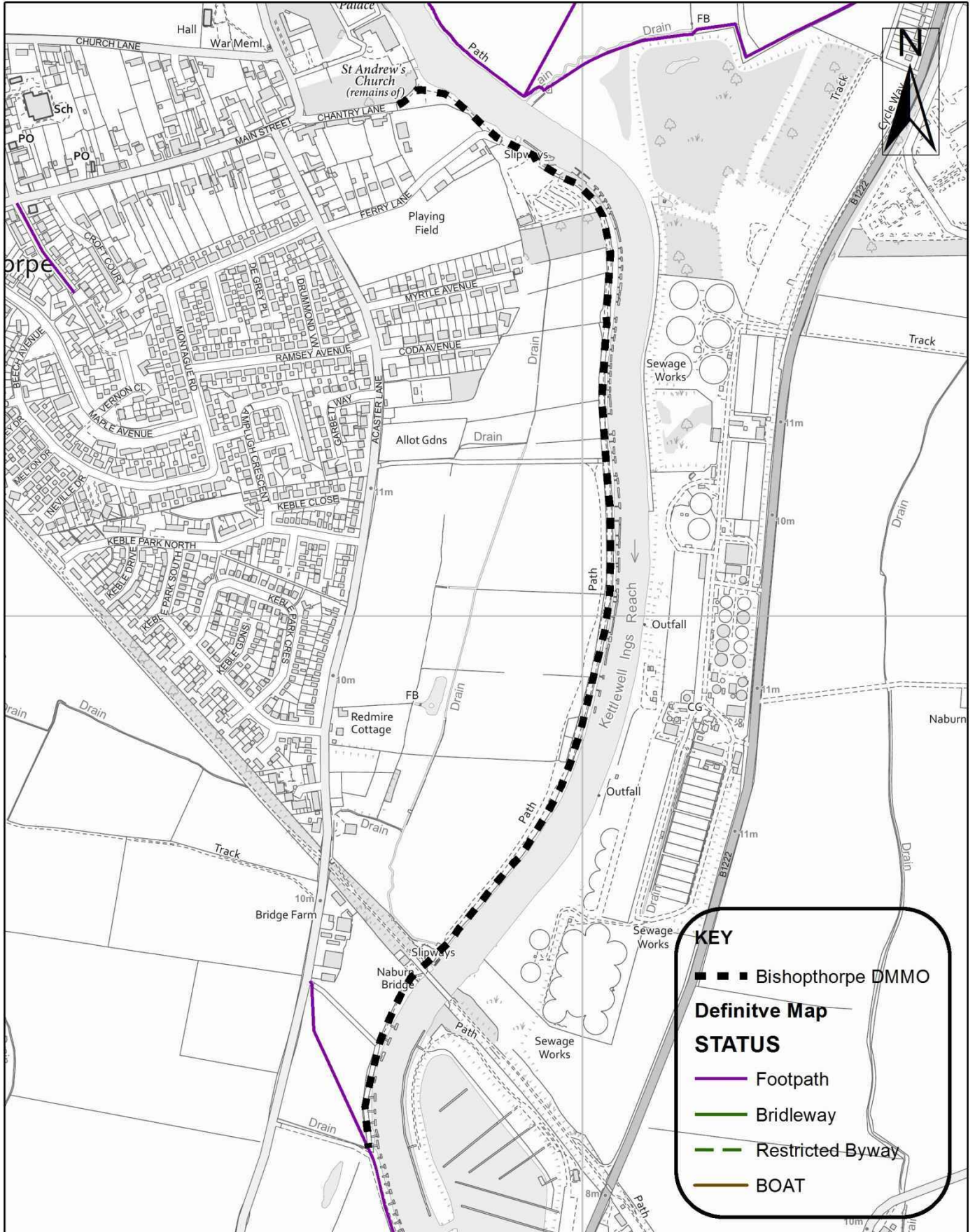
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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

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York Marine Services Ltd  
Ferry Lane  
Bishophthorpe  
York  
YO23 2SB

Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Our Ref: 199402 Bishophthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Sir/Madam ,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishophthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishophthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

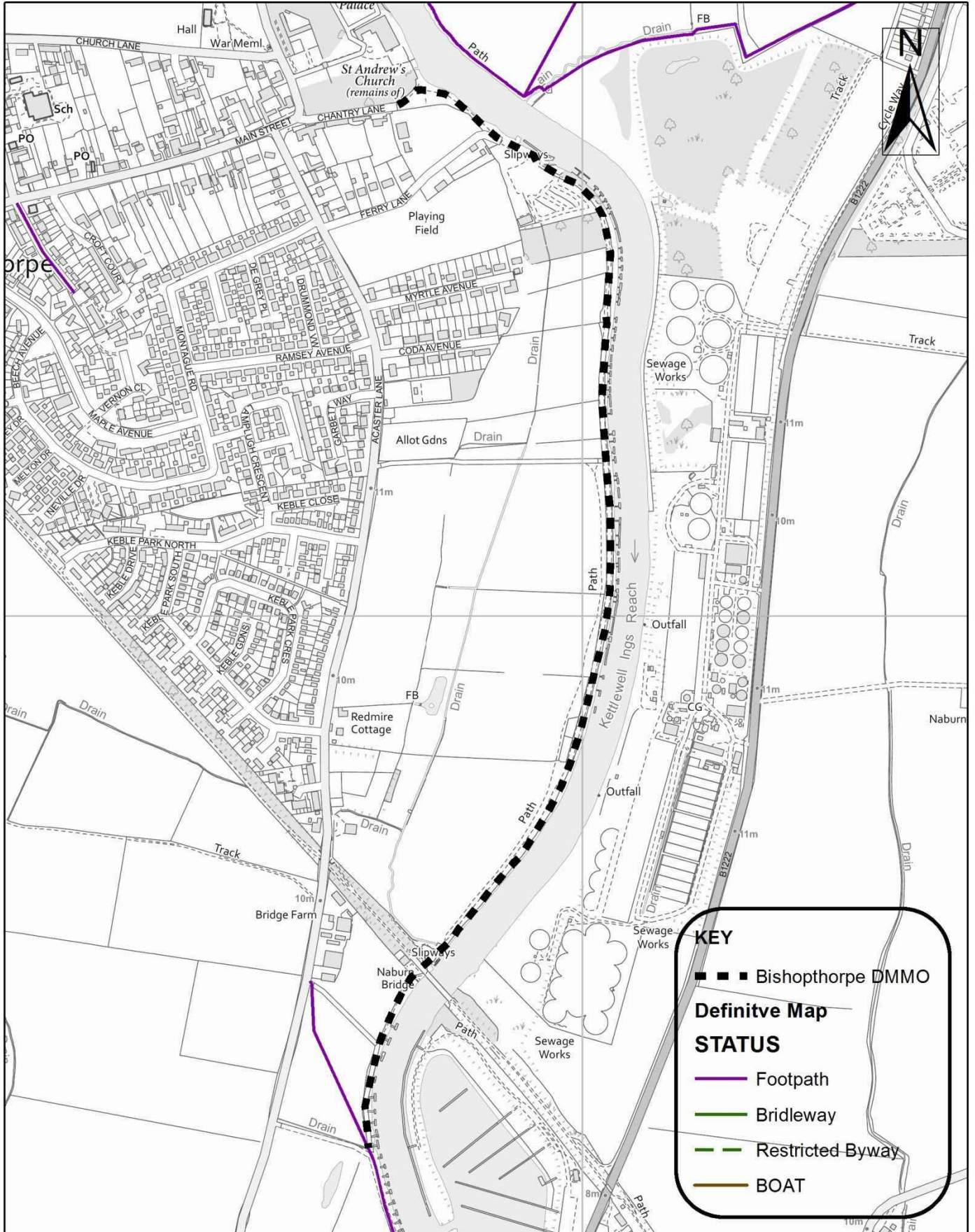
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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

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Date:26/11/18

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Reference:

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York RI  
22 Queen Street  
York  
YO24 1AD

Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Sir/Madam ,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

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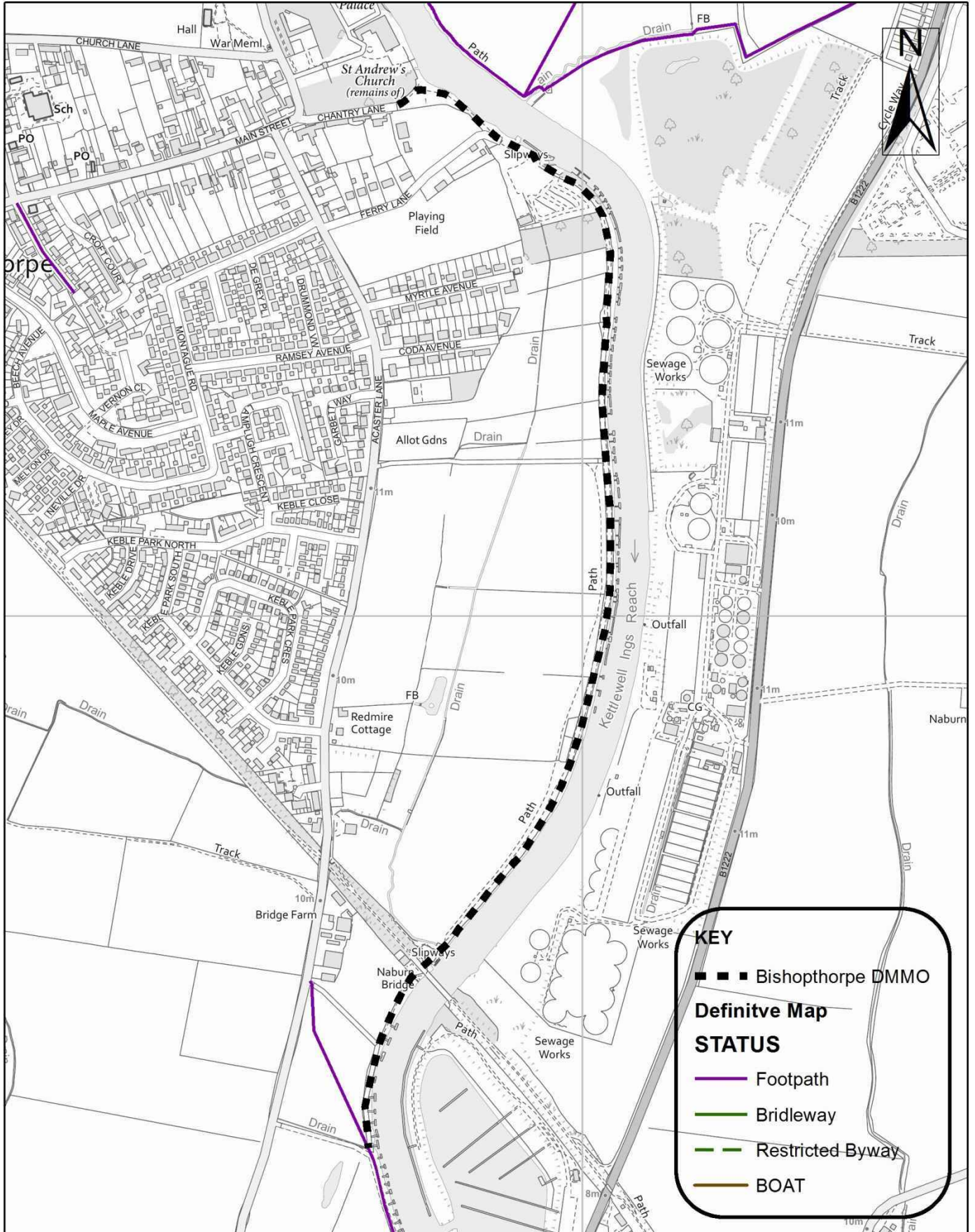
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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GAOfficial Custodian for Charities  
The Church Estate at Bishopthorpe  
Second Floor, 20 Kings Parade  
Queen Dock  
Liverpool  
L3 4DQOur Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Sir/Madam ,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

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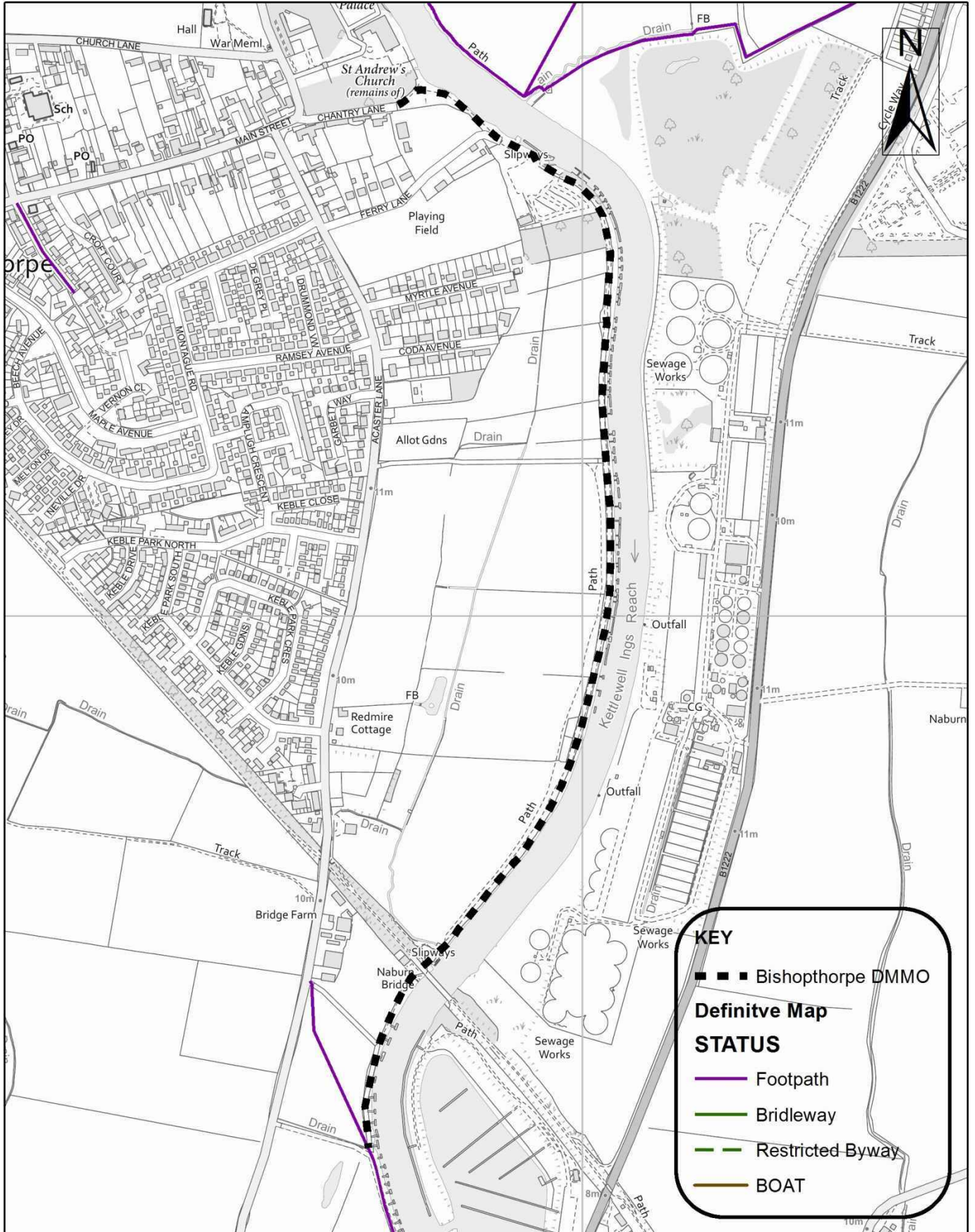
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Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

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Charity of Thomas Annotson  
4 Lang Road  
Bishopthorpe  
York  
YO23 2QL

Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

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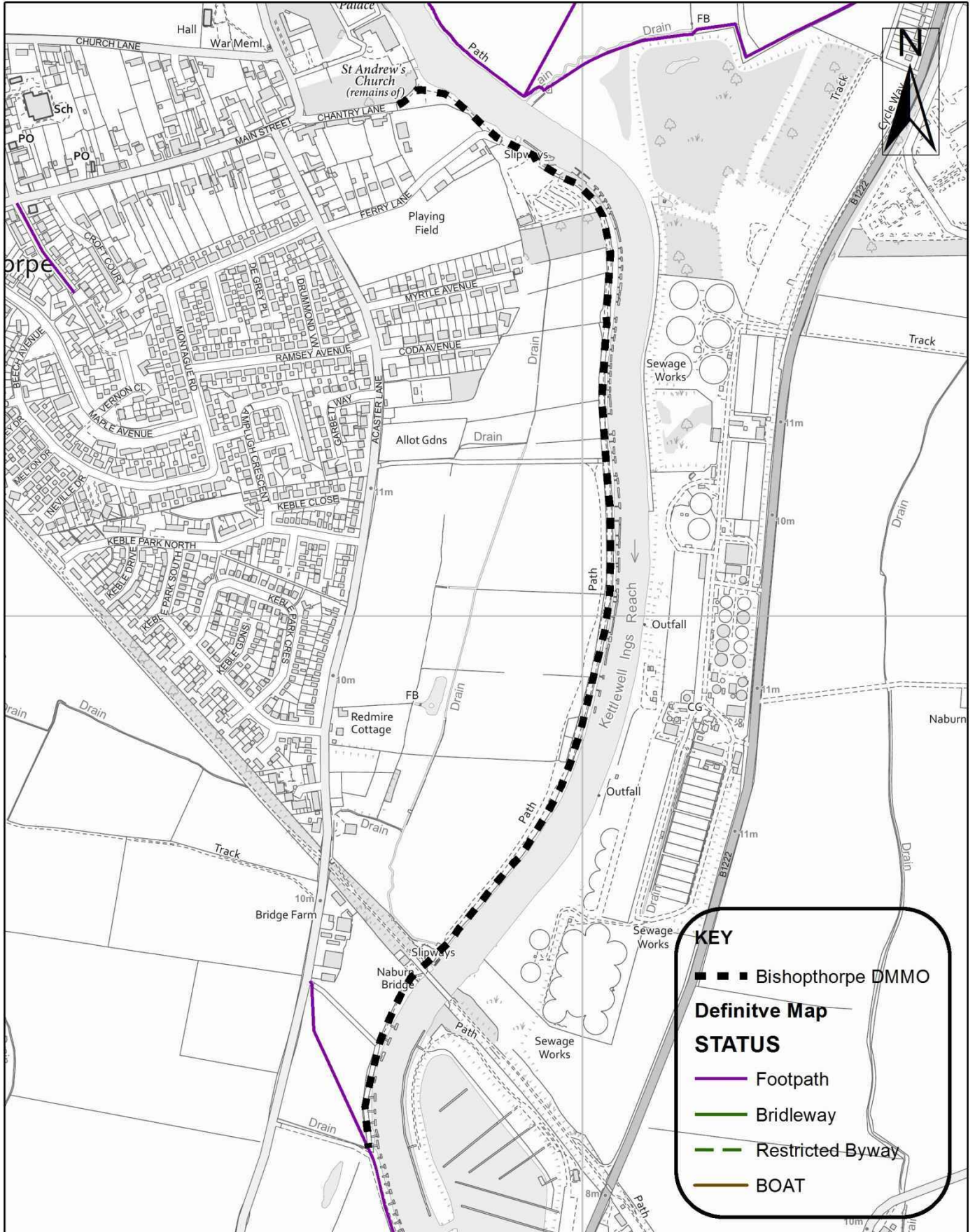
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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GAMessrs N & S Masterman  
Bridge Farm  
Acaster Malbis  
York  
YO2 1XBOur Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Messrs Masterman,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

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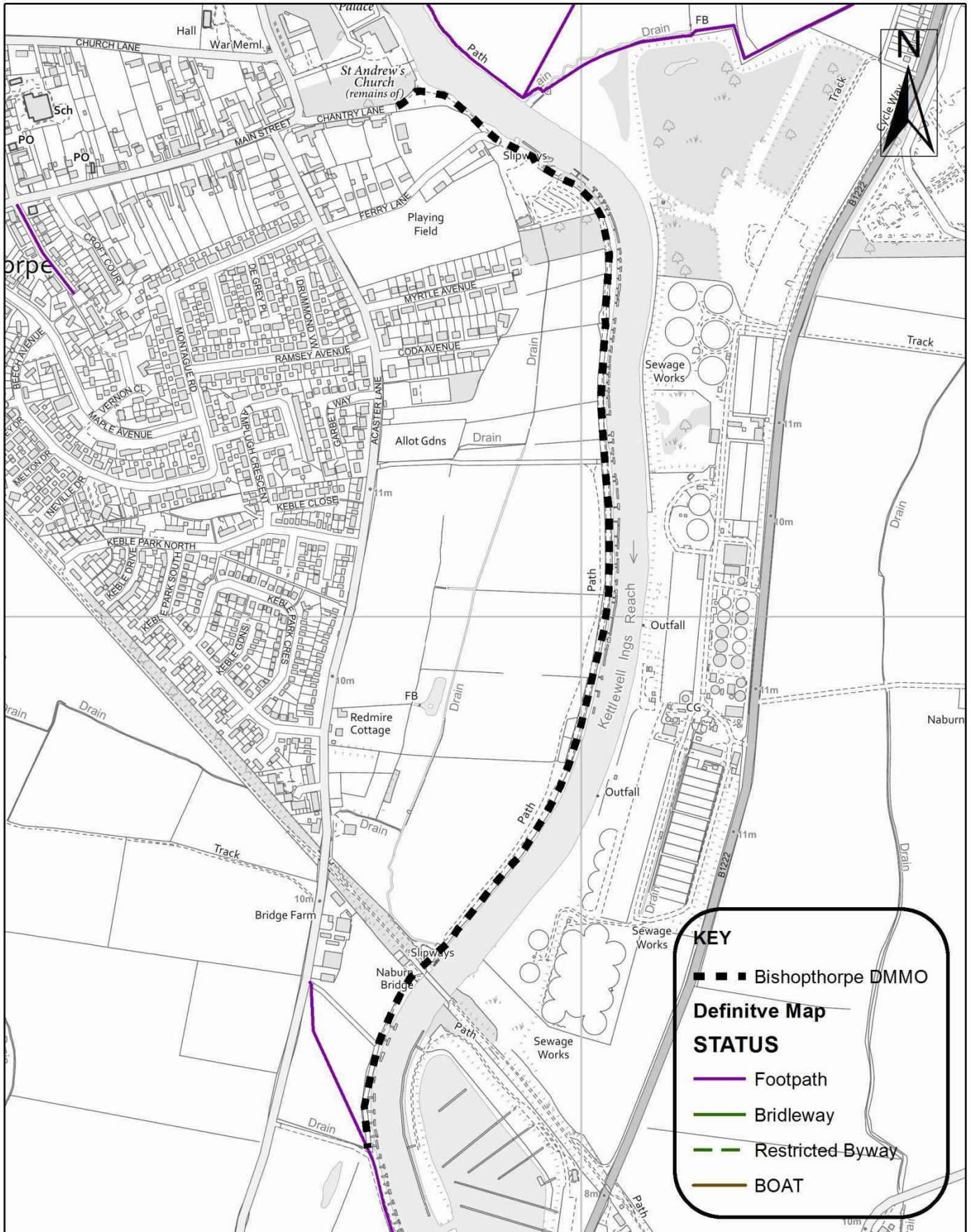
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Yours sincerely

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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GASt. Andrew's Trust Bishopthorpe  
C/O Grays  
Duncombe Place  
York  
YO1 7DYOur Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Sir/Madam ,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

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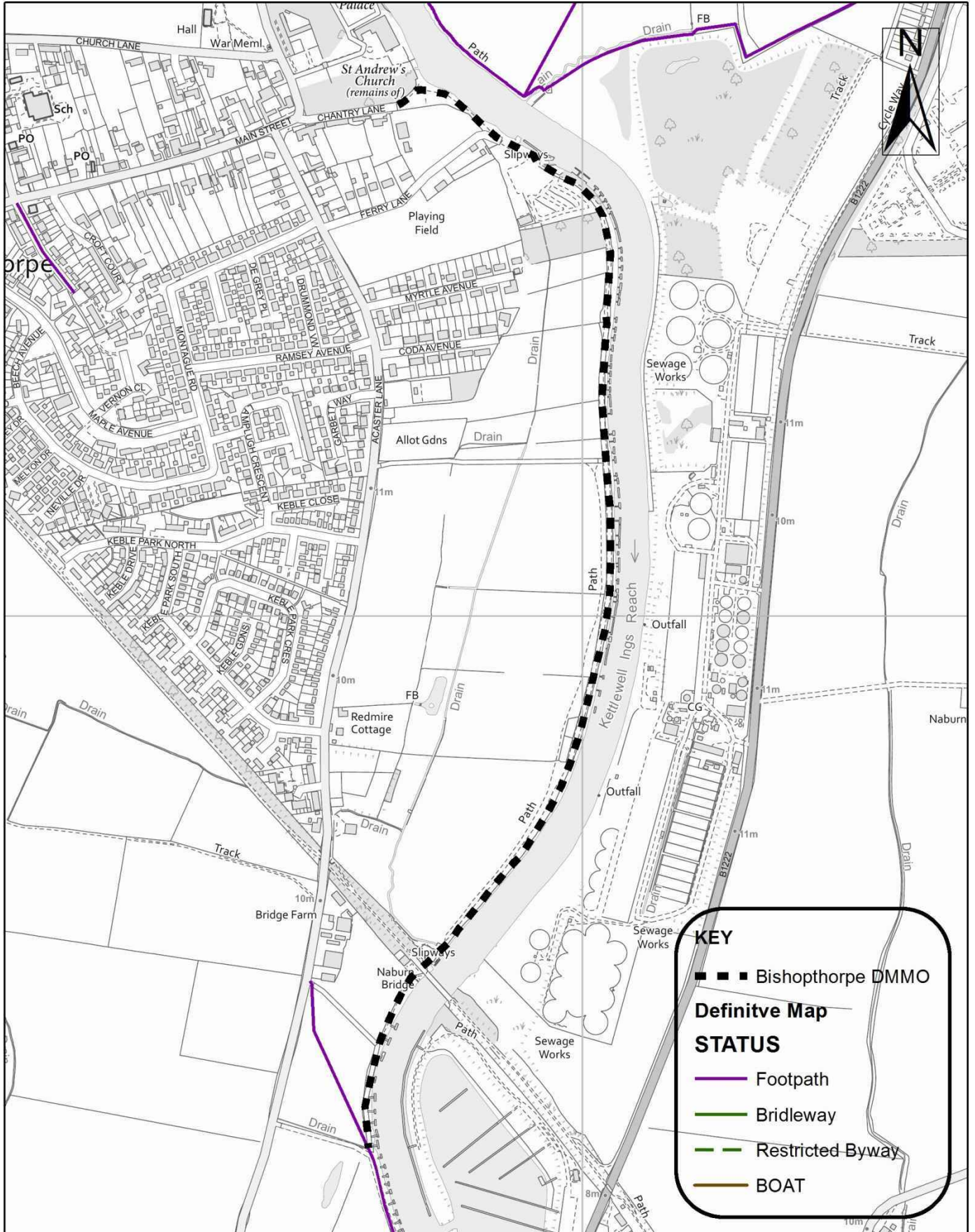
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Yours sincerely

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Russell Varley  
Definitive Map Officer



**KEY**

- ■ ■ Bishopthorpe DMMO

**Definitive Map**

**STATUS**

- Footpath
- Bridleway
- - - Restricted Byway
- BOAT



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

**DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3**

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Bishopthorpe Parish Council  
The Village Hall  
40 Main Street  
Bishopthorpe  
York  
YO23 2RB

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mrs Godfrey,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

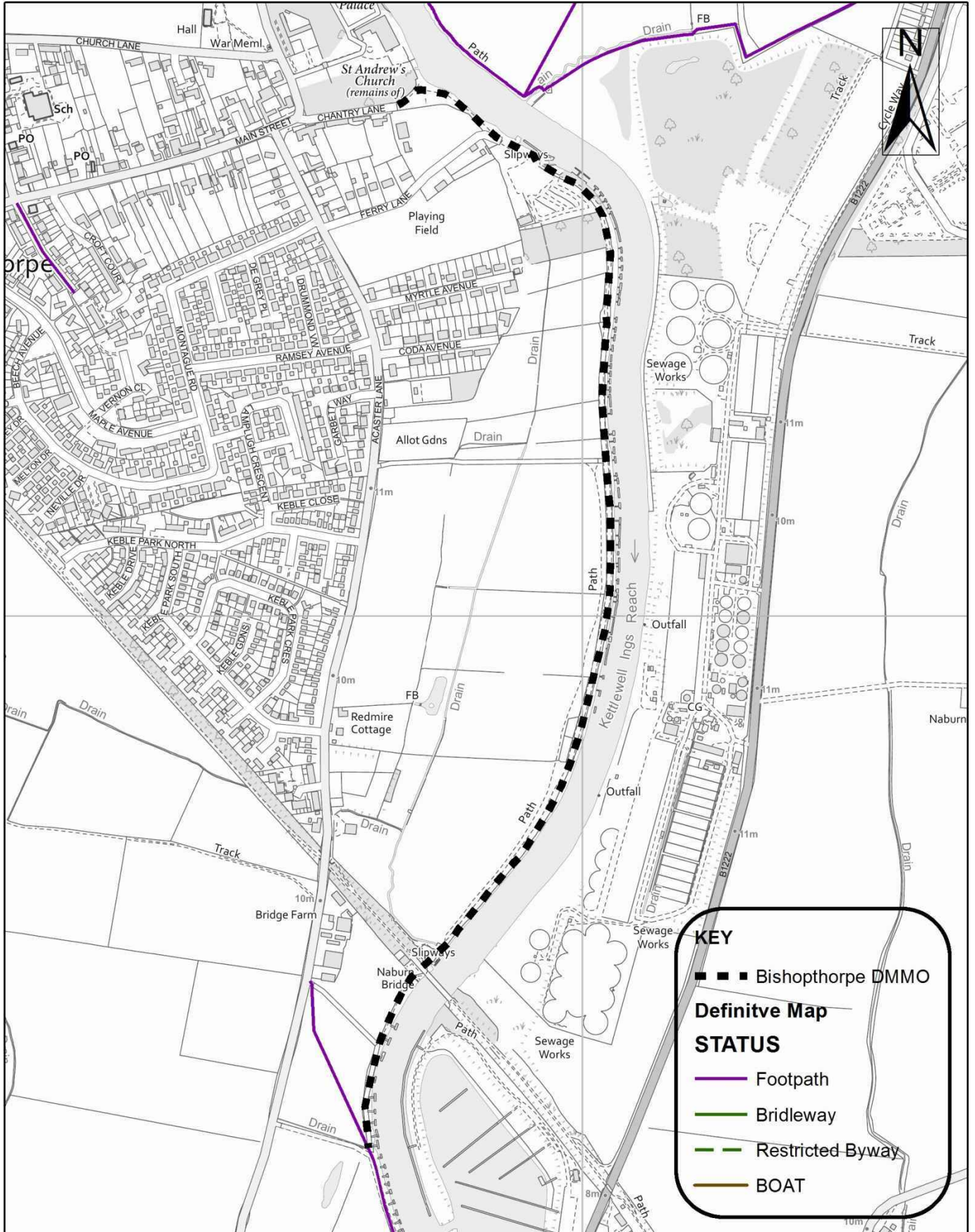
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'RV', with a small flourish at the end.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

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Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Mr S. Buckley  
2 Ascot Mews  
Emerald Street  
York  
YO31 8LT

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Buckley,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

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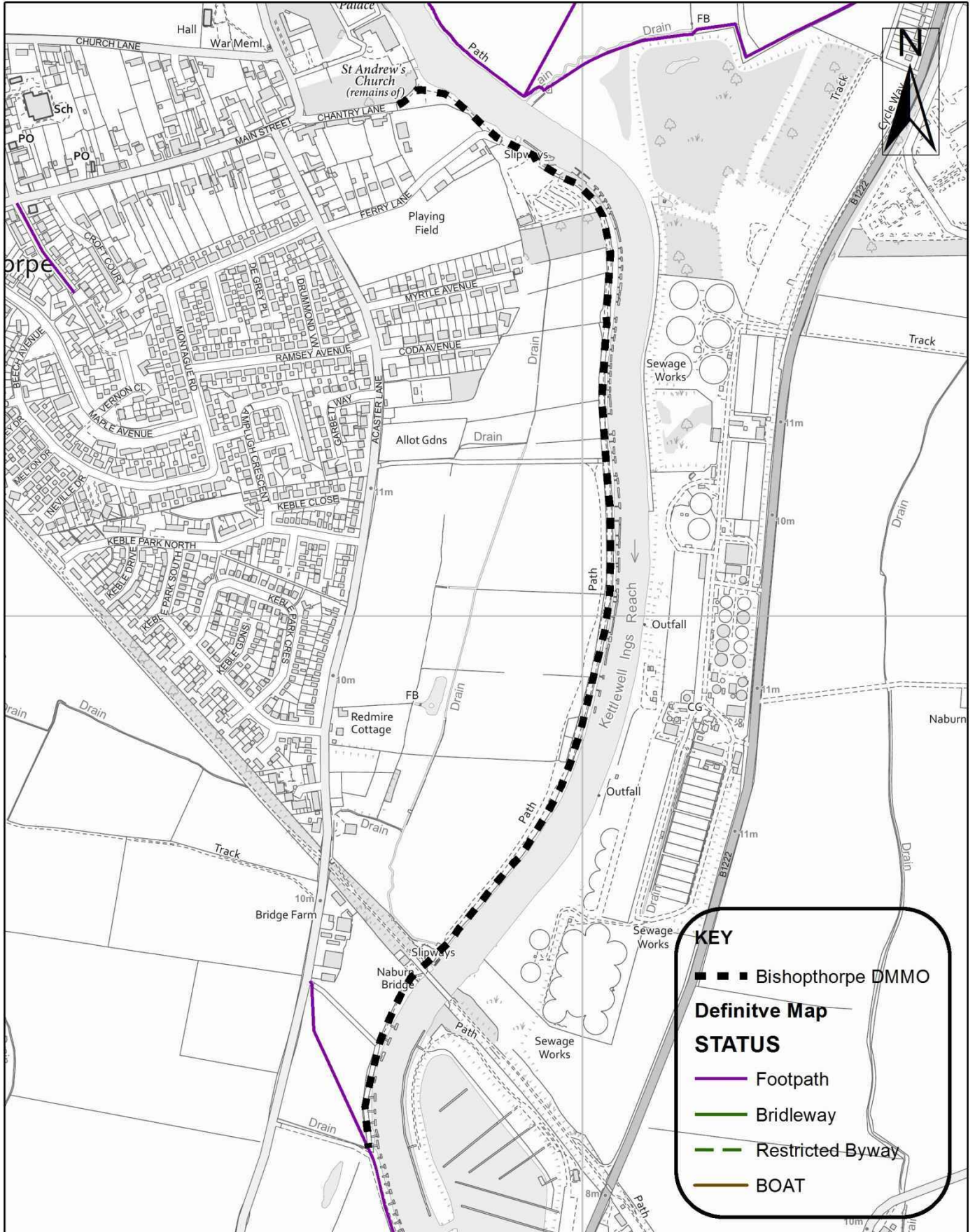
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Yours sincerely

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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GAMr R. Parker  
The Boat Yard  
Ferry Lane  
Bishopthorpe  
York  
YO23 2SBOur Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Parker,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

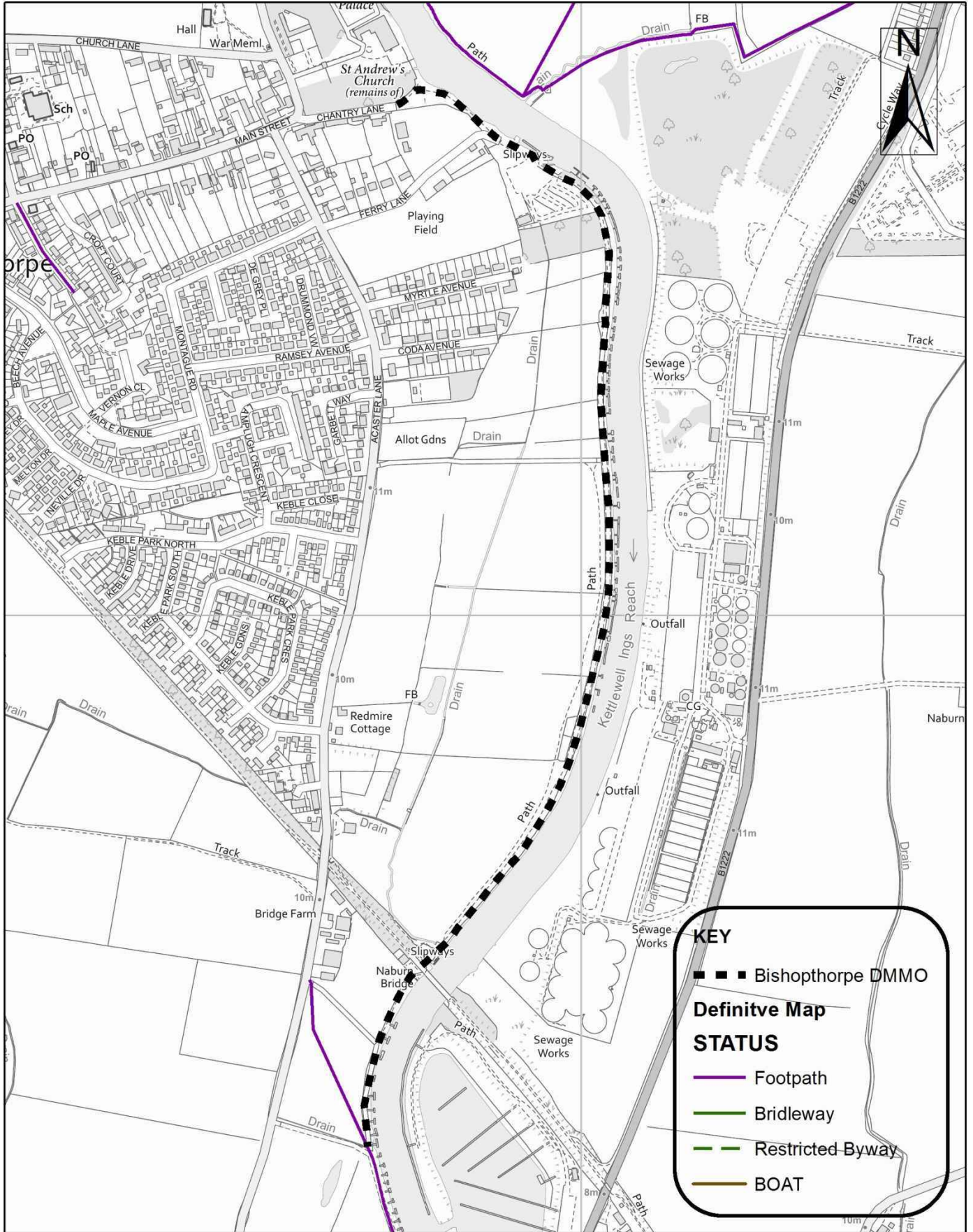
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Yours sincerely

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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

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Reference:

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Mr P. Mandy  
76 The Green  
Acomb  
York  
YO26 5LS

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Mandy,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

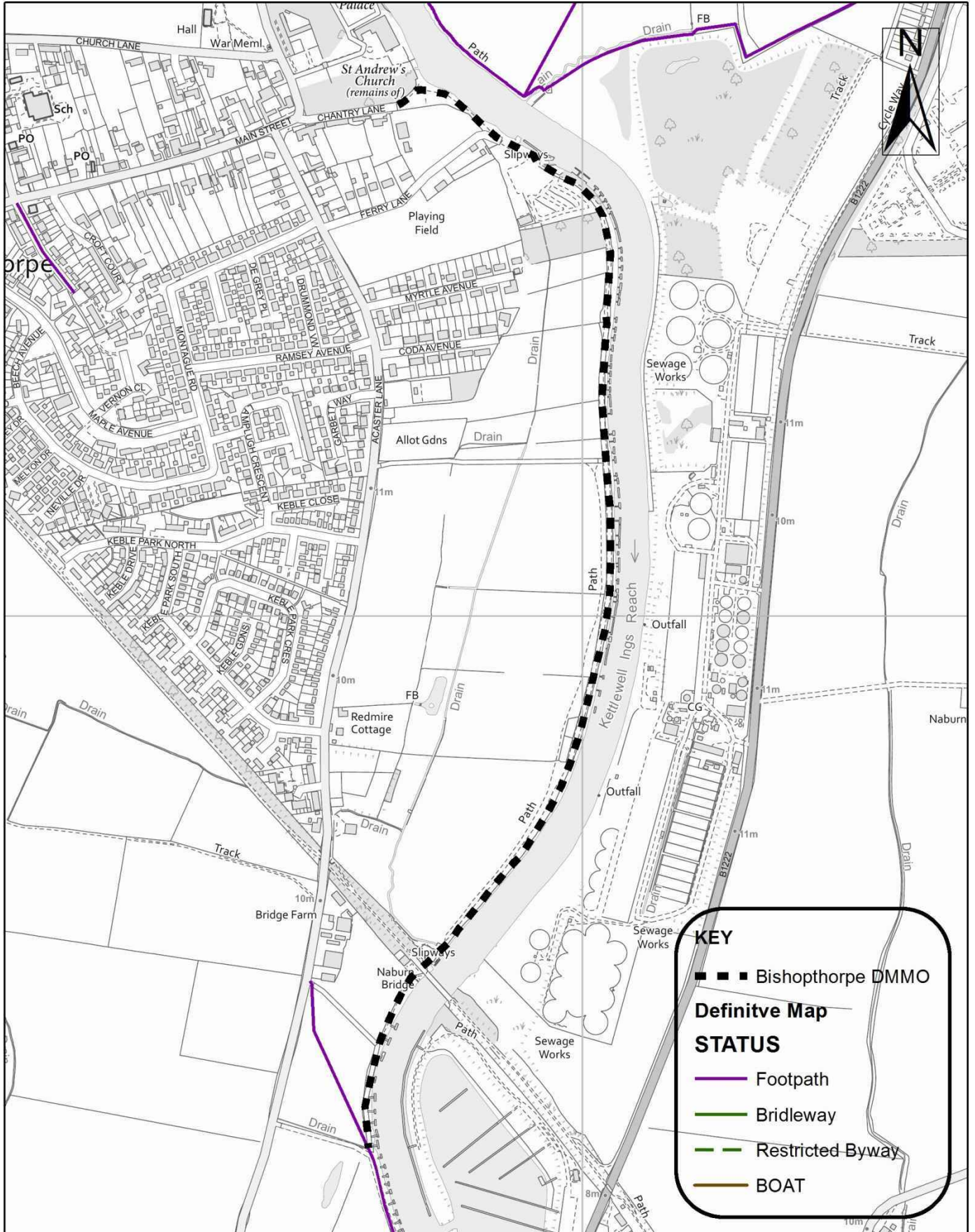
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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Mr C. Warriner  
9 Lawnway  
York  
YO31 1JD

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Warriner,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

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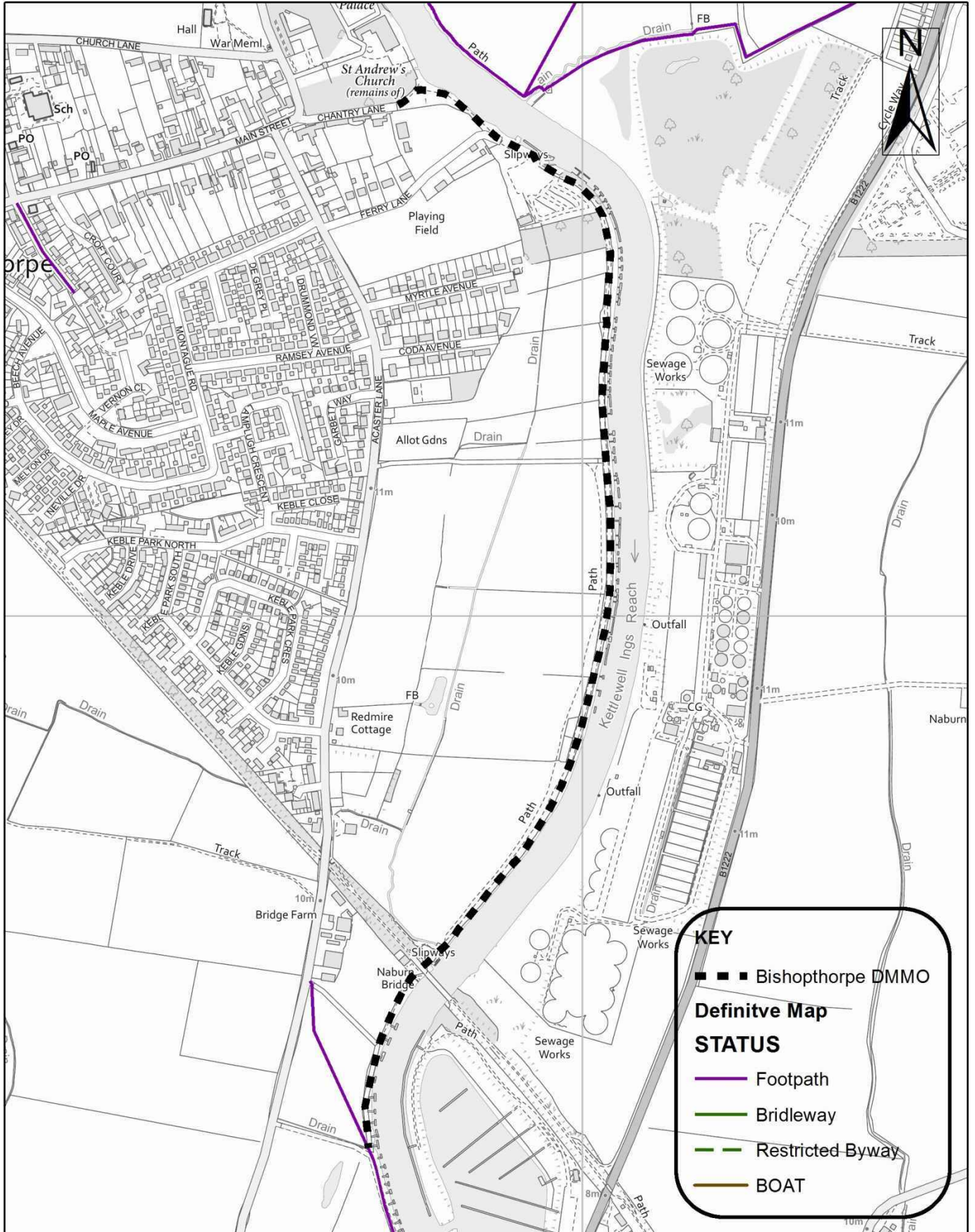
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500	Drawn By:RJV	Date:26/11/18
Public Rights of Way	Reference:	Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Church Commissioners for England  
Church House  
Great Smith Street  
London  
SW1P 3AZ

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Sir/Madam ,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

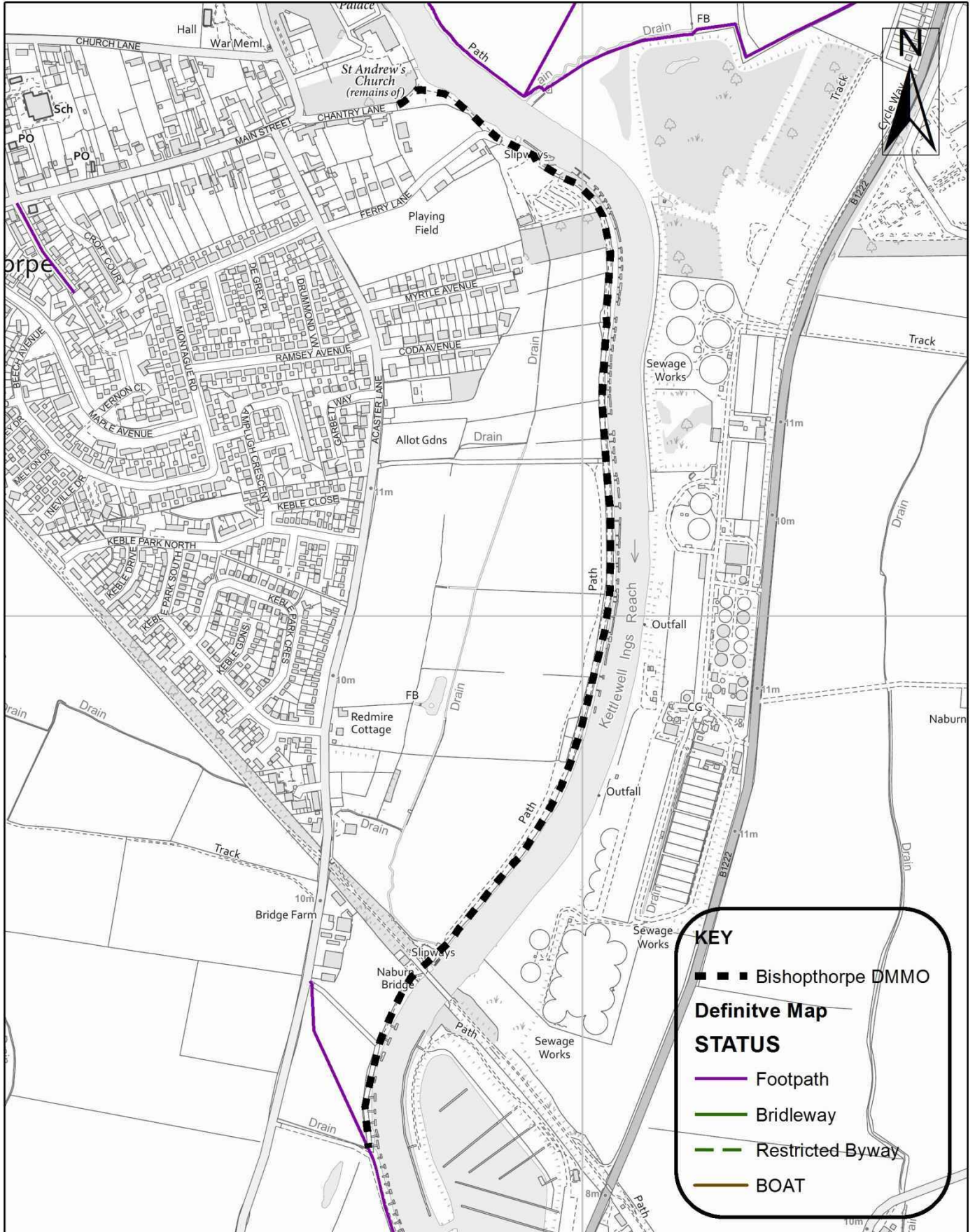
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Yours sincerely

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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Ms. M. Baylis  
Hillcrest  
Main Street  
Appleton Roebuck  
York  
YO23 7DA

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Ms Bayliss,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

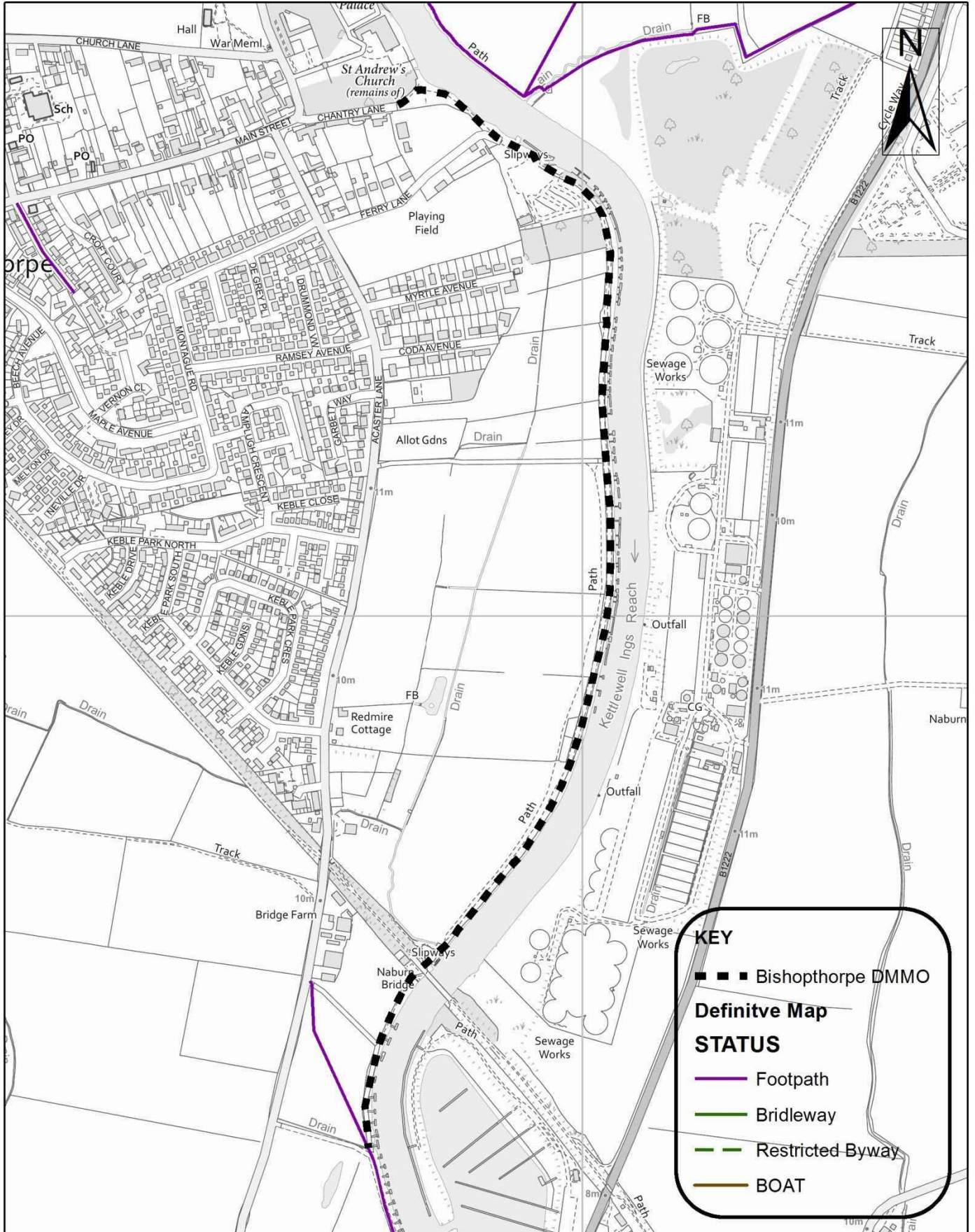
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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Cyclists Touring Club  
1 Whitehouse Rise  
York  
YO24 1EE

Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Twigg,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

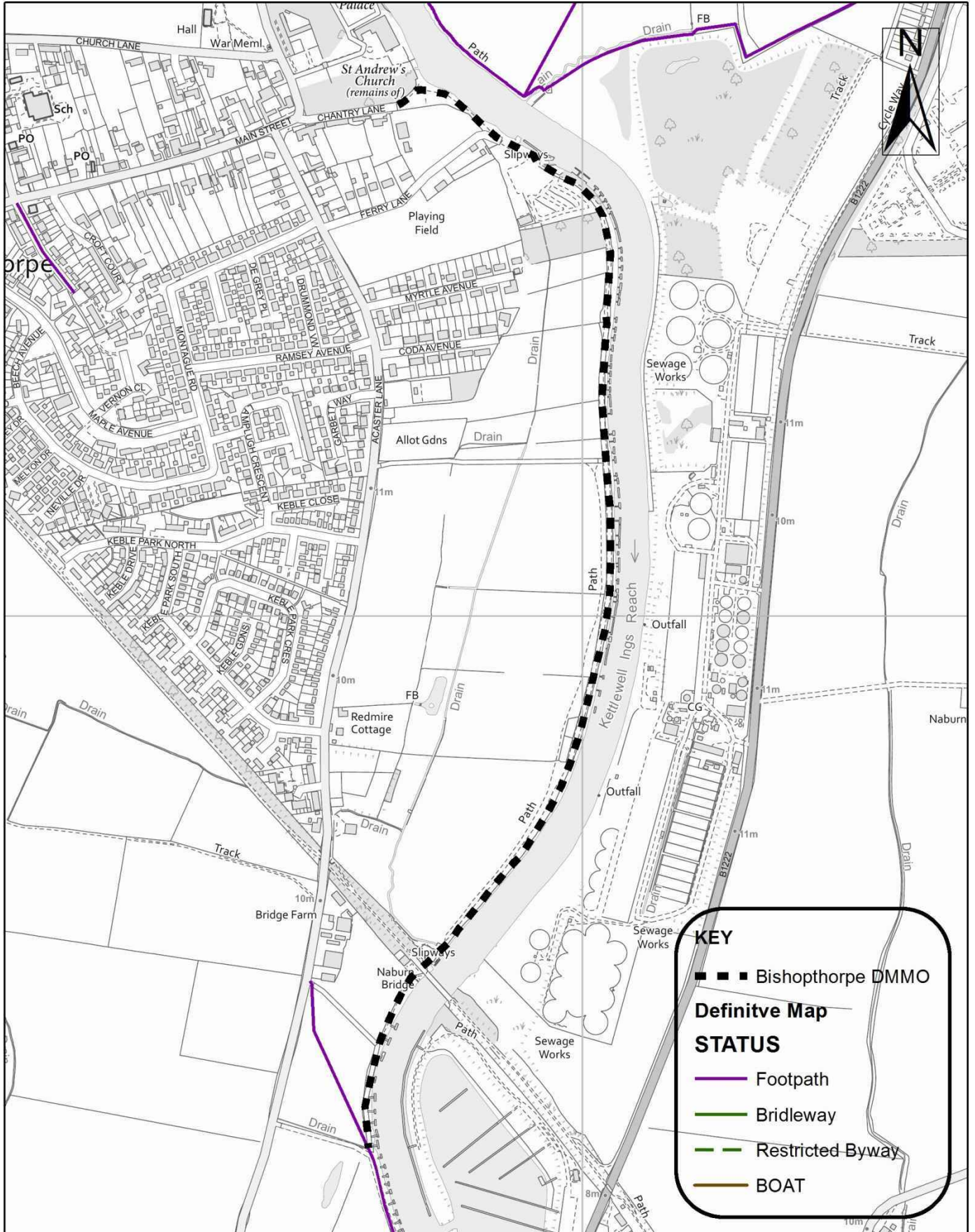
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Yours sincerely

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Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

York Cycling Campaign  
21 Barnfield Way  
Copmanthorpe  
York  
YO23 3RT

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr Setter,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

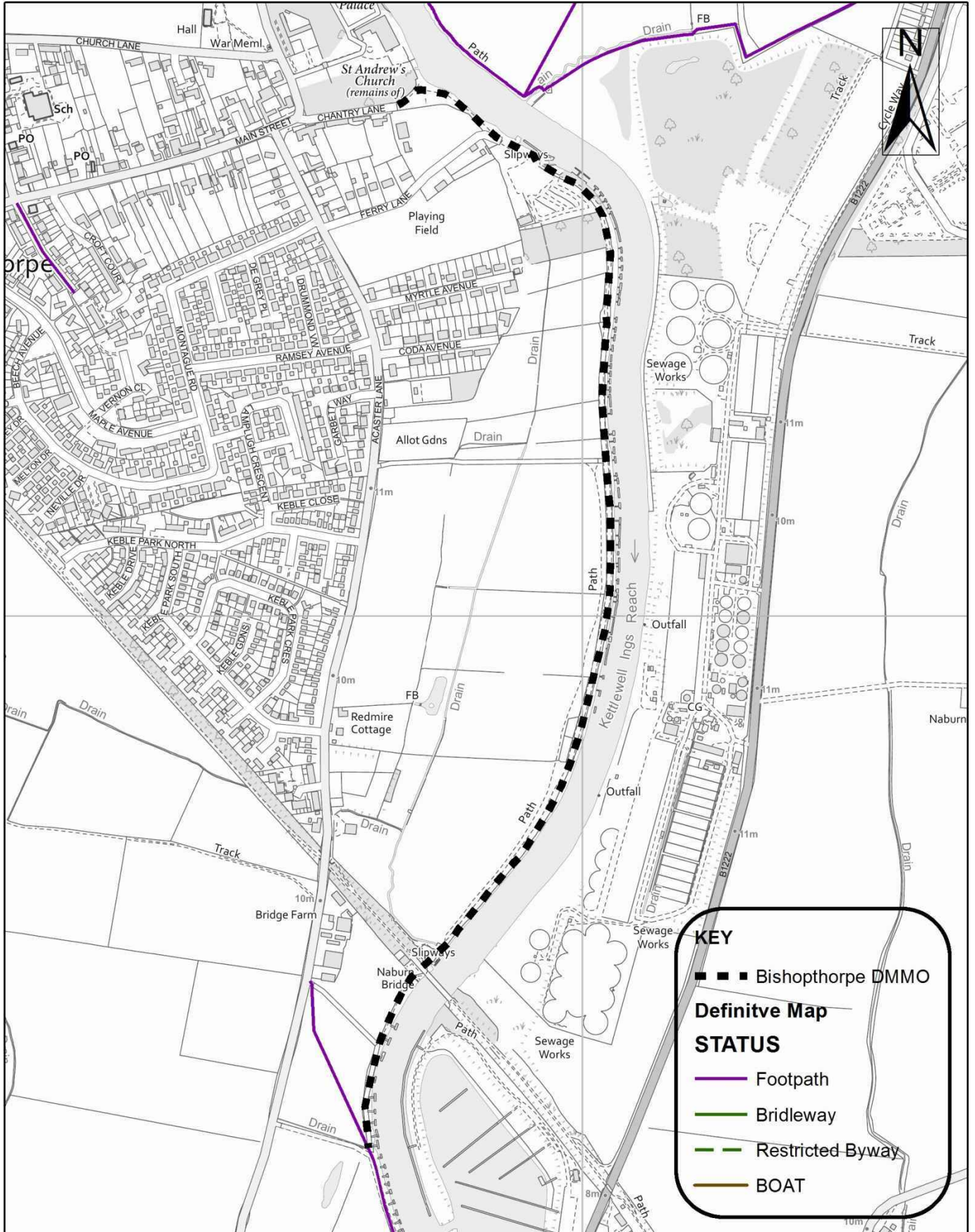
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Bishopthorpe Parish Council  
The Village Hall  
40 Main Street  
Bishopthorpe  
York  
YO23 2RB

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mrs Godfrey,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

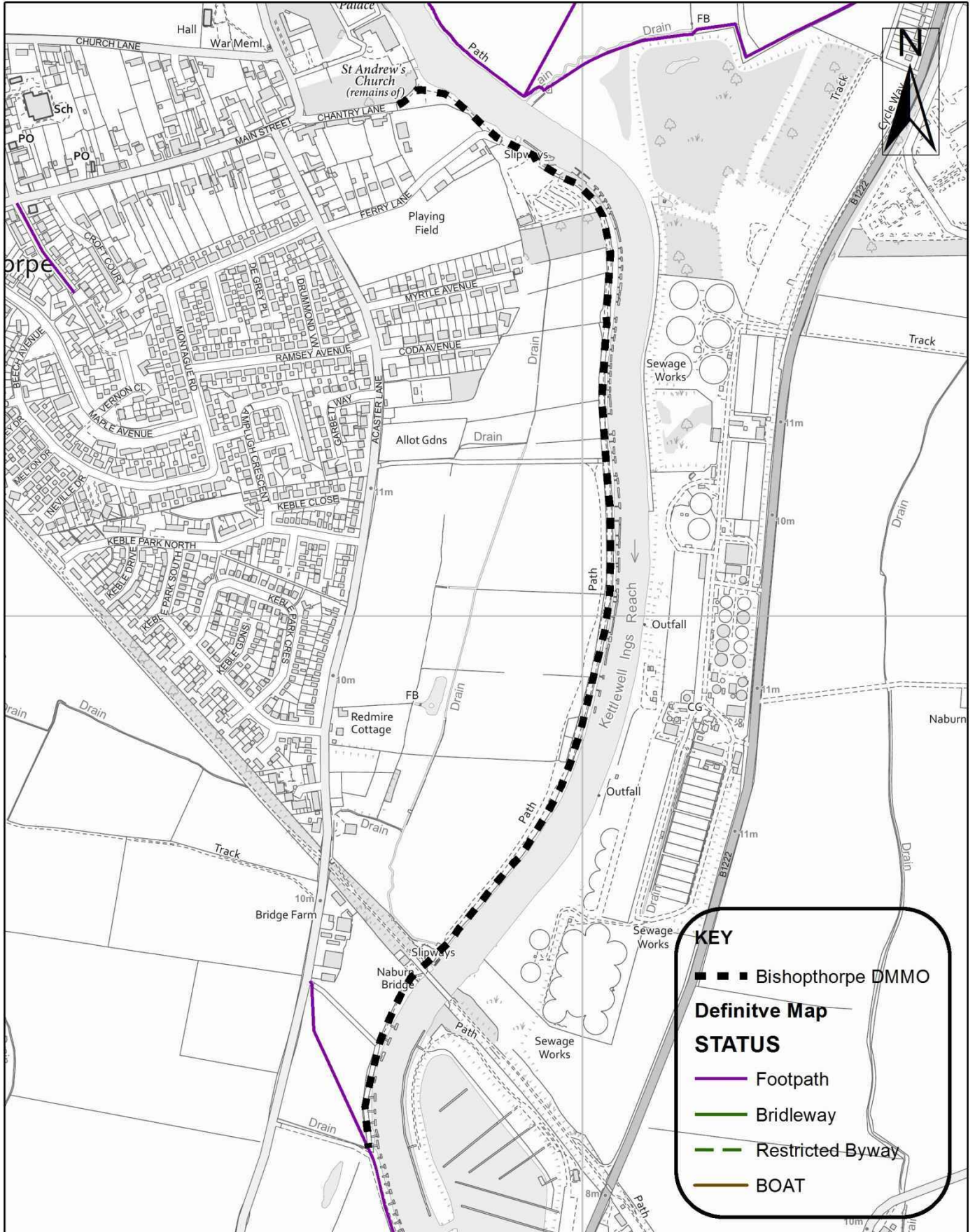
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

St. Andrew's Trust Bishopthorpe  
Stable Yard  
Chantry Lane  
Bishopthorpe  
York  
YO23 2QF

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Sir/Madam ,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

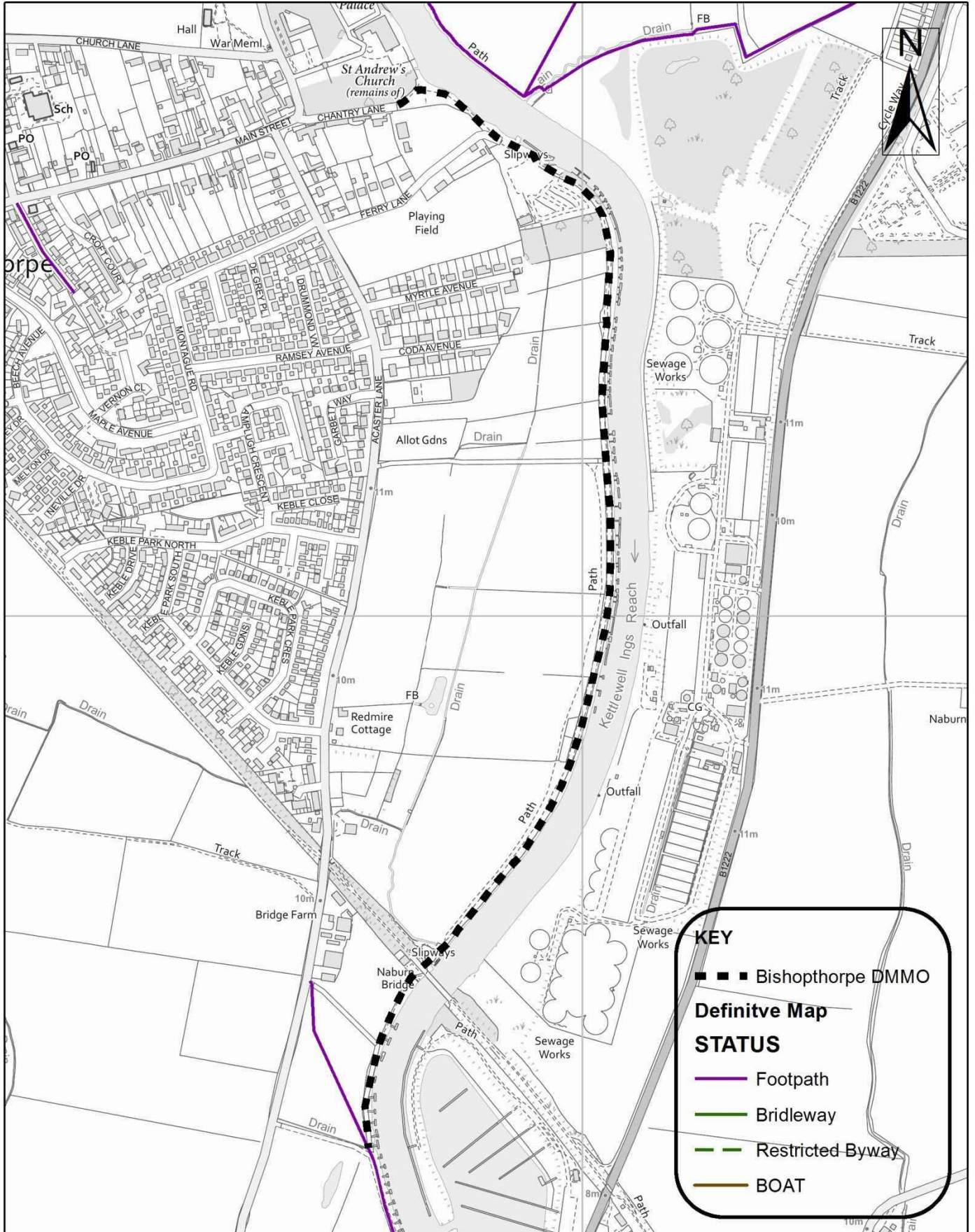
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GAAcaster Malbis Parish Council  
22 Lakeside  
Acaster Malbis  
York  
YO23 2TYOur Ref: 199402 Bishopthorpe  
Date: 4 September 2019  
Email: russell.varley@york.gov.uk

Dear Mr Davies,

**Section 53 Wildlife and Countryside Act 1989 – Notice of an application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

In 1994 North Yorkshire County Council received an application seeking to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3. When City of York Council was created in 1996 that application was passed to us for determination and I am writing to you to inform you that we have started investigations.

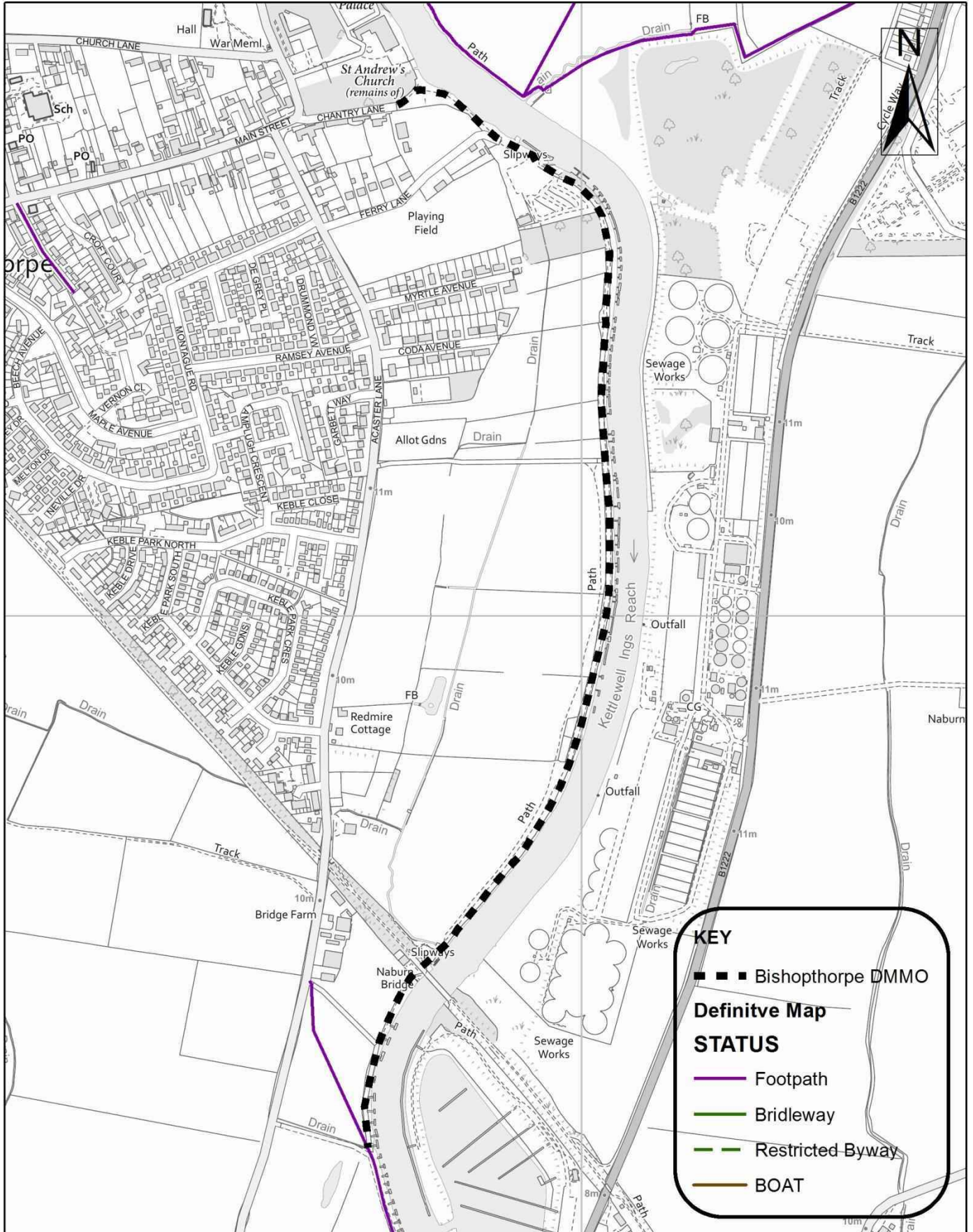
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If you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### DMMO Application to record a public footpath from Chantry lane, Bishopthorpe to Acaster Malbis 3

Scale 1:7,500

Drawn By:RJV

Date:26/11/18

Public Rights of Way

Reference:

Drawing No.

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**Varley, Russell**

---

**From:** Elizabeth Kirk <elizabethmkirk@aol.com>  
**Sent:** 26 November 2018 18:07  
**To:** Varley, Russell  
**Subject:** Re: Bishopthorpe

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

hello Russ,

Sorry, I don't know anything about this one.

All the best,  
Elizabeth

-----Original Message-----

From: Varley, Russell <Russell.Varley@york.gov.uk>  
To: Lady Elizabeth Kirk (elizabethmkirk@aol.com) <elizabethmkirk@aol.com>  
Sent: Mon, 26 Nov 2018 17:17  
Subject: Bishopthorpe

Hi Elizabeth

Please see the attached letter

All the best

Russ

**Russell Varley** | Definitive Map Officer  
t: 01904 553691 | e: [russell.varley@york.gov.uk](mailto:russell.varley@york.gov.uk) | w: [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap)

**City of York Council** | Rights of Way/Transport Service  
Directorate of Economy and Place | West Offices, Station Rise | York YO1 6GA  
[www.york.gov.uk](http://www.york.gov.uk) | [facebook.com/cityofyork](https://facebook.com/cityofyork) | [@CityofYork](https://twitter.com/CityofYork)

\*\*\*\*\*  
Help protect the environment! - please don't print this email unless you really need to.  
\*\*\*\*\*

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If you have received this communication in error, please return it immediately to the sender, then delete and destroy any copies of it.

4 Lane Road  
Bishopthorpe  
York  
YO23 2QL

Russell Varley,  
Definitive Map Officer,  
City of York Council,  
West Office,  
Station Rise,  
York,  
YO1 6GA.

01904 705361

(YOUR REF 199402 BISHOP THORPE)

3<sup>rd</sup> December 2018.

Dear Mr Varley,

Section 53 Wildlife and Countryside Act  
(The Charity of Thomas Annotson)

Further to your letter dated 26.11.18, I have checked our records and can confirm that I have found nothing, which refutes the existence of a public right of way from Chawton to Bishopthorpe to Acaston Malbis. In fact I have found a note from Bishopthorpe Parish Council dated June 95, part of which states:

'During a recent meeting with the owners of the land at the riverside where the boats are moored, it was pointed out that some people and their dogs are straying from the foot path and trespassing on the private land beyond the foot path. This, of course, should not happen and all users of the area are requested to stick to the foot path.'

Further more I would confirm that I have lived in the village for 48 yrs and during the whole of that time have regularly walked the whole of the route described.

Thank you,

Yours sincerely,

R. J. Edward Hants.

(Secretary/Treasurer to the Charity of Thomas Annotson)

# ST ANDREW'S TRUST BISHOPTHORPE

---

06 December 2018

Russell Varley  
Definitive Map Officer  
City of York Council  
West Offices  
Station Rise  
York  
YO1 6GA

Dear Mr Varley

## **PROPOSED PUBLIC RIGHT OF WAY ACROSS ST ANDREW'S TRUST'S LAND.**

We have received your letter addressed to Grays Solicitors with a small scale unnumbered plan, apparently drawn by yourself, both dated 26/11/2018.

Are you able to bring one of much larger scale to site and point out what you are referring to more distinctly? This would be helpful because your council provided Grays Solicitors with the evidence in the first place that you now seem to be asking us for.

We would be available to meet you on site between 11.00am and 3.00pm from Tuesday 11 to Wednesday 26 December 2018. Please let us know when it would be convenient for you.

Yours sincerely

Russell Wright  
Trustee

Copy to all trustees

St Andrew's Trust Bishopthorpe is a company limited by guarantee, registered in England and Wales. Company registration no. 3494257

St Andrew's Trust Bishopthorpe is registered as a charity in England and Wales. Charity no. 1068768

Registered office: The Stable Yard, Chantry Lane, Bishopthorpe, York, YO23 2QF

# ST ANDREW'S TRUST BISHOPTHORPE

---

10 December 2018

Russell Varley  
Definitive Map Officer  
City of York Council  
West Offices  
Station Rise  
York  
YO1 6GA

Dear Mr Varley

## **PROPOSED PUBLIC RIGHT OF WAY BETWEEN FERRY AND CHANTRY LANES.**

Thank you, we now have received your letter correctly addressed to us with the same plan and both still dated 26/11/2018. We have been going through our files for you in the meantime with a few preliminary results that seem enough to answer your enquiry with reasonable confidence.

You presumably know that your council advised our solicitor in 1998 that no public right of way exists or has ever existed across what is now our land. This legal result of a conveyance search is all you really need to know without having to ask for more but you say you are investigating a claim that goes back to 1994 which was made to a county council. Selby District Council had responsibility for ruling on such matters at that time.

This was before our time but the same searches in 1998 would still have discovered a ***long and uninterrupted public use of a path*** if one had really existed only four years earlier. So we have focused on that period.

Our records do show that a similar claim was made to you in 2006 by Bishopthorpe Parish Council which after thorough investigation you felt unable to support. But this doesn't help our journey back to 1994 directly.

A letter we have on file from an organisation called The Ramblers Association may shed a glimmer of light but only to confirm the rightness of your council's response to our solicitor's searches in 1998.

This letter is not addressed to a county council, nor in 1994, but to the Church Commissioners of England in 1999, and based on a mistaken assumption that they were still the landowners. The Commissioners passed it on to us to answer.

It is not a formal application; in effect it simply asks them to dedicate a new riverside path we were planning to build out into the river as a public right of way because a path through the churchyard had been lost, so they said, to erosion 5 years earlier.

Therefore no such path could have existed according to the Ramblers in 1994. It had already been extinguished by natural forces if it had existed at all.

There is no proof either way but the 1961 O.S. does indeed show a network of what appear to be garden paths through these former Church lands in the grounds of The Chantry, our site, and throughout the grounds of Bishopthorpe Palace. None of them connect Ferry Lane to Chantry Lane, the Ramblers letter does not claim this either, and none are marked as rights of way by the O.S. Theirs was an aspiration in other words for such a route to be established at some future date rather an application to preserve an existing one. It is possible that some may have enjoyed rambling along a churchyard path before it disappeared but technically they were trespassing.

So this looks more like an attempt made by this organisation to avoid that charge by exploiting our forthcoming NHMF-funded conservation work to establish a new unrestricted public right where none had existed before. It was unsuccessful because the Commissioners were much opposed to jeopardising the security of the Archbishop of York by providing uncontrolled and uncontrollable public access so close to his abode. Our reasons were and are even more cogent. Unrestricted public access to a nationally-important heritage site breaches our contract with the NHMF. Establishing a public right of way through it is simply impossible for this reason alone.

Our reference to the Ramblers may be a red herring but it is the only one we have found so far with any relationship to 1994. They said which may or may not be true, that a path that once existed part way across our land had been lost to embankment erosion five years earlier i.e. in 1994. We are under no obligation to replace or reinstate it now of course. We were not the landowners at the time and it did not, according to them, connect Ferry Lane to Chantry Lane in any case.

But we must now ask you how you know that an application was made to the county council for such a route in 1994. Do you have a copy of the application notice to the land owner? This would have been the Church Commissioners. If so please bring an authenticated copy of it with you for our files together with a larger site plan for our site meeting. Or post them to us in advance if you wish and we look forward to hearing from you again before your deadline of 2 January 2019.

Yours sincerely

Russell Wright  
Trustee

Copy to all trustees

St Andrew's Trust Bishopthorpe is a company limited by guarantee, registered in England and Wales. Company registration no. 3494257

St Andrew's Trust Bishopthorpe is registered as a charity in England and Wales. Charity no. 1068768

Registered office: The Stable Yard, Chantry Lane, Bishopthorpe, York. YO23 2QF



Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Charity of Thomas Annotson  
4 Lang Road  
Bishopthorpe  
York  
YO23 2QL

Our Ref: 199402 Bishopthorpe  
Date: 26 November 2018  
Email: russell.varley@york.gov.uk

Dear Mr. Harte,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

Thank you for your letter dated 3 December 2018. I am most grateful for the information contained within your letter. I will be in touch with you again when this matter is due to be placed before the Executive Member for Transport and Planning for a formal decision.

In the meantime, if you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Varley'.

Russell Varley  
Definitive Map Officer



Economy and Place Directorate

West Offices  
Station Rise  
York YO1 6GA

Mr R. Wright  
St Andrew's Trust Bishopthorpe,  
The Stable Yard,  
Chantry Lane,  
Bishopthorpe,  
York.  
YO23 2QF BY EMAIL ONLY

Our Ref: 199402 Bishopthorpe  
Date: 11 December 2018  
Email: russell.varley@york.gov.uk

Dear Mr. Wright,

**Section 53 Wildlife and Countryside Act 1989 – Application to record a public footpath between Chantry Lane, Bishopthorpe and Acaster Malbis 3**

Thank you for your letter dated 10 December 2018. I am most grateful for the information contained within therein. Furthermore, please find copies of all three applications the council has received in respect of alleged footpaths beside the river in Bishopthorpe. I have obliterated the signature of the various applicants but they are otherwise as I hold on the paper file. All three applications were made on behalf of Bishopthorpe Parish Council. For the sake of clarity and expediency I am dealing with all three applications simultaneously.

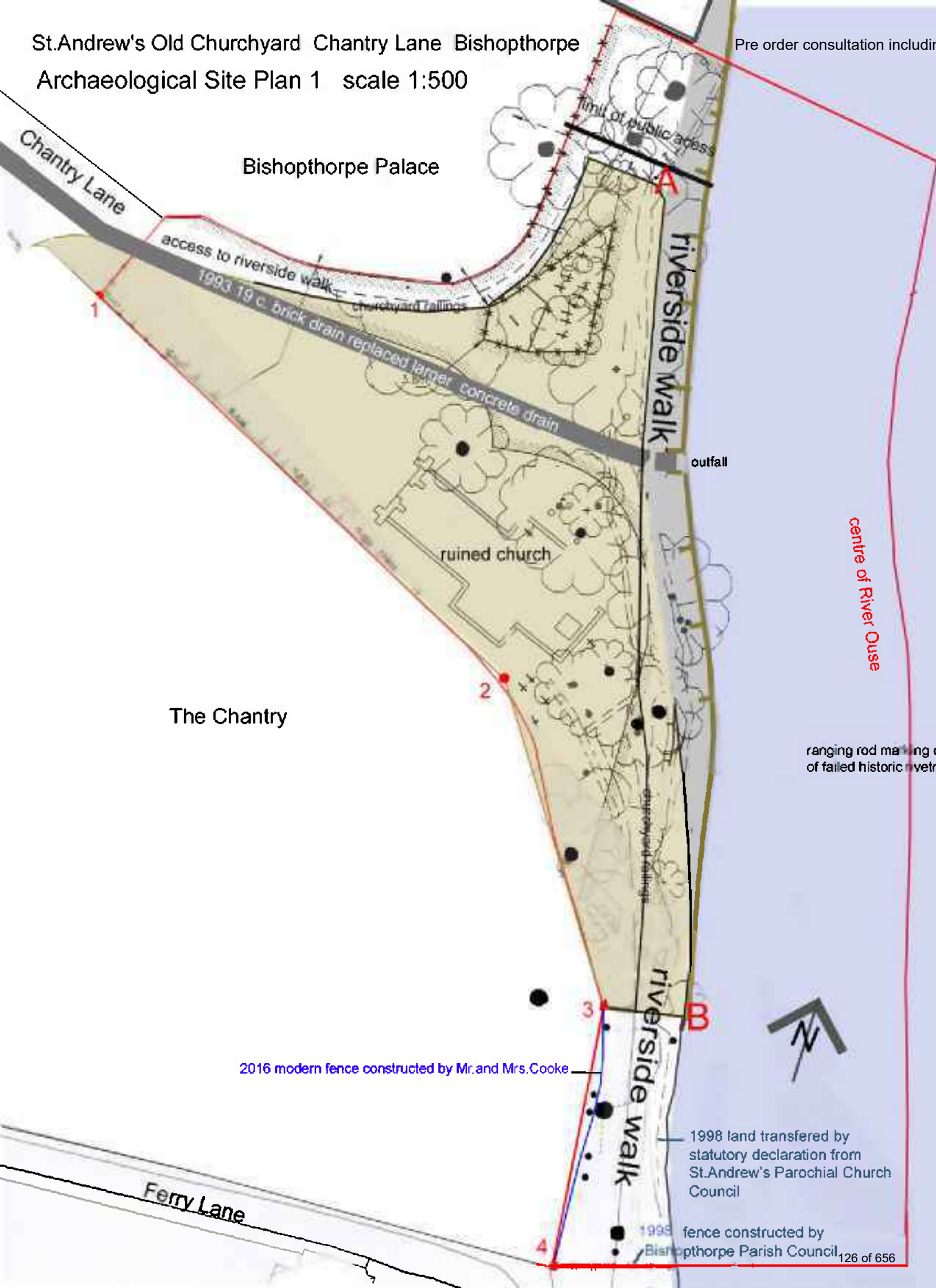
With regard to the substantive points you raise within your letter, I am not able to comment on them specifically at this stage. This is due to the council's policy for dealing with applications made under section 53 of the Wildlife and Countryside Act 1981. I will be presenting a report containing all the responses I have received to the Executive Member for Transport and Planning. It is then for him to make the council's formal decision. Such decision sessions are public meetings and any member of the public is welcome to address the decision session. My report on this application will be made available to everyone a few days before the meeting. I will write to you at that time detailing how you can view the report and how you can register to address the meeting.

Whilst I cannot comment on the specific matters you raise at this stage I have enclosed our guidance for land owners who are faced with an application of this type and a flow chart detailing how the council will deal with these applications. I trust this will be helpful in directing any inquiries you may need to make. In the meantime, if you would like further information you can contact me using the postal or email addresses above. Alternatively you can telephone me on 01904 551550.

Yours sincerely

A handwritten signature in black ink, appearing to read 'RV', with a small flourish at the end.

Russell Varley  
Definitive Map Officer



- land owned by St. Andrew's Trust Bishopthorpe
- extent of burial ground from cartographic and site evidence
- modern(2001) gabions and rockfill



**A-B** extent of erosion of burial ground 1999



undercut churchyard tree



2002 new riverside walk constructed over rockfill and gabions (approximate extent of lost burial ground)



**Varley, Russell**

---

**From:** Steve Hogg <stevehogg@hotmail.com>  
**Sent:** 12 December 2018 17:47  
**To:** Varley, Russell  
**Cc:** seanheslop@virginmedia.com  
**Subject:** York RI Sailing Club - Proposed footpath Your Ref 199402 Bishopthorpe

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear Mr Varley

Thank you for your time this afternoon explaining the liabilities and responsibilities associated with the adoption of a right of way across the frontage at our Sailing Club.

As mentioned could you please copy myself into future communications on this matter. You explained that you are obliged to send communications to York RI as the land owner. The contact there is Sean Heslop who is Chair of the RI Board, email above.

My contact details are.

Steve Hogg  
Secretary  
York RI Sailing Club  
2 Muncastergate  
York  
YO31 9JY

Tel 01904 421258  
Email as above.

Again thank you for your time today.

Kind regards  
Steve Hogg  
Secretary  
York RI Sailing Club

**Varley, Russell**

---

**From:** St Andrews Trust <info@standrewstrust.co.uk>  
**Sent:** 12 December 2018 14:37  
**To:** Varley, Russell  
**Subject:** Re: 2004 Application  
**Attachments:** application plan 1 copy.pdf

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Dear Russell, no map attached but it doesn't matter. Our attached site plan will remind you of the points raised at our meeting on it today. Notice the intellectual copyright to the Trust before you use it for any public document. You can do so with our written consent but not without. This is the only accurate depiction currently available anywhere of our land resulting from the topographical changes we made to it back in 2000-2002. O.S has a copy but yet to update. This is why I said your maps are out of date .

The BURIAL GROUND on ours is the area of primary archaeological interest protected by our metal railings since 2002 as a condition of our contract with the NHMF. This is the consecrated ground you referred to. Getting it de-consecrated for the purpose of conveyance to us was one of the fences we had to jump which from memory happened just before our take-over in 1998. But the order in council must be around in dusty Diocesan files somewhere if not transferred to the Borthwick . A lot of them were about 12 years ago. I would start looking there first if I were you. There is no reason we should have a copy but we just might if we delve deeper and can be bothered to do so.

Incidentally, did you know that etymologically our name is in Russia after the Swedish tribe who founded it, the Ruse or Russ, and in the French rouge, meaning red-headed or fox-like. We were a powerful Viking lot once , the chosen bodyguard no less of the Emperor of Constantinople whose life was literally in their hands. How times have changed but this heritage site is now in my hands and I am unlikely to give it up without a fight either . Hopefully I won't have to.

Regards ,  
Russell

**From:** [Varley, Russell](#)  
**Sent:** Tuesday, December 11, 2018 2:31 PM  
**To:** <mailto:info@standrewstrust.co.uk>  
**Subject:** 2004 Application

Dear Mr Wright

Please accept my apologies. The redacted copy of the 2004 application I sent you earlier did not contain the correct map The copy attached has the correct map included that was submitted with the application.

Kind regards

**Russell Varley** | Definitive Map Officer

t: 01904 553691 | e: [russell.varley@york.gov.uk](mailto:russell.varley@york.gov.uk) | w: [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap)

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**Varley, Russell**

---

**From:** St Andrews Trust <info@standrewstrust.co.uk>  
**Sent:** 13 December 2018 14:53  
**To:** Varley, Russell  
**Subject:** Re: 2004 Application

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Dear Russell, the site plan you handed me yesterday to go with the 1994 claim was drawn the day before. Have you a copy of the one actually submitted with the application ?

Regards

Russell Wright

**From:** [Varley, Russell](#)

**Sent:** Tuesday, December 11, 2018 2:31 PM

**To:** <mailto:info@standrewstrust.co.uk>

**Subject:** 2004 Application

Dear Mr Wright

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Kind regards

**Russell Varley** | Definitive Map Officer

t: 01904 553691 | e: [russell.varley@york.gov.uk](mailto:russell.varley@york.gov.uk) | w: [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap)

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**Varley, Russell**

---

**From:** St Andrews Trust <info@standrewstrust.co.uk>  
**Sent:** 13 December 2018 14:54  
**To:** Varley, Russell  
**Subject:** Re: 2004 Application

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Dear Russell, the site plan you handed me yesterday to go with the 1994 claim was drawn the day before. Have you a copy of the one actually submitted with the application ?

Regards

Russell Wright

**From:** [Varley, Russell](#)

**Sent:** Tuesday, December 11, 2018 2:31 PM

**To:** <mailto:info@standrewstrust.co.uk>

**Subject:** 2004 Application

Dear Mr Wright

Please accept my apologies. The redacted copy of the 2004 application I sent you earlier did not contain the correct map. The copy attached has the correct map included that was submitted with the application.

Kind regards

**Russell Varley** | Definitive Map Officer

t: 01904 553691 | e: [russell.varley@york.gov.uk](mailto:russell.varley@york.gov.uk) | w: [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap)

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**Varley, Russell**

---

**From:** Varley, Russell  
**Sent:** 13 December 2018 12:47  
**To:** 'Steve Hogg'  
**Cc:** seanheslop@virginmedia.com  
**Subject:** RE: York RI Sailing Club - Proposed footpath Your Ref 199402 Bishopthorpe

Dear Mr Hogg

Thank you for the telephone call and email yesterday. I have updated our records so that all communication will go to both the Sailing Club and York RI. I will use email where I can but please be aware that there are some items like a legal notice that were are forced to post to you. For these things I will send copies to both Queen Street and Muncastergate.

Kind regards

**Russell Varley** | Definitive Map Officer  
t: 01904 553691 | e: [russell.varley@york.gov.uk](mailto:russell.varley@york.gov.uk) | w: [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap)

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**From:** Steve Hogg [mailto:stevehogg@hotmail.com]  
**Sent:** 12 December 2018 17:47  
**To:** Varley, Russell  
**Cc:** seanheslop@virginmedia.com  
**Subject:** York RI Sailing Club - Proposed footpath Your Ref 199402 Bishopthorpe

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Dear Mr Varley

Thank you for your time this afternoon explaining the liabilities and responsibilities associated with the adoption of a right of way across the frontage at our Sailing Club.

As mentioned could you please copy myself into future communications on this matter. You explained that you are obliged to send communications to York RI as the land owner. The contact there is Sean Heslop who is Chair of the RI Board, email above.

My contact details are.

Steve Hogg  
Secretary  
York RI Sailing Club  
2 Muncastergate  
York  
YO31 9JY

Tel 01904 421258  
Email as above.

Again thank you for your time today.

Kind regards  
Steve Hogg  
Secretary  
York RI Sailing Club

# ST ANDREW'S TRUST BISHOPTHORPE

---

17 December 2018

Russell Varley  
Definitive Map Officer  
City of York Council  
West Offices  
Station Rise  
York  
YO1 6GA

Dear Russell

## **PROPOSED PUBLIC RIGHT OF WAY BETWEEN FERRY AND CHANTRY LANES.**

Thank you very much for the O.S. archives. Yes we have seen them before but glad to have clearer copies. We hadn't noticed that the churchyard was fenced off on its southern boundary which seems to rule out our theory that a path might once have run between the Palace and Bishopthorpe Ferry.

We had not seen all your small scale attachments before but they seem consistent with each other and to describe the same general route. Your retrospective plan of 11/12/2018 you say is for the 1994 claim is a specific route across our land said to have been in existence *before* 1994. But it wasn't there in 1970 according to the O.S. As far as we can see this claim appears to be made solely by this parish council as an assertion with nothing to back it up e.g. letters from parishioners stating when and how they used to cross this site regularly and freely to Chantry Lane and what route they took to it from Ferry Lane prior to 1994. And no approaches have ever been made to us as landowners, by parishioners, to make the same claim and we are well-known in this community. So we wonder what the real motive for this parochial claim might be.

We are now off for Christmas so season's greetings to you, thank you again for the old maps, and we look forward to your report to committee in the New Year. It should make for interesting reading.

Yours sincerely

Russell Wright  
Trustee  
Copy to all trustees

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St Andrew's Trust Bishopthorpe is registered as a charity in England and Wales. Charity no. 1068768

Registered office: The Stable Yard. Chantry Lane. Bishopthorpe. York. YO23 2QF



**Varley, Russell**

---

**From:** David or Enid Nunns <den3mil3@talktalk.net>  
**Sent:** 18 December 2018 14:08  
**To:** Varley, Russell  
**Subject:** Re: Bishopthorpe DMMO

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The path from Naburn Ferry at Acaster Malbis to Bishopthorpe Ferry Landing at the foot of Ferry Lane has been shown as a Footpath from before 1850 up to the current day. When the Ouse Navigation was formed it was the official Towing Path for river traffic, crossing over at Bishopthorpe Ferry (to avoid the Palace) and crossing back at Bishopthorpe Roving. We are not aware of anyone being turned back when using this path. It was an enclosed path north from opposite Redmire Cottage and when the railway was built there was an adequate arch left under Naburn railway bridge for the Tow Path. When there were proposals to form a Marina at the bottom of Ferry Lane, 2 or 3 options for this path were discussed and considered and it was considered to be a private path. We believe the footpath up to Bridge Farm on Acaster Lane was a more convenient way to Bishopthorpe village from Naburn Ferry (Acaster Malbis FP.3) The path to Acaster Malbis from Naburn Ferry was originally recorded as a footpath on the Definitive Map, but I believe the British Horse Society demonstrated higher rights after consulting Quarter Sessions records. There may be higher rights claimed for the path north from Naburn Ferry.

The continuation of the path from Ferry Lane to Chantry Lane is almost certainly just a footpath, with various routes being used by the public over the years, without let or hindrance.

**From:** [Varley, Russell](#)  
**Sent:** Monday, November 26, 2018 5:16 PM  
**To:** <mailto:den3mil3@talktalk.net>  
**Subject:** Bishopthorpe DMMO

Hi David

Please see the attached letter

All the best

Russ

**Russell Varley** | Definitive Map Officer  
t: 01904 553691 | e: [russell.varley@york.gov.uk](mailto:russell.varley@york.gov.uk) | w: [www.york.gov.uk/DefinitiveMap](http://www.york.gov.uk/DefinitiveMap)

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# ST ANDREW'S TRUST BISHOPTHORPE

---

20 December 2018

Russell Varley  
Definitive Map Officer  
City of York Council  
West Offices  
Station Rise  
York  
YO1 6GA

Dear Russell

## **PROPOSED PUBLIC RIGHT OF WAY BETWEEN FERRY AND CHANTRY LANES.**

I have now had opportunity to consult our records more fully about the specific question you raised concerning consecration. Except for its **buildings** our site was declared redundant by Order of the Church Commissioners on 31 October 1996 but this does not mean that it was also de-consecrated. On the contrary we were given this churchyard on condition that we would keep it as **a place of quiet reflection and contemplation** (the phrase used by the Commissioners) not as a through route for members of the public. This is another reason for our gated perimeter path being concessionary. We must be able to close it if in our opinion it threatens the purpose for which the Commissioners were willing to transfer this sacred site into our safe-keeping. This has been stated publicly by an informative notice erected on it since we acquired it and we built our perimeter riverside walk as a public amenity. It is our gift to local people providing they respect it, but is not a given right to unrestricted access.

These limitations imposed on our acquisitions were fully explained to this parochial council as reason for our inability to comply with the Ramblers' requests. In consequence it notified your council of its withdrawal of support. We can only assume that with the passage of time, change of chairman, and then the frequent resignations of members from it that followed, it has forgotten its previous undertakings and understandings.

For completeness in replying to your question, the **buildings** mentioned above were the ruins of the church in which we allow a long tradition of Church of England services on this sacred site to continue at important times in the religious year, the next after Christmas being Sunrise Services for Easter week led by the local vicar, Chris Coates. We do receive applications from other religious groups or sects from time to time but we confine our permissions to Roman Catholics and members of the Anglian Church for whom this place has special meaning. So much so, in fact, that in 2001 a Vicar Choral of York Minster was buried in our churchyard with full rites officiated by the Church of the England. He was our late Chairman, the very Rev. John McMullen, whose will it was to rest in peace in so sacred a plot of consecrated ground. Translated, the Latin inscription he devised for his own headstone describes it as the Gate to Heaven.

I think you now have your answer and we do not expect to have to provide it again either to you as a statutory council or to this little local lay one that appears to be pursuing its own agenda. It has not had the courtesy to inform us of any of the series of applications you now tell us it has been making behind our backs and we would not be surprised to learn that it does not understand that it has ethical as well as legal duties to do so.

Yours sincerely

Russell Wright

Trustee

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Registered office: The Stable Yard, Chantry Lane, Bishopthorpe, York. YO23 2QF

York RI Sailing Club  
2 Muncastergate  
York  
YO31 9JY

Russell Varley  
Definitive Map Officer  
York City Council  
West Offices  
Station Rise  
York  
YO1 6GA

1 January 2019

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

Dear Mr Varley


Further to your letter dated 26 November 2018 to York RI at Queen Street I am responding on behalf of York RI (CIO) regarding the proposal to record a public footpath along the frontage of the Sailing Club.

As you know there are two concrete slipways leading down to the river and from time to time these slipways will need maintaining so there may be occasions that the footpath will need to be closed to allow these works to take place and fresh concrete to set hard. I would ask that the Sailing Club be allowed to do this at no cost for the closure of the proposed public footpath. In agreeing to this the Sailing Club would only close the footpath for a maximum of 5 days.

During our conversation on the 12 December you mentioned the stile on the south boundary of the Sailing Club is the responsibility of Bridge Farm and I would also like to point out that the current gap in the fence to the north of our boundary is not on our boundary and therefore neither the stile nor this gap is our responsibility.

Other than this request and the comments on the stile and gap in the fence the York RI Sailing Club and York RI do not have any objections to the path being adopted as a public footpath.

Yours sincerely



Steve Hogg  
Secretary  
York RI Sailing Club

Copy: Sean Heslop - Chair of York RI board

**Varley, Russell**

---

**From:** Matt Davies <parish.clerk@acastermalbis-pc.gov.uk>  
**Sent:** 05 September 2019 07:44  
**To:** Varley, Russell  
**Subject:** Re: Parish council consultation

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Good morning Russell

Thank you for this consultation which I have circulated to all Parish Councillors for comment.

I can personally confirm that I used to walk this path quite regularly when I lived on Keble Park North, Bishopthorpe but usually joined it via Ferry Lane going as far as the Naburn swing bridge. I cannot recall ever using the short stretch between Ferry Cottage and Chantry Lane but have certainly seen others doing so.

I will respond formally when I have councillor responses.

Whilst writing could I ask if you have an up to date map of footpaths in Acaster Malbis? This would be useful for reference purposes when contacting City of York on general footpath matters.

Regards  
Matt Davies  
Clerk  
Acaster Malbis Parish Council

On 04/09/2019 16:08, Varley, Russell wrote:

> Dear Mr Davies  
>  
> Please find attached a copy of a letter you will be receiving by recorded delivery in the next few days. It is a consultation relating to an application to record the route from Acaster Malbis footpath 3 north along the river to Ferry Lane Bishopthorpe.  
>  
> I should have sent this to the parish council earlier this year and I can only apologise for this oversight. If the council have any evidence they wish to submit that either supports or refutes the existence of this route as a public footpath please could you send it to me by 2 October 2019?  
>  
> If you or the council have any queries regarding this matter please let me know.  
>  
> Kind regards  
>  
> Russell Varley | Definitive Map Officer  
> t: 01904 553691 | e:  
> russell.varley@york.gov.uk<mailto:your.name@york.gov.uk> | w:  
> www.york.gov.uk/DefinitiveMap<http://www.york.gov.uk/DefinitiveMap>  
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> www.york.gov.uk<http://www.york.gov.uk/> |

**Varley, Russell**

---

**From:** Parish Clerk <parish.clerk@acastermalbis-pc.gov.uk>  
**Sent:** 07 October 2019 16:17  
**To:** Varley, Russell  
**Subject:** Re: DMMO 199810 Naburn, Landing Lane to Hauling Lane, Acaster Malbis

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Hello Russell

Thank you for your prompt response. I should point that Mr Garry Taylor is the chairman of Acaster Malbis Parish Council and lives at Poplar Farm, the caravan park is located on the old farm. If you notified Poplar Farm then I would assume the letter has gone stray as a separate notification would not have been required in respect of the caravan park. Mr Taylor confirmed he had been notified of the Bishopthorpe application but not the Naburn one.

Just for interest I understand that in historic times Naburn had no church and the ferry was used to convey coffins across to Acaster Malbis for burial at Holy Trinity Church. I'm told that the ferry ceased operation in the 1950s.

The Parish Council resolved not to respond formally to the Bishopthorpe application as we understood the footpath was set to be approved with the exception of the Chantry Lane section where there was apparently an issue related to passage over consecrated ground. My personal comments regarding use of the path between Naburn bridge and Ferry Lane are however valid. I can not personally recall using the Chantry Lane section.

Finally, are you also responsible for road naming? Residents seem to think that Hauling Lane ends at the corner by The Ship Inn, your consultation seem to imply it extends further towards Bishopthorpe.

Regards  
Matt Davies  
Clerk  
Acaster Malbis

On 07/10/2019 14:47, Varley, Russell wrote:

> Good afternoon Matt

>

> Thank you for your email. Please extend my apologies to Mr Taylor about not consulting him on this matter, I was reliant on what the Land Registry had recorded and it looks like we only had a contact for Poplar Farm, rather than the caravan park.

>

> Yes most of the route is already recorded as a footpath and the only previously unrecorded sections are the short ways on both sides down that give access to the river. I included the whole route back to Hauling Lane because there is a suggestion that the route that is currently recorded as footpath should be of a higher status (bridleway in this case). To be perfectly honest this case file is somewhat chaotic and I until I have the time to properly organise it I am trying to let as many people know as I can. Hence my gratitude to you for passing on my letter to Mr Taylor.

>

> I will take the time to properly organise this file once we have determined this and the other 16 applications we have received.

>

> I understand from Cllr Galvin that the routes either side of the river gave access to a ferry across the river. It is not possible to get a right of way over water, so if the suggestion that higher rights exist over the rest of the route turns out not to be credible then is it possible this application will go no further.

>

> On a separate matter, the consultation for the riverside path that extends up into Bishopthorpe Parish, you gave me an initial response and said you would communicate the parish council's views formally in due course. I don't appear to have received anything so far, so I was wondering if you were happy for me to use your initial response as the council's reply?

>

> Many thanks

>

> Russell

>

> Russell Varley | Definitive Map Officer  
 > t: 01904 553691 | e: russell.varley@york.gov.uk | w:  
 > www.york.gov.uk/DefinitiveMap

>

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>

> -----Original Message-----  
 > From: Matt Davies <parish.clerk@acastermalbis-pc.gov.uk>  
 > Sent: 07 October 2019 13:01  
 > To: Varley, Russell <Russell.Varley@york.gov.uk>  
 > Subject: DMMO 199810 Naburn, Landing Lane to Hauling Lane, Acaster  
 > Malbis

>

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>

> Good afternoon Russell

>

> Mr Garry Taylor of Poplar Farm Caravan Park, Moor End, Acaster Malbis,  
 > YO23 2UQ has reported that he has not received a copy of this consultation even though the proposed route apparently passes over land owned him. I will be providing a copy of your letter to him this afternoon.

>

> Am I correct in thinking that the majority of the proposed footpath in question already exists (20/3/10 to 20/3/20) as shown on your map RJV dated 5/9/19? The only new section appears to be the portion that crosses the River Ouse along the route of what was (presumably) the original chain ferry that once linked the two villages. Can a footpath be established across a river? Presumably a long standing right of way does exist.

>

> Comments appreciated.

>

> Regards  
 > Matt Davies  
 > Clerk  
 > Acaster Malbis Parish Council

>

>

>

> \* \* \* \* \*



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**Varley, Russell**

---

**From:** Parish Clerk <parish.clerk@acastermalbis-pc.gov.uk>  
**Sent:** 07 October 2019 16:38  
**To:** Varley, Russell  
**Subject:** Re: DMMO 199810 Naburn, Landing Lane to Hauling Lane, Acaster Malbis

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The stretch from The Ship Inn towards Bishopthorpe allegedly has no name but at some point becomes Acaster Lane in Bishopthorpe. One of life's great mysteries I suppose.

The Naburn site may tell the tale but I believe they would bring coffins over the night before and leave them in a small stone building (now housing drainage pumps) between the river and Holy Trinity with the mourners crossing by boat on the day of the funeral. Apparently the boat capsized once when the river was in flood and a number of mourners drowned. This prompted the building of a new church in Naburn.

Regards  
 Matt

On 07/10/2019 16:25, Varley, Russell wrote:

> Many thanks for your reply, Matt. I note that AMPC are choosing not to respond formally to the application up into Bishopthorpe. Thank you for that and I will note your comments on the file as being from Matt Davies rather than the clerk to AMPC.

>  
 > With regard to the ferry that is what I understood as well, the village website has some good photos of the ferry in operation. As far as naming roads is concerned, no that it not my area. I am relying on what the Ordnance Survey print on their maps so it is entirely possible I have made a mistake in the name.

>  
 > Kind regards

>  
 > Russell

>  
 > Russell Varley | Definitive Map Officer  
 > t: 01904 553691 | e: russell.varley@york.gov.uk | w:  
 > www.york.gov.uk/DefinitiveMap

>  
 > City of York Council | Rights of Way/Transport Service Directorate of  
 > Economy and Place | West Offices, Station Rise | York YO1 6GA  
 > www.york.gov.uk | facebook.com/cityofyork |@CityofYork

>  
 >  
 > -----Original Message-----

> From: Parish Clerk <parish.clerk@acastermalbis-pc.gov.uk>  
 > Sent: 07 October 2019 16:17  
 > To: Varley, Russell <Russell.Varley@york.gov.uk>  
 > Subject: Re: DMMO 199810 Naburn, Landing Lane to Hauling Lane, Acaster  
 > Malbis

>  
 > This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

>  
 > Hello Russell

>

> Thank you for your prompt response. I should point that Mr Garry Taylor is the chairman of Acaster Malbis Parish Council and lives at Poplar Farm, the caravan park is located on the old farm. If you notified Poplar Farm then I would assume the letter has gone stray as a separate notification would not have been required in respect of the caravan park. Mr Taylor confirmed he had been notified of the Bishopthorpe application but not the Naburn one.

>

> Just for interest I understand that in historic times Naburn had no church and the ferry was used to convey coffins across to Acaster Malbis for burial at Holy Trinity Church. I'm told that the ferry ceased operation in the 1950s.

>

> The Parish Council resolved not to respond formally to the Bishopthorpe application as we understood the footpath was set to be approved with the exception of the Chantry Lane section where there was apparently an issue related to passage over consecrated ground. My personal comments regarding use of the path between Naburn bridge and Ferry Lane are however valid. I can not personally recall using the Chantry Lane section.

>

> Finally, are you also responsible for road naming? Residents seem to think that Hauling Lane ends at the corner by The Ship Inn, your consultation seem to imply it extends further towards Bishopthorpe.

>

> Regards  
> Matt Davies  
> Clerk  
> Acaster Malbis

>

>

> On 07/10/2019 14:47, Varley, Russell wrote:

>> Good afternoon Matt

>>

>> Thank you for your email. Please extend my apologies to Mr Taylor about not consulting him on this matter, I was reliant on what the Land Registry had recorded and it looks like we only had a contact for Poplar Farm, rather than the caravan park.

>>

>> Yes most of the route is already recorded as a footpath and the only previously unrecorded sections are the short ways on both sides down that give access to the river. I included the whole route back to Hauling Lane because there is a suggestion that the route that is currently recorded as footpath should be of a higher status (bridleway in this case). To be perfectly honest this case file is somewhat chaotic and I until I have the time to properly organise it I am trying to let as many people know as I can. Hence my gratitude to you for passing on my letter to Mr Taylor.

>>

>> I will take the time to properly organise this file once we have determined this and the other 16 applications we have received.

>>

>> I understand from Cllr Galvin that the routes either side of the river gave access to a ferry across the river. It is not possible to get a right of way over water, so if the suggestion that higher rights exist over the rest of the route turns out not to be credible then is it possible this application will go no further.

>>

>> On a separate matter, the consultation for the riverside path that extends up into Bishopthorpe Parish, you gave me an initial response and said you would communicate the parish council's views formally in due course. I don't appear to have received anything so far, so I was wondering if you were happy for me to use your initial response as the council's reply?

>>

>> Many thanks

>>  
>> Russell  
>>  
>> Russell Varley | Definitive Map Officer  
>> t: 01904 553691 | e: russell.varley@york.gov.uk | w:  
>> www.york.gov.uk/DefinitiveMap  
>>  
>> City of York Council | Rights of Way/Transport Service Directorate of  
>> Economy and Place | West Offices, Station Rise | York YO1 6GA  
>> www.york.gov.uk | facebook.com/cityofyork |@CityofYork  
>>  
>> -----Original Message-----  
>> From: Matt Davies <parish.clerk@acastermalbis-pc.gov.uk>  
>> Sent: 07 October 2019 13:01  
>> To: Varley, Russell <Russell.Varley@york.gov.uk>  
>> Subject: DMMO 199810 Naburn, Landing Lane to Hauling Lane, Acaster  
>> Malbis  
>>  
>> This email originated from outside of the organisation. Do not click links or open  
>> attachments unless you recognise the sender and know the content is safe.  
>>  
>> Good afternoon Russell  
>>  
>> Mr Garry Taylor of Poplar Farm Caravan Park, Moor End, Acaster  
>> Malbis,  
>> Y023 2UQ has reported that he has not received a copy of this consultation even  
>> though the proposed route apparently passes over land owned him. I will be providing a  
>> copy of your letter to him this afternoon.  
>>  
>> Am I correct in thinking that the majority of the proposed footpath in question  
>> already exists (20/3/10 to 20/3/20) as shown on your map RJV dated 5/9/19? The only  
>> new section appears to be the portion that crosses the River Ouse along the route of  
>> what was (presumably) the original chain ferry that once linked the two villages. Can  
>> a footpath be established across a river? Presumably a long standing right of way does  
>> exist.  
>>  
>> Comments appreciated.  
>>  
>> Regards  
>> Matt Davies  
>> Clerk  
>> Acaster Malbis Parish Council  
>>  
>>  
>>  
>> \* \* \* \* \*  
>> \* \* \* \* \* Help protect the environment! - please don't print this email  
>> unless you really need to.  
>> \* \* \* \* \*  
>> \* \* \* \* \*  
>>  
>> This communication is from City of York Council.  
>>  
>> The information contained within, and in any attachment(s), is confidential and  
>> legally privileged. It is for the exclusive use of the intended recipient(s). If you  
>> are not the intended recipient(s), please note that any form of distribution, copying  
>> or use of this communication, or the information within, is strictly prohibited and

may be unlawful. Equally, you must not disclose all, or part, of its contents to any other person.

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>> If you have received this communication in error, please return it immediately to the sender, then delete and destroy any copies of it.

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> \* \* \* \* \*

> \* \* \* \* \* Help protect the environment! - please don't print this email unless you really need to.

> \* \* \* \* \*

> \* \* \* \* \*

>

> This communication is from City of York Council.

>

> The information contained within, and in any attachment(s), is confidential and legally privileged. It is for the exclusive use of the intended recipient(s). If you are not the intended recipient(s), please note that any form of distribution, copying or use of this communication, or the information within, is strictly prohibited and may be unlawful. Equally, you must not disclose all, or part, of its contents to any other person.

>

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## **Appendix 13**

### **Definitive map and statement**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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

# The Council of the City of York (Part of the former No 2 Area of the County of the West Riding of Yorkshire) Definitive Map



**KEY**

- PUBLIC FOOTPATH
- PUBLIC BRIDLEWAY
- PARISH BOUNDARIES
- Area not part of definitive map

Scale:- 1:10000

Certified as: The Council of the City of York  
(Part of the former No 2 Area of the County of the West Riding of Yorkshire)  
Definitive Map

THE COMMON SEAL OF THE COUNCIL OF THE CITY OF YORK was this 26th day of February 2001 hereto affixed in the presence of:-

*R. H. Lewis*  
Head of Legal Services

**Relevant Date**  
**1 December 2000**

Ordnance Survey Sheet No. <b>SE54NE</b>	Definitive Map Sheet No. <b>WR 6</b>
City of York Council, LA 09067L Reproduced from the Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office © Crown Copyright. Unauthorised reproduction infringes Crown Copyright and may lead to prosecution or civil proceedings.	

WR 3	WR 4
WR 5	WR 6
	WR 7

2327



**Wildlife and Countryside Act 1981**

**The Council of the City of York  
(Part of the former No 2 Area of the County of the West Riding of Yorkshire)  
Definitive Statement**

---

**Parish:** Bishopthorpe      **Status:** Public Footpath      **Path Number:** 1

**O.S. Map Sheet Reference:** SE 54 NE      **Definitive Map Sheet Reference:** WR 6

**Approximate Length:** 0.50

**Description of Route:**

Footpath commencing at its junction with the County Road adjoining the School at Bishopthorpe and proceeding in a southerly direction to the Railway and thence to the Acaster Malbis Parish Boundary.

**Nature of Surface:**

<u>Start Grid Reference</u>	<u>End Grid Reference</u>	<u>Surface Type</u>
		Arable Land

**Approximate Width:**

<u>Start Grid Reference</u>	<u>End Grid Reference</u>	<u>Width</u>
		1 metre

**General:**

**Structures:** (*Stiles, Gates and Bridges etc*)

<u>Structure</u>	<u>Grid Reference</u>	<u>Structure Reference</u>
Wicket Gate	SE 5912 4723	
Wicket Gate	SE 5912 4721	
Stile	SE 5913 4688	358

**Limitations and Conditions of Use:**

**Legal Events:**

<u>CYC Order Ref:</u>	<u>Order Citation</u>
-----------------------	-----------------------

---

**Definitive Statement**  
**Relevant Date: 1 December 2000**





**Wildlife and Countryside Act 1981**

**The Council of the City of York  
(Part of the former No 2 Area of the County of the West Riding of Yorkshire)  
Definitive Statement**

---

---

**Definitive Statement  
Relevant Date: 1 December 2000**

## **Appendix 14**

**All persons notified**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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

## All persons notified

Appendix 14

Auto Cycle Union Ltd  
 ACU House  
 Wood Street  
 RUGBY  
 CV21 2YX

The British Horse Society  
 Abbey Park  
 Stareton  
 KENILWORTH  
 CV8 2XZ

Byways and Bridleways Trust  
 Burgate Farm  
 Harwood Dale  
 Scarborough  
 YO13 0DS

Open Spaces Society  
 25A Bell Street  
 HENLEY ON THAMES  
 RG9 2BA

The Ramblers  
 3rd Floor  
 1 Clink Street  
 LONDON  
 SE1 9DG

The British Driving Society  
 Endersley  
 Church Road, Wingfield  
 Eye  
 Suffolk  
 IP21 5QZ

Cyclists' Touring Club  
 Parklands  
 Railton Road  
 GUILDFORD  
 GU2 9JX

Bishopthorpe Parish Council  
 3 Appleton Court  
 Bishopthorpe  
 York  
 YO23 2RY

Acaster Malbis Parish Council  
 25 Lakeside  
 Acaster Malbis  
 York  
 YO23 2TY

York Marine Services Ltd  
 Ferry Lane  
 Bishopthorpe  
 York  
 YO23 2SB

Charity of Thomas Annotson  
 4 Lang Road  
 Bishopthorpe  
 York  
 YO23 2QL

Messrs N & S Masterman  
 Bridge Farm  
 Acaster Malbis  
 York  
 YO2 1XB

St.Andrew's Trust Bishopthorpe  
 Stable Yard  
 Chantry Lane  
 Bishopthorpe  
 York  
 YO23 2QF

Mr S. Buckley  
 2 Ascot Mews  
 Emerald Street  
 York  
 YO31 8LT

Mr R. Parker  
 The Boat Yard  
 Ferry Lane  
 Bishopthorpe  
 York  
 YO23 2SB

Mr P. Mandy  
 76 The Green  
 Acomb  
 York  
 YO26 5LS

All persons notified

Appendix 14

Mr C. Warriner  
9 Lawnway  
York  
YO31 1JD

Church Commissioners for England  
Church House  
Great Smith Street  
London  
SW1P 3AZ

Ms. M. Baylis  
Hillcrest  
Main Street  
Appleton Roebuck  
York  
YO23 7DA

York RI Sailing Club  
2 Muncastergate  
York  
YO31 9JY

York RI  
22 Queen Street  
York  
YO24 1AD

All persons notified

Appendix 14

The Ramblers  
BY EMAIL ONLY  
den3mil3@talktalk.net

British Horse Society  
BY EMAIL ONLY  
ccburgatebovey@gmail.com

Byways and Bridleways Trust  
BY EMAIL ONLY  
bbt@bywaysandbridlewaystrust.org.uk

Cllr. J. Galvin  
BY EMAIL ONLY  
cllr.jgalvin@york.gov.uk

York RI  
BY EMAIL ONLY  
seanheslop@virginmedia.com

York RI Sailing Club  
BY EMAIL ONLY  
stevehogg@hotmail.com

York Cycling Campaign  
BY EMAIL ONLY  
yorkcyclecampaign@gmail.com

Bishopthorpe Parish Council  
BY EMAIL & RECORDED DELIVERY  
bpccclerk@aol.com

Acaster Malbis Parish Council  
BY EMAIL & RECORDED DELIVERY  
parish.clerk@acastermalbis-pc.gov.uk

St.Andrew's Trust Bishopthorpe  
BY EMAIL & RECORDED DELIVERY  
info@standrewstrust.co.uk

York Cycling Campaign  
BY EMAIL ONLY  
yorkcyclecampaign@gmail.com

The Ramblers  
BY EMAIL AND RECORDED DELIVERY  
Pathorders@ramblers.org.uk

British Horse Society  
BY EMAIL AND RECORDED DELIVERY  
access@bhs.org.uk

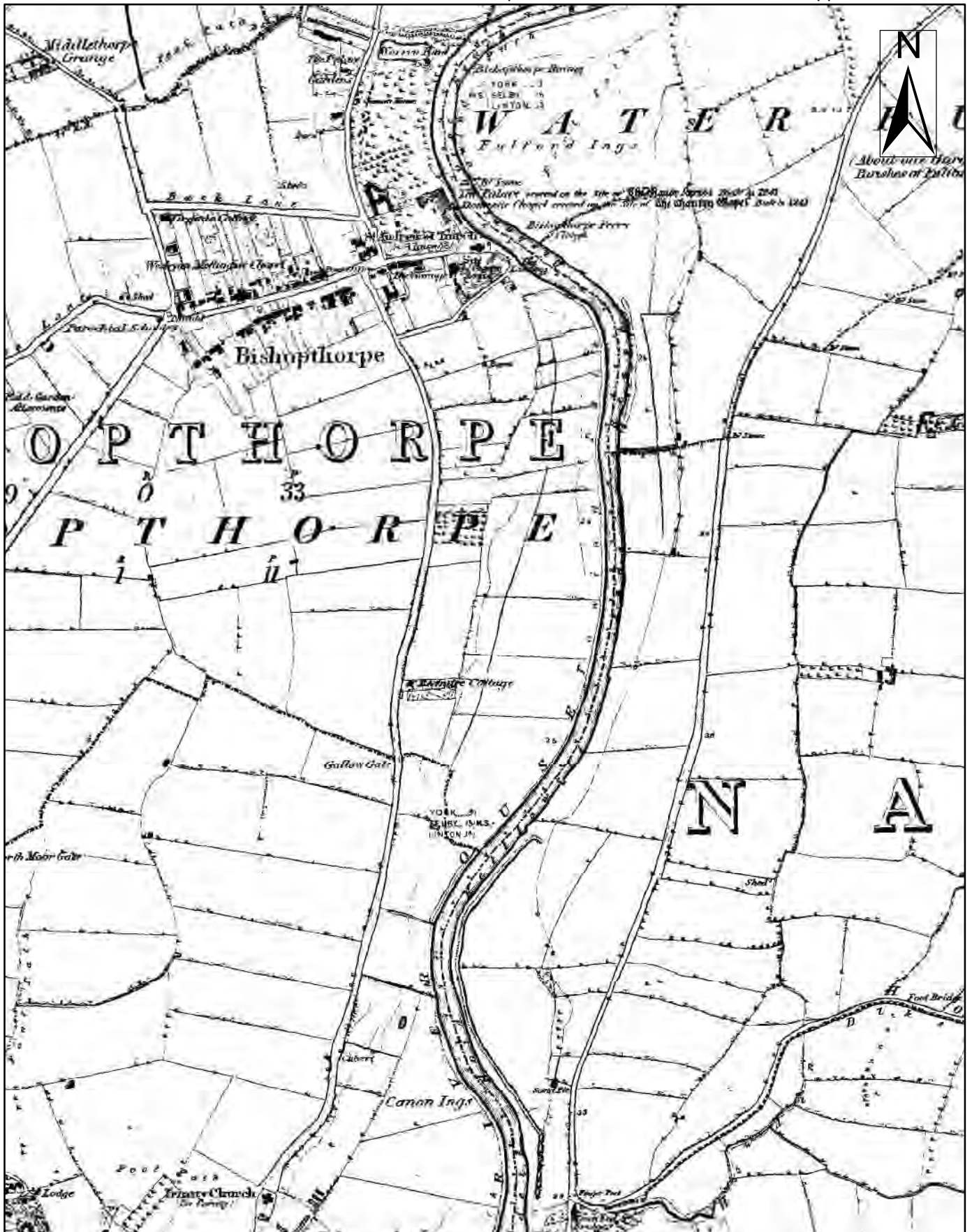
Byways and Bridleways Trust  
BY EMAIL AND RECORDED DELIVERY  
notices@bywaysandbridlewaystrust.org.uk

## **Appendix 15**

### **OS maps**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## County Series 6 inches to 1 mile 1851

Scale 1:10,560

Drawn By:RJV

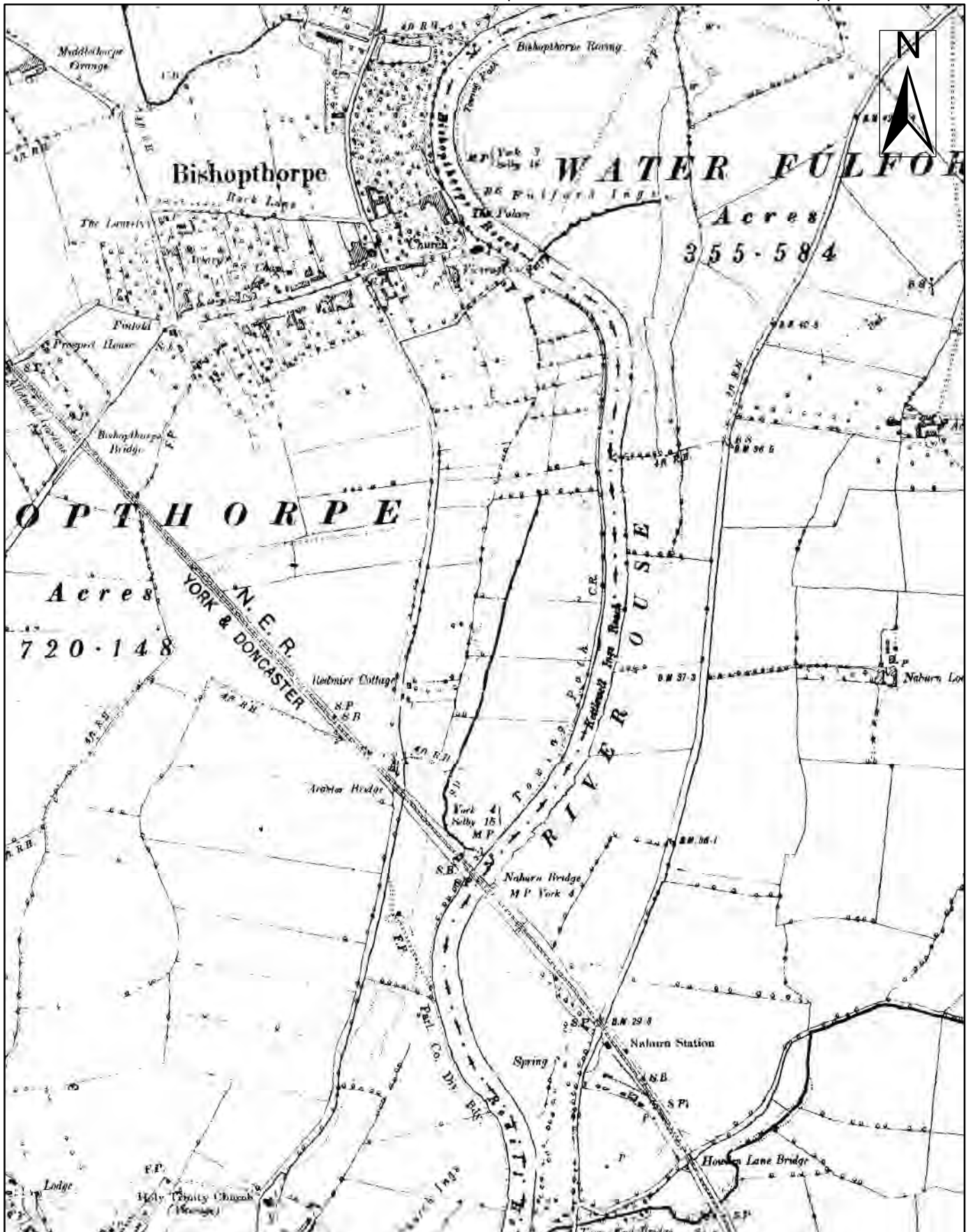
Date:10/1/19

Public Rights of Way

Reference:

Drawing No.

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## County Series 6 inches to 1 mile 1893

Scale 1:10,560

Drawn By:RJV

Date:10/1/19

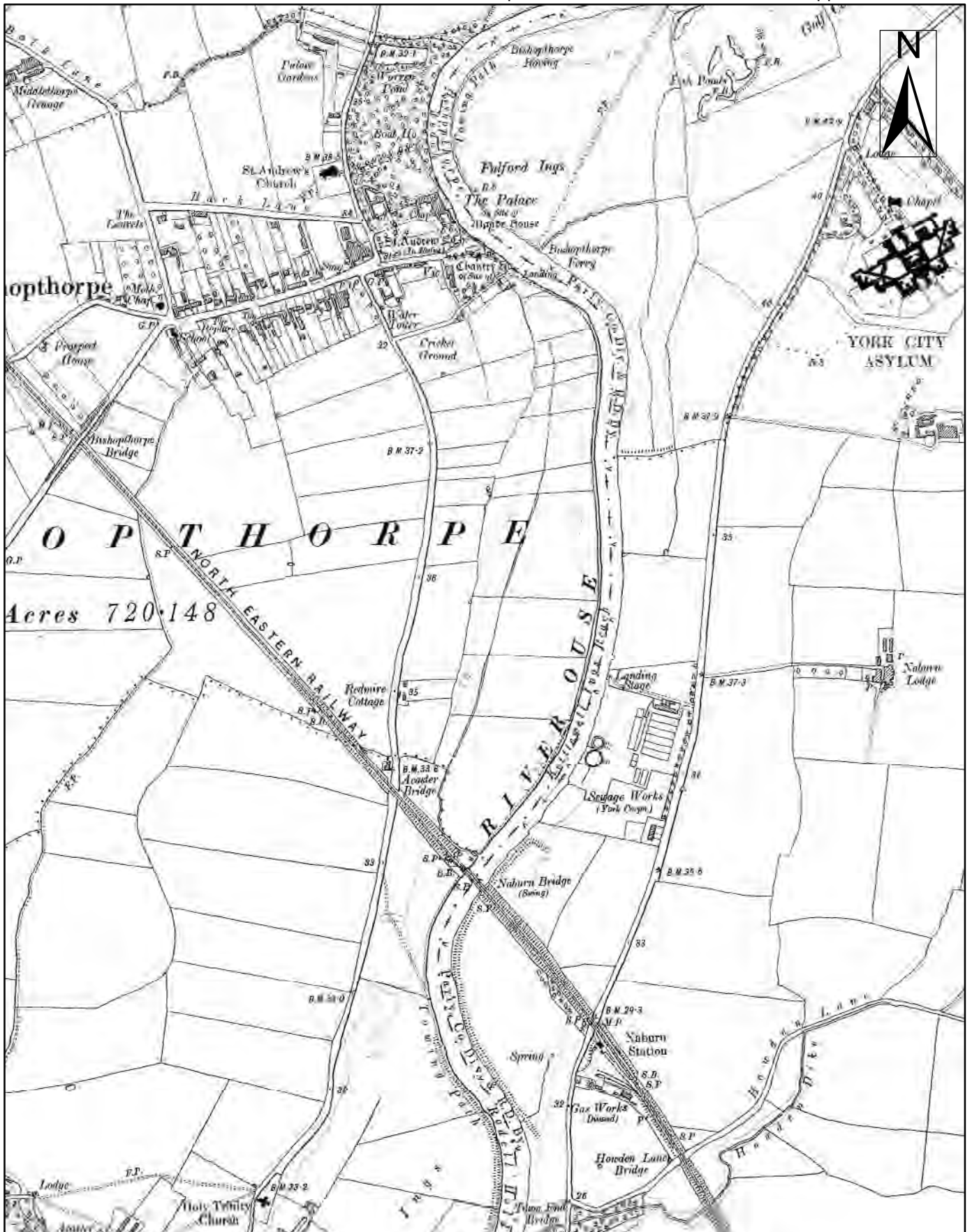
Public Rights of Way

Reference:

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## County Series 6 inches to 1 mile 1910

Scale 1:10,560

Drawn By:RJV

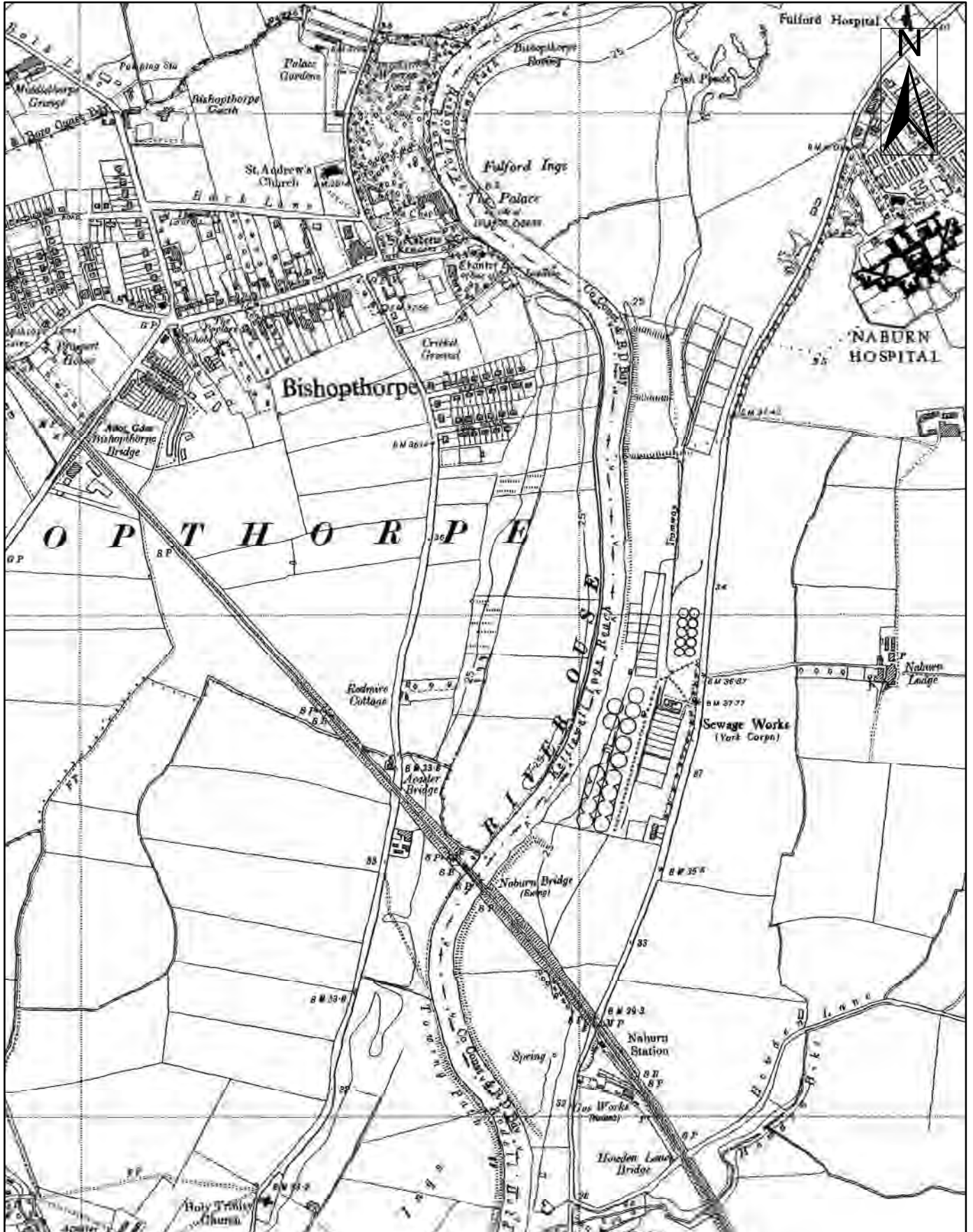
Date:10/1/19

Public Rights of Way

Reference:

Drawing No.

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## County Series 6 inches to 1 mile 1953

Scale 1:10,560

Drawn By:RJV

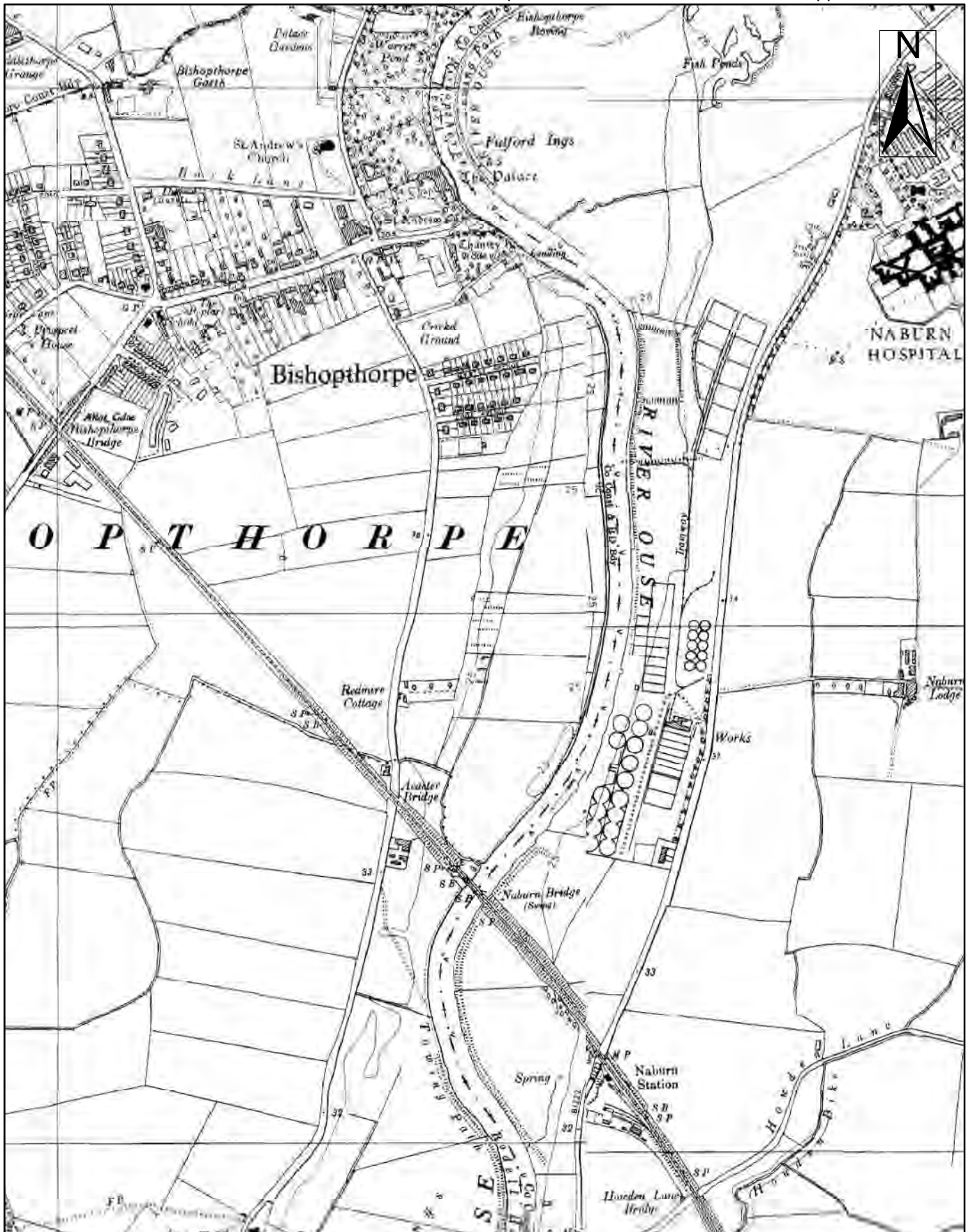
Date:10/1/19

Public Rights of Way

Reference:

Drawing No.

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## National Grid Series 1:10000 1958

Scale 1:10,000

Drawn By:RJV

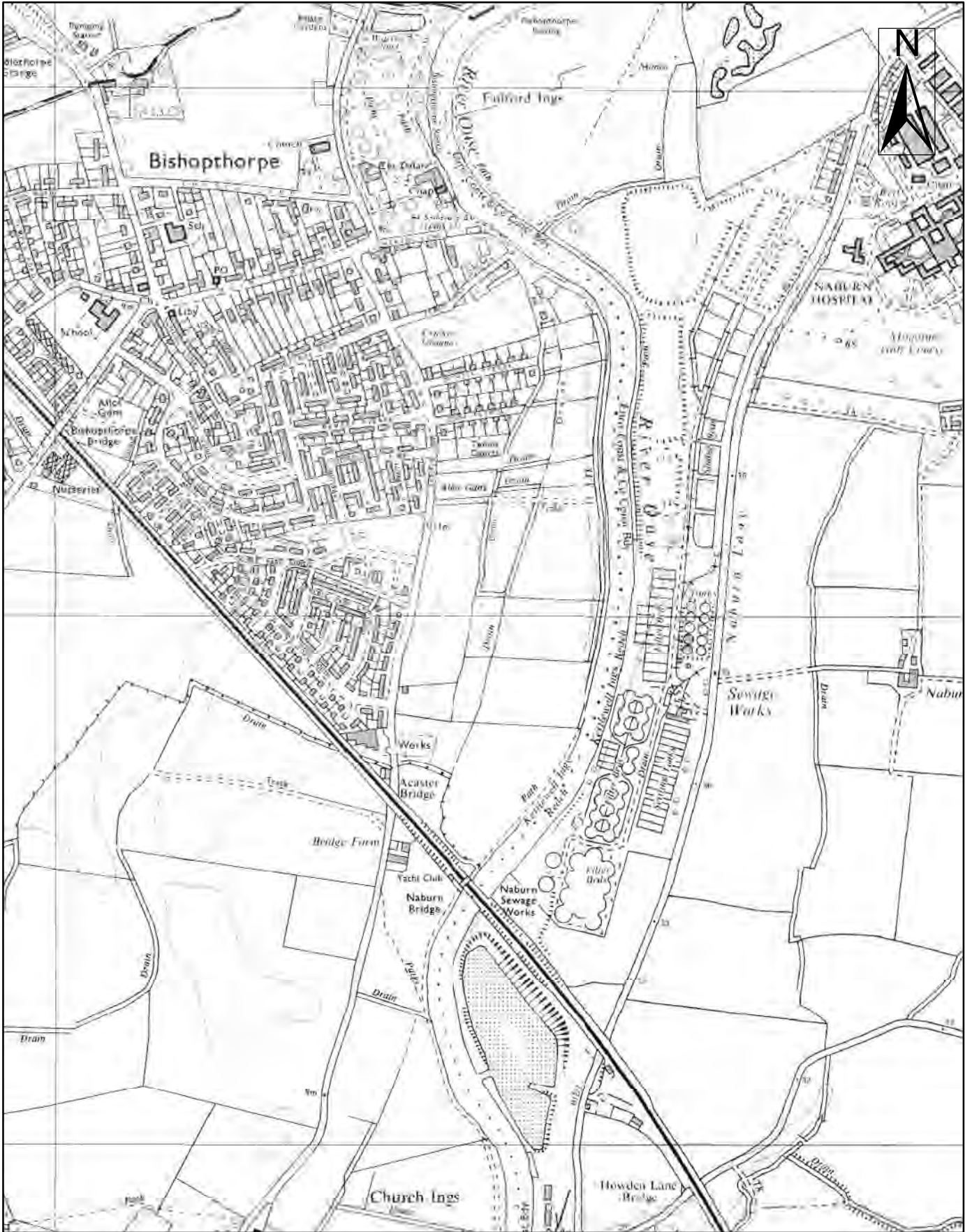
Date:10/1/19

Public Rights of Way

Reference:

Drawing No.

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## National Grid Series 1:10000 1982

Scale 1:10,000

Drawn By:RJV

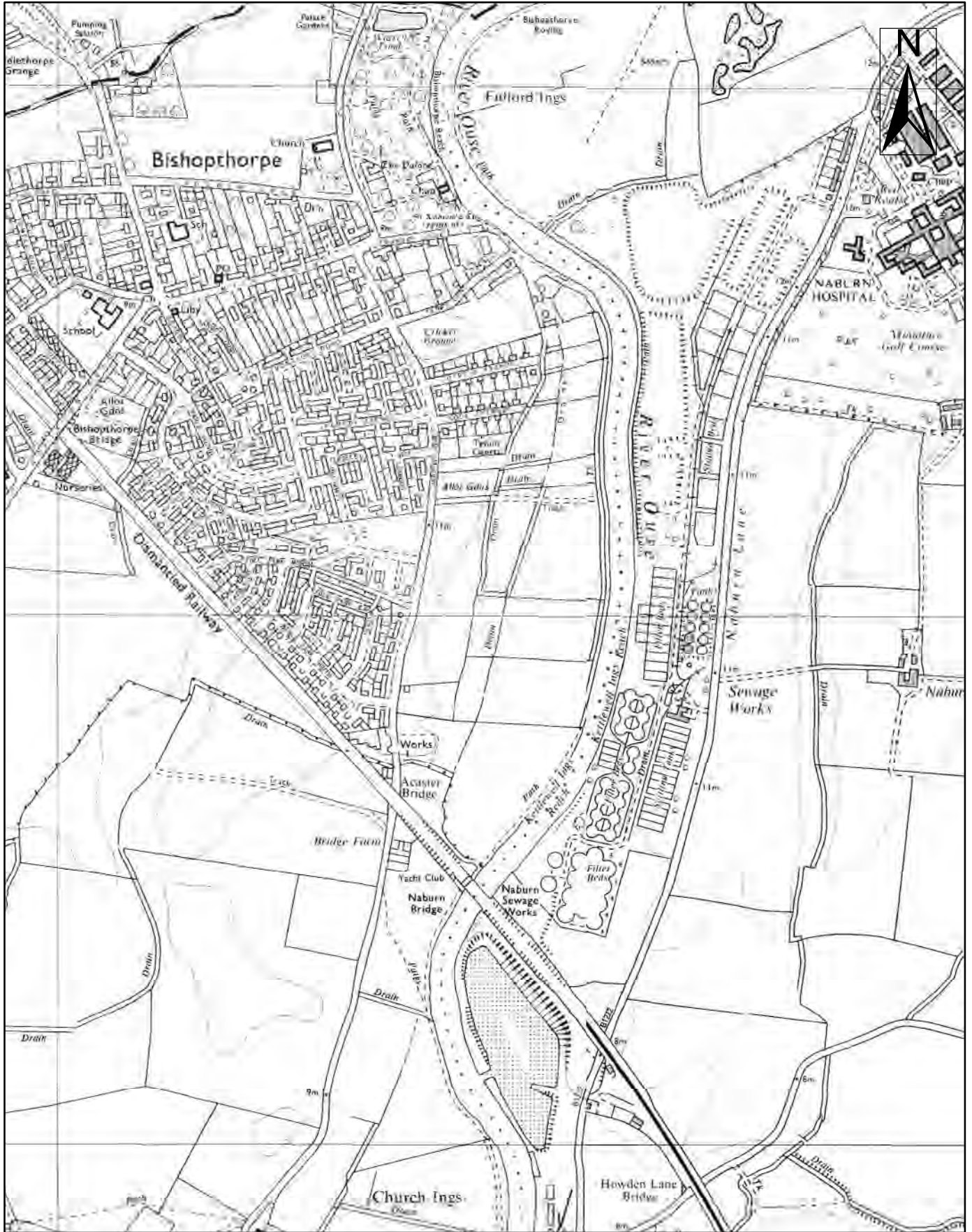
Date:10/1/19

Public Rights of Way

Reference:

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## National Grid Series 1:10000 1985

Scale 1:10,000

Drawn By:RJV

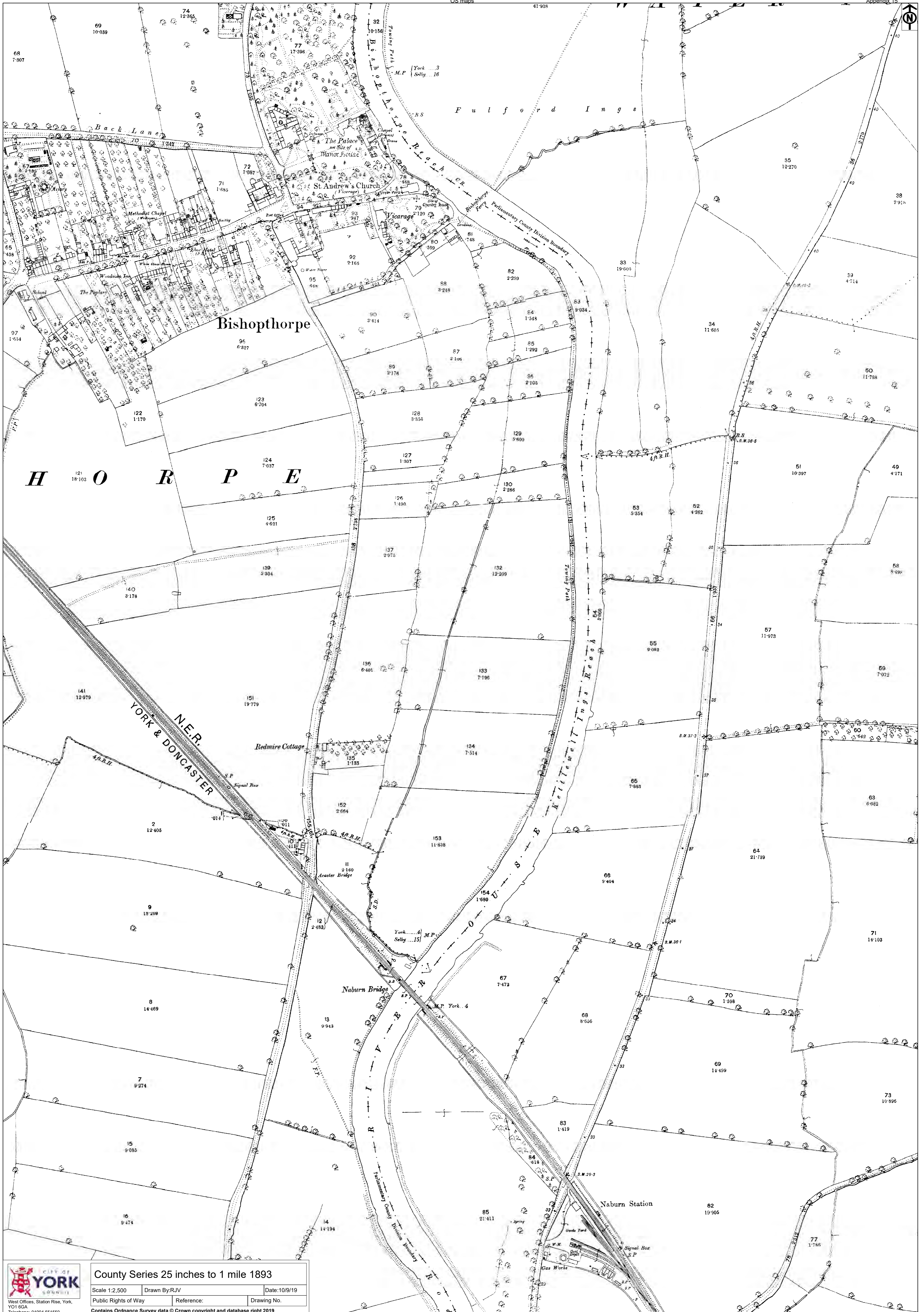
Date:10/1/19

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Drawing No.

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**BISHOPTHORPE**

**H O R P E**

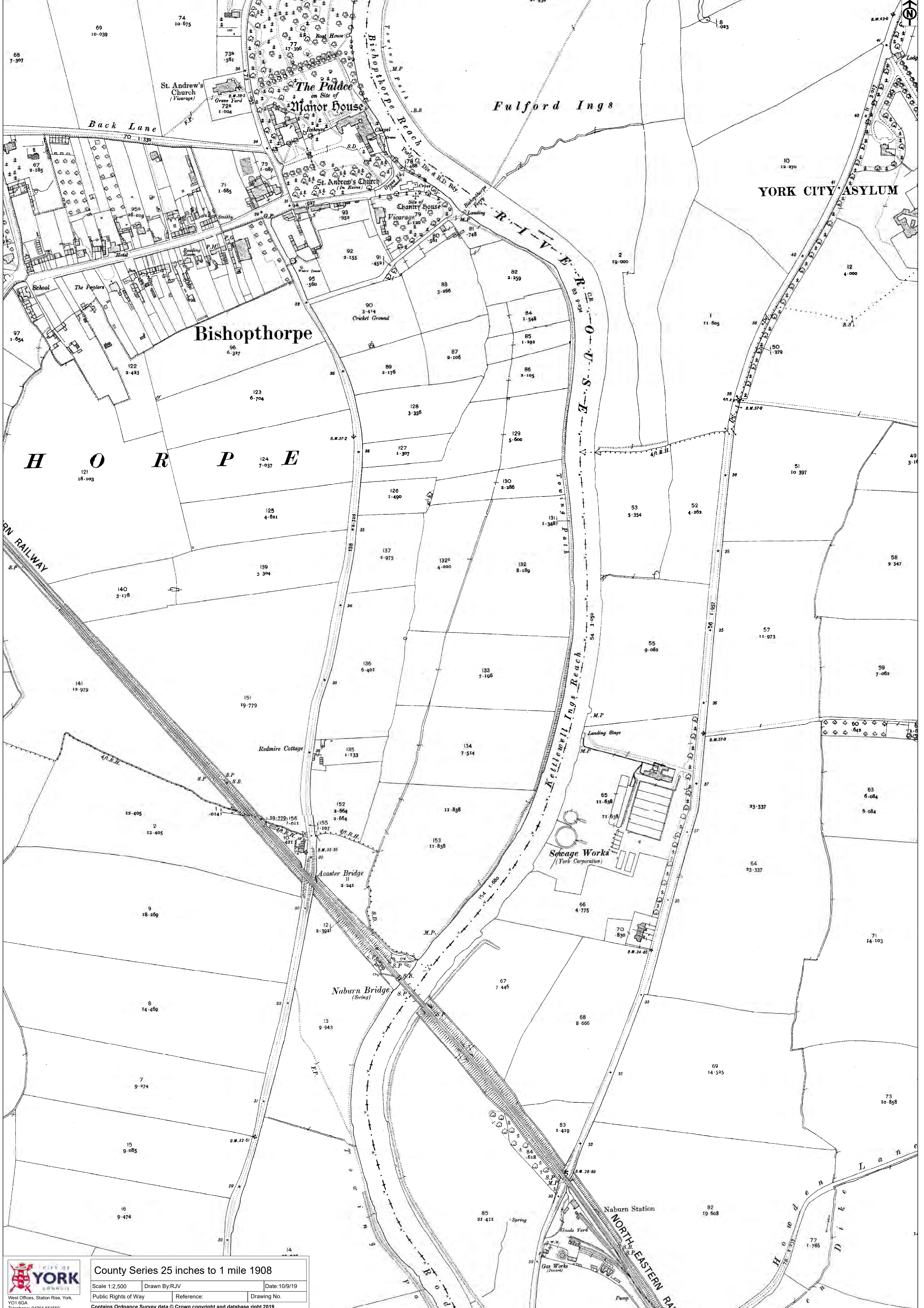
**YORK & DONCASTER N.E.R.**

**CITY OF YORK**  
 West Offices, Station Rise, York, YO1 6GA  
 Telephone: 01904 551550

**County Series 25 inches to 1 mile 1893**

Scale 1:2,500	Drawn By: RJV	Date: 10/9/19
Public Rights of Way	Reference:	Drawing No.

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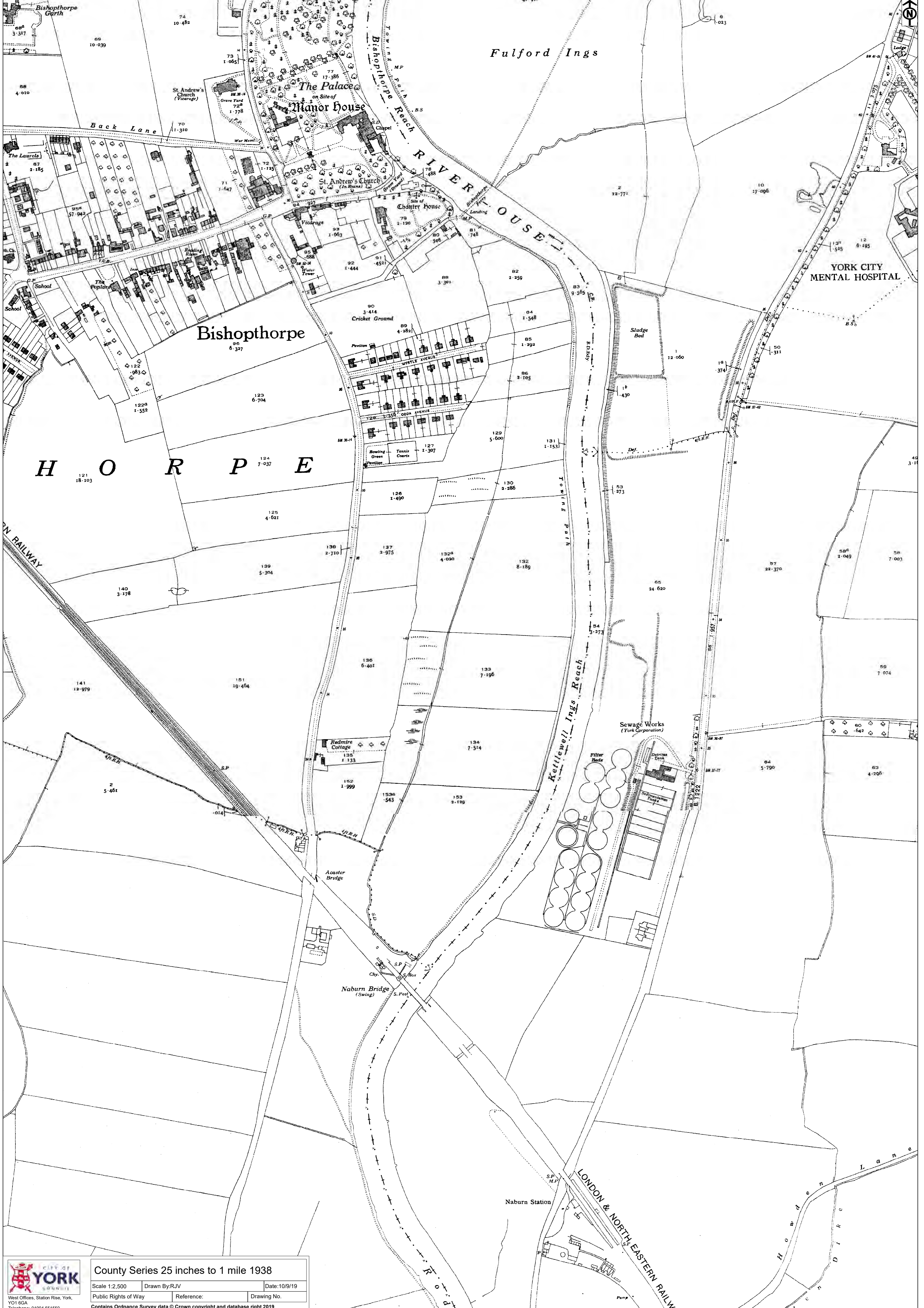


**CITY OF YORK**  
 West Offices, Station Rise, York, YO1 6GA  
 Telephone: 01904 551550

**County Series 25 inches to 1 mile 1908**

Scale 1:2,500	Drawn By: RJV	Date: 10/9/19
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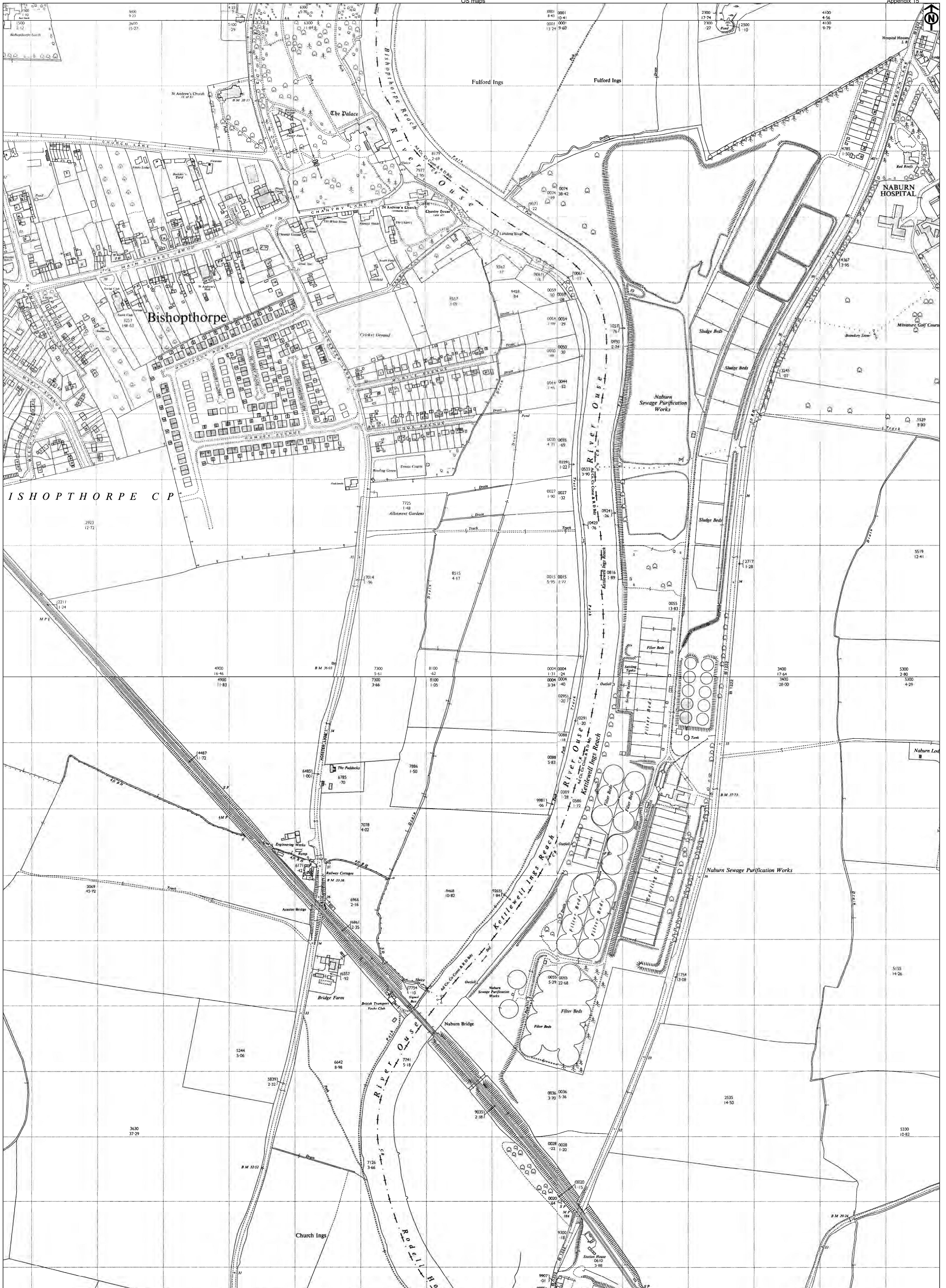
**CITY OF YORK**  
 West Offices, Station Rise, York, YO1 6GA  
 Telephone: 01904 551550

**County Series 25 inches to 1 mile 1938**

Scale 1:2,500	Drawn By: RJV	Date: 10/9/19
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**CITY OF YORK**  
 West Offices, Station Rise, York, YO1 6GA  
 Telephone: 01904 551550

**County Series 25 inches to 1 mile 1967**

Scale 1:2,500	Drawn By: RJV	Date: 10/9/19
Public Rights of Way	Reference:	Drawing No.

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## **Appendix 16**

### **OMA Aerial photographs**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### Aerial photograph 1951

Scale 1:1,807      Drawn By:RJV      Date:10/11/21

Public Rights of Way      Reference:      Drawing No.

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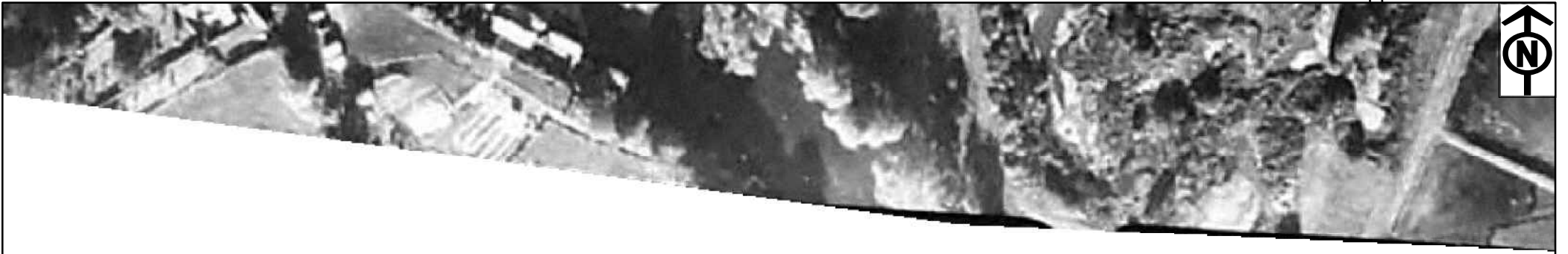
West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### Aerial photograph 1961

Scale 1:1,807      Drawn By:RJV      Date:10/11/21

Public Rights of Way      Reference:      Drawing No.

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West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

### Aerial photograph 1971

Scale 1:1,807	Drawn By:RJV	Date:10/11/21
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Public Rights of Way	Reference:	Drawing No.
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## **Appendix 17**

### **2012 OMA route photos**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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



















































## **Appendix 18**

### **1970s Photo taken on the route**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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

1970s photo    Appendix 18



196 of 656

## **Appendix 19**

### **Executive Member report**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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



---

## 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.

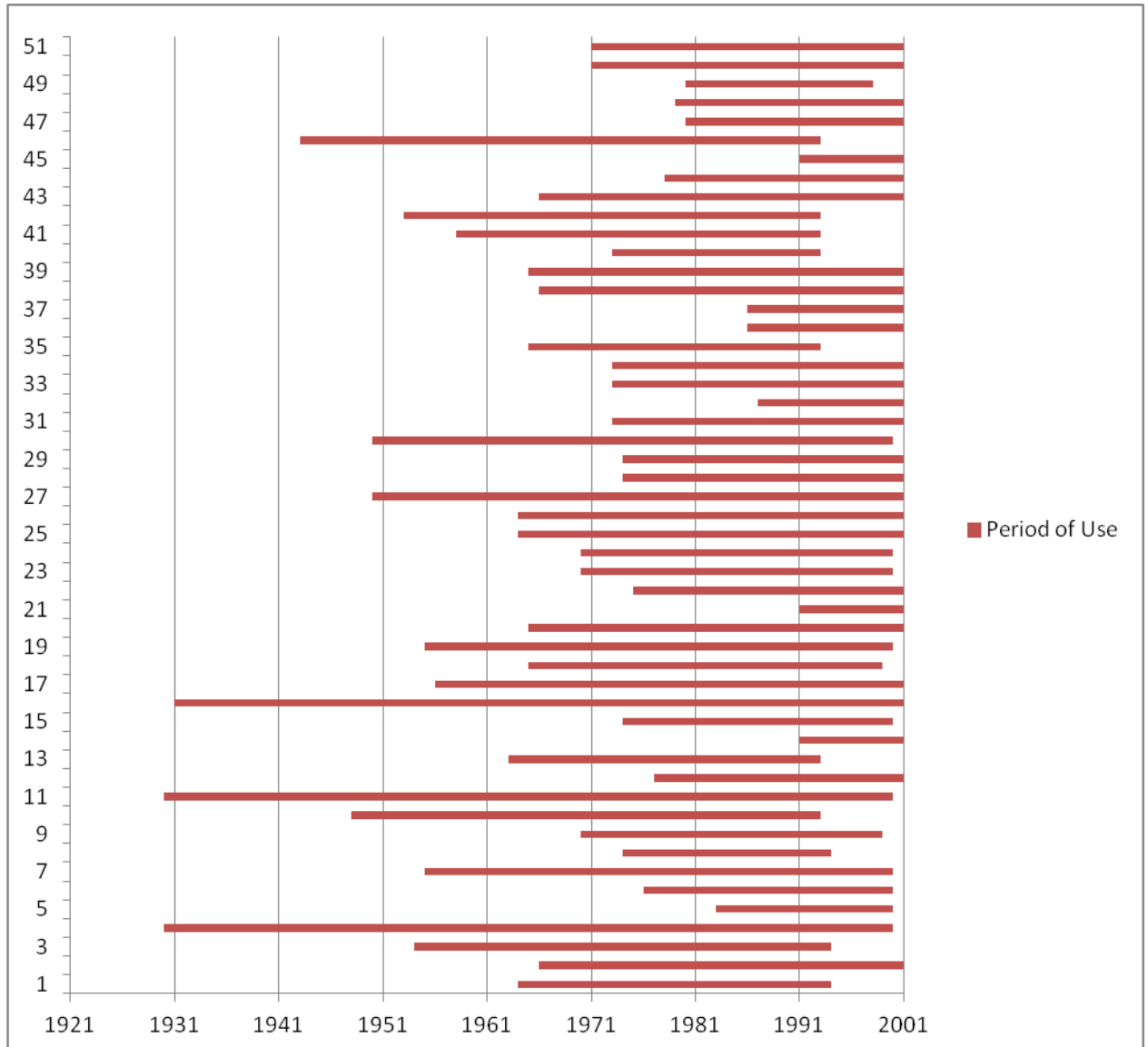
Reason: This is not recommended, because the evidence before the council does reasonably allege the existence of a public footpath from B to C to D on the map at appendix 2. In addition it gives the opportunity to the applicant to appeal this decision to the secretary of state. If CYC did reject this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

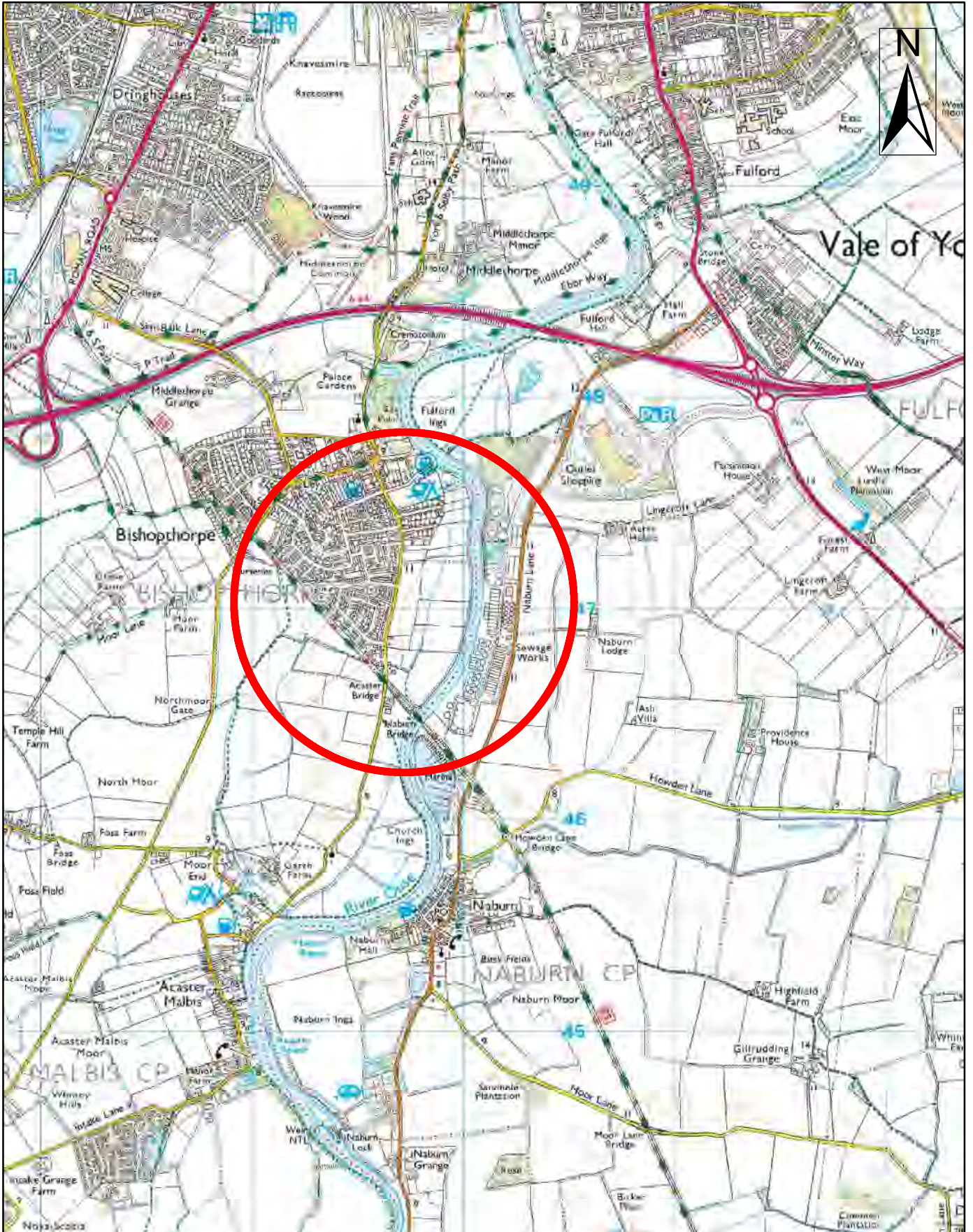
Highways Act 1980  
Wildlife and Countryside Act 1981  
Natural Environment and Rural Communities Act 2006  
Grange Lane DMMO case file

## 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



West Offices, Station Rise, York,  
YO1 6GA  
Telephone: 01904 551550

## Location of DMMO application

Scale 1:25,000

Drawn By:RJV

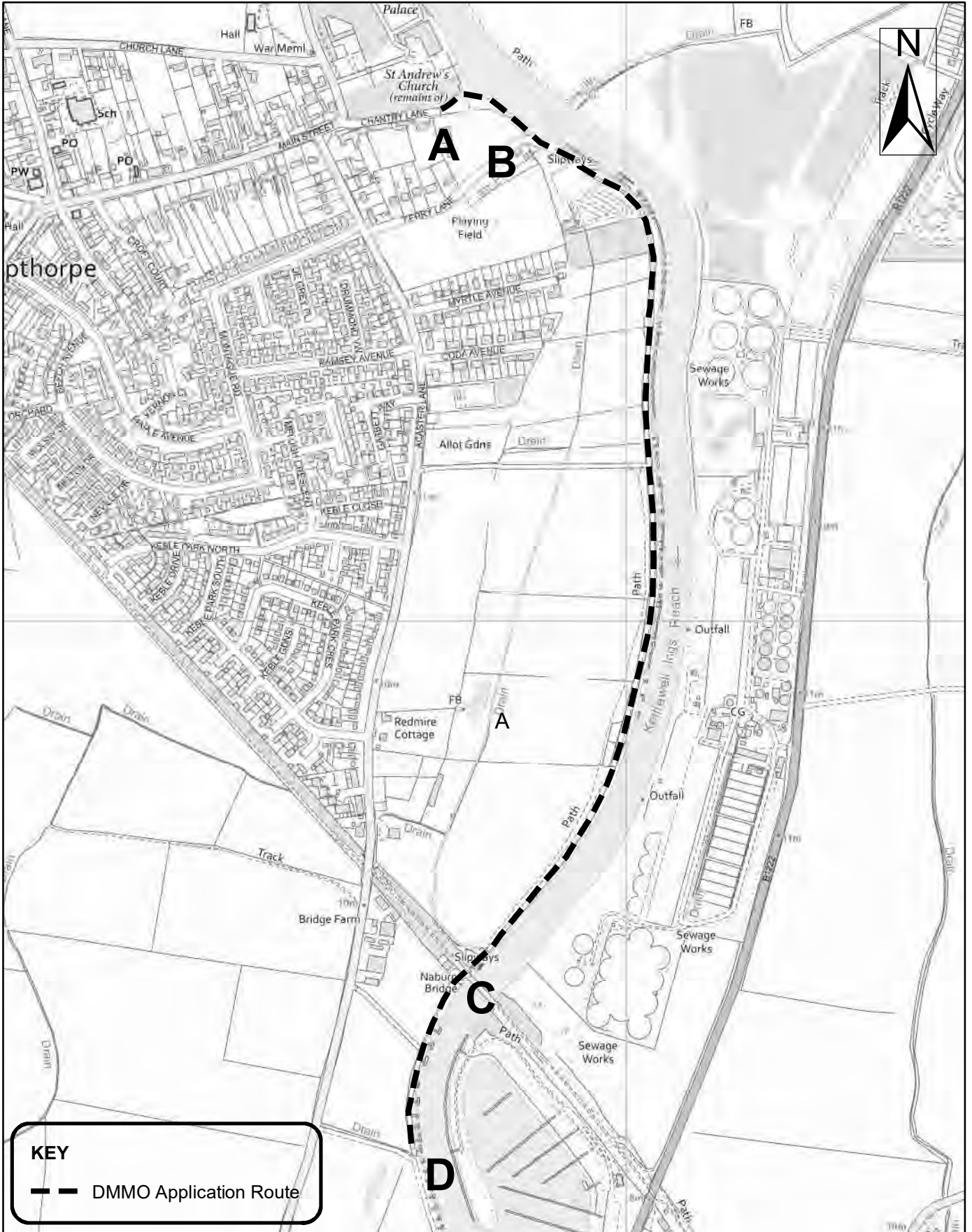
Date:17/6/19

Public Rights of Way

Reference:

Drawing No.

**Contains Ordnance Survey data © Crown copyright and database right 2019**



**KEY**  
 --- DMMO Application Route



West Offices, Station Rise, York,  
 YO1 6GA  
 Telephone: 01904 551550

## DMMO Application river side path Bishopthorpe

Scale 1:7,500

Drawn By:RJV

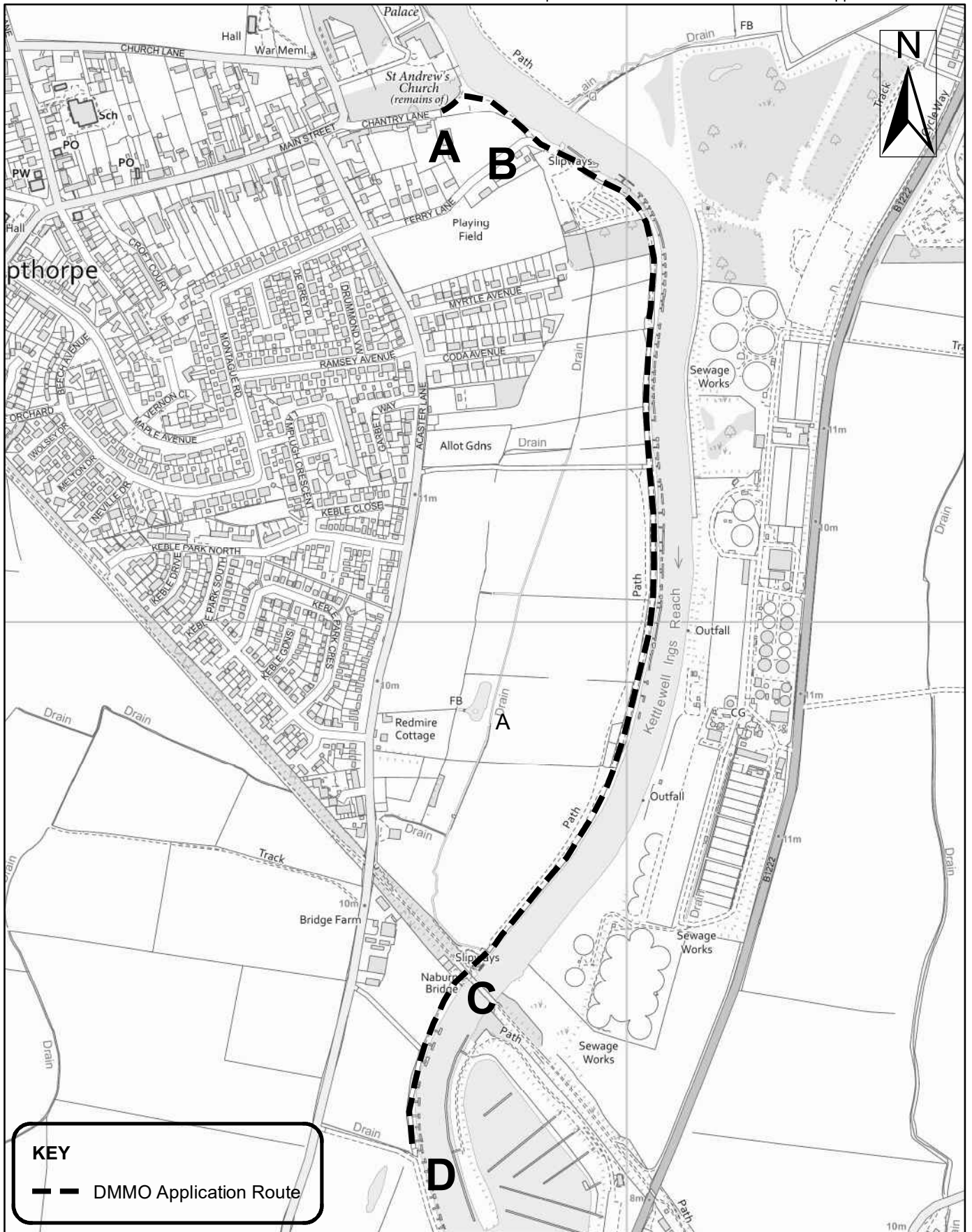
Date:15/1/19

Public Rights of Way

Reference:

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 YO1 6GA  
 Telephone: 01904 551550

## DMMO Application river side path Bishopthorpe

Scale 1:7,500

Drawn By:RJV

Date:15/1/19

Public Rights of Way

Reference:

Drawing No.

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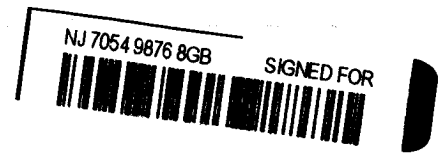
## **Appendix 20**

### **Documents relating to church land**

#### **STATEMENT OF CASE OF COUNCIL OF THE CITY OF YORK**

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

**From:** Stewart Harrison  
**Sent:** 03 July 2020 15:54  
**To:** Russell.Varley@york.gov.uk; bpcclerk@aol.com  
**Subject:** DMMO Chantry Lane To Ferry Lane Bishopthorpe



Dear Russell,

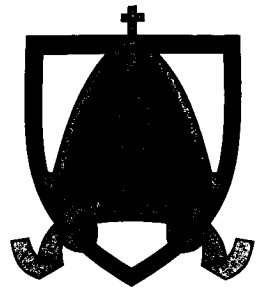
Please find attached a further document to support our objection to the footpath between Chantry Lane and Ferry Lane being omitted from the riverside footpath to Acaster Malbis.

I have requested our clerk to forward a signed copy to you, by post, on Bishopthorpe Parish Council headed notepaper.

Kind regards,

Stewart

Stewart Harrison  
Chairman - Bishopthorpe Parish Council  
M: 0773 621 6481



# Bishopthorpe Parish Council

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## **DEFINITIVE MAP MODIFICATION ORDER APPLICATION TO RECORD A PUBLIC FOOTPATH BETWEEN CHANTRY LANE BISHOPTHORPE AND ACASTER MALBIS 3**

### **ADDITIONAL SUBMISSION BY BISHOPTHORPE PARISH COUNCIL**

#### **INTRODUCTION**

1. Applications were made by Bishopthorpe Parish Council (**the Parish Council**) to North Yorkshire County Council and/or City of York Council (**CYC**) in 1994, 2004 and 2006 to make a Definitive Map Modification Order (**DMMO**) in respect of the route from Chantry Lane, Bishopthorpe, to Ferry Lane, Bishopthorpe and beyond.
2. This submission relates only to the section from Chantry Lane to Ferry Lane, shown on the map that accompanied CYC's report and minutes (**the Route Map**) as A to B. The Route Map is reproduced below:

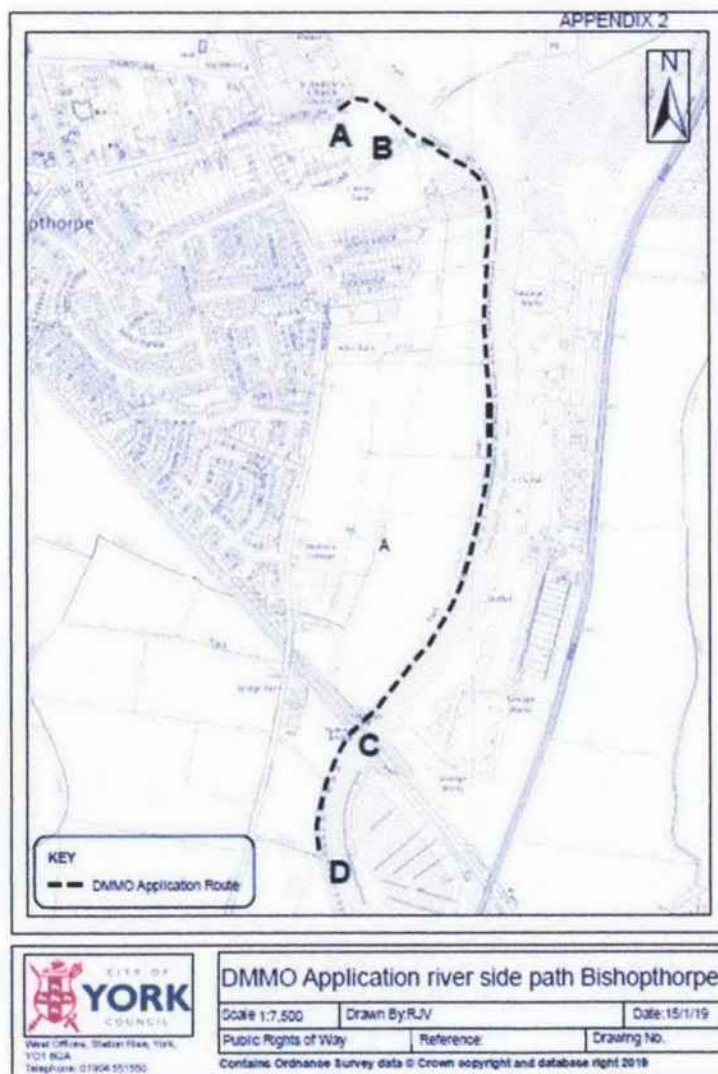
# Bishophorpe Parish Council

Chairman: Cllr. Stewart Harrison



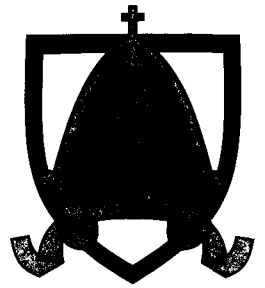
Mrs C Godfrey - Clerk  
The Village Hall  
40 Main Street  
Bishophorpe, York  
YO23 2RB

Tel: 01904 709015  
Email: bpcclerk@aol.com



3. The 1994 and 2004 applications differed in that the former related only to the route A to B to C and the latter to the route A to B to C to D.
4. The section A to B (Chantry Lane to Ferry Lane) runs through the churchyard of the former St Andrew's Church. The church has not been used since the 19<sup>th</sup>





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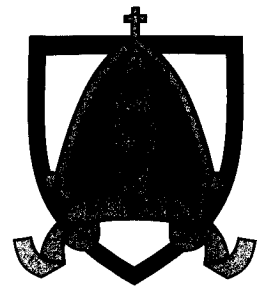
Tel: 01904 709015  
Email: bpcclerk@aol.com

Century. Most of the building was demolished in 1899. A new church was built elsewhere in the village and is still in regular use. The façade of the former St Andrew's Church is still standing, surrounded by a grassed churchyard. The River Ouse runs on the other side of the footpath A to B.

5. Our understanding is that the churchyard ceased to be used regularly for burials after the "great flood" of 1892 (which apparently washed many bodies away from the graves) and that, since then, the graveyard has been used only on a very few occasions, for burials in old family graves (up to the 1920s) or for the interment of ashes. John R Keble MA (former Vicar of Bishopthorpe) wrote a *History of the Parish and Manor-House of Bishopthorpe*, published in 1905. He commented there (page 29) that:

*The main village drain was made in 1828, under the direction of Mr Raisin, Archbishop Harcourt bearing the larger share of the cost. It is unfortunate that it should have been taken through the churchyard, as it prevented a large part of it from being used.*

6. The church façade and graveyard nevertheless remain as a prominent feature at the end of Chantry Lane, alongside the grounds of the Archbishop's Palace and the river.
7. The land itself was transferred by the Church Commissioners for England to its current owner, St Andrew's Trust Bishopthorpe, by two transfers dated 24<sup>th</sup> February 1999 (after the end of the "relevant period" mentioned in paragraph 18 below).
8. By Executive Member decision on 25 July 2019 York City Council (CYC) resolved:
  - 8.1. To approve 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 to the minutes (the Route Map) as a public footpath; and
  - 8.2. To reject the 2006 application because it was not "duly made" and (it appears) because "it relates only to the consecrated land (A-B)".



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9. The reference in CYC's minutes to consecrated land is made only in respect of the (rejected) 2006 application but the Parish Council's understanding is that these two resolutions should be read together, with the effect that the DMMO that has been made excludes the section A to B because that section crosses consecrated land.
10. The Parish Council has previously objected to the path from Chantry Lane Bishopthorpe to Ferry Lane Bishopthorpe (A to B) being excluded on this ground (that it is consecrated land).
11. In doing so the Parish Council said that it is debatable whether the path is, or ever has been, consecrated land but the Parish Council also quoted the following extract (the opening paragraph) of an Opinion of the Legal Advisory Commission to the General Synod dated October 2016 (**the LAC Opinion**):

*The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated a highway under section 31 of the Highways Act 1980.*

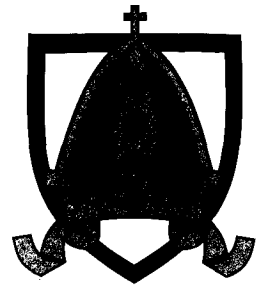
12. A copy of the LAC Opinion is available on the Church of England's website at:

[https://www.churchofengland.org/sites/default/files/2017-12/churchyards -  
\\_highways oct 2016 .pdf](https://www.churchofengland.org/sites/default/files/2017-12/churchyards_-_highways_oct_2016.pdf)

13. The purpose of this statement is to add comment to support the Parish Council's objection.

## **Further supporting comments**

14. The issue of whether the land crossed by the path is, or ever has been, consecrated land is unresolved, though the Parish Council understands informally from the Church of England that at least part of the route A to B shown on the Route Map may not be consecrated land. That is immaterial to the central point of this submission however, which is that there is no reason in law why a DMMO should not be made to record a public footpath over consecrated land.



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15. The rationale for our assertion is set out at length in the LAC Opinion. We feel it appropriate however to comment upon the reasons given by CYC in the report (dated 15 July 2019) of the Corporate Director of Economy and Place to the Decision Session – Executive Member for Transport on 25 July 2019 (**the Officer's Report**). The map at appendix 2 of the Officer's Report is the Route Map referred to above.

16. Section 16 of the Officer's Report says, as to the option of including the length A to B (Chantry Lane to Ferry Lane):

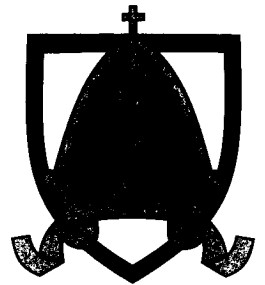
*This is not recommended because the evidence before the council shows that the land between A and B is consecrated and public rights of way cannot be established over consecrated ground. Therefore the requirements of section 31(1) of the Highways Act 1980 do not apply to the section of the application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

17. We believe that that statement is wrong in law.

18. Section 31(1) of the Highways Act 1980 says that:

*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.*

19. It would appear from the Officer's Report (see paragraphs 24 and 28 in particular) that there is sufficient evidence to satisfy the requirements of actual enjoyment by the public as of right and without interruption for a full period of 20 years, and that CYC was satisfied that there was nothing that would constitute "*sufficient evidence that there was no intention during that period to dedicate it*". For these purposes we note that the relevant period is 1974 to 1994, though the evidence submitted (51 evidence forms) alleges uninterrupted use between 1930 and



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2001. We are accordingly only addressing the issue of consecrated land in this submission.

20. This point is addressed in paragraphs 21 to 34 of the Officer's Report.

21. Paragraph 33 of the Officer's Report places reliance on two cases in support of its argument that, "*once land is consecrated it ...cannot give rise to a public right of way at common law.*", being the cases of St Martin Le Grand, York (1988) (relating to a private easement) and Oakley v Boston (1976) (access over glebe land).

22. We do not think that St Martin Le Grand, York supports that argument. We do not think that Oakley v Boston is relevant to the present case. Specifically:

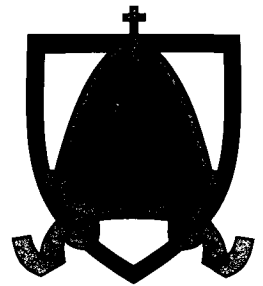
## 22.1. St Martin Le Grand

In paragraph 33 of the Officer's Report it is stated that, in St Martin Le Grand, "*existence of a lost grant made by the church could not be presumed*". That is not our reading of the judgement in St Martin Le Grand.

In St Martin Le Grand the court held that a pedestrian right of way across the (consecrated) churchyard had been exercised as of right by the occupiers of the buildings around the churchyard for at least the previous hundred years and "*that it was to be presumed that such right had been conferred by way of lost faculty*".

The issue in St Martin Le Grand was as to the nature of the right of way – was it a permanent easement or one which could be terminated? It was on this point that the lack of a "faculty" (ecclesiastical licence) was relevant. That issue however is of no direct significance to our case, as St Martin Le Grand concerned a private easement and not one which (as in our case) is subject to the deemed dedication principles of the Highways Act 1980.

Paragraph 17 of the LAC Opinion explains further why the decision in St Martin Le Grand is not applicable to the question of whether a public right of way can be created across a consecrated churchyard, distinguishing



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between Section 2 of the Prescription Act 1832 (which was relevant to that case) and Section 31(1) of the Highways Act 1980 (which is relevant to ours).

## 22.2. Oakley v Boston

The case of *Oakley v Boston*, [1976] Q.B. 270 relates to a private easement over unconsecrated glebe land (and was decided specifically by reference to the provisions of the Ecclesiastical Leasing Acts 1842 and 1858 insofar as they related to glebe land).

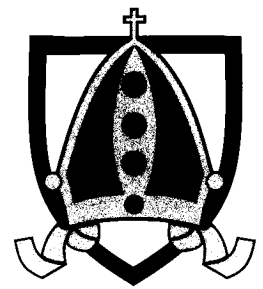
We would question the relevance of this case to our case, which relates to a *public right of way over consecrated land*. *Oakley v Boston* is not mentioned in the judgment in *St Mary's Longdon* (2011) (see paragraph 23 below), or in the *Widford Order Decision* (2013) (see paragraph 26 below), or in the *LAC Opinion* (2016) (or for that matter in the judgement in *St Martin Le Grand* (1988) (see paragraph 22.1 above).

23. Of direct relevance (but not mentioned in the Officer's Report) is the case of *St Mary's Longdon* (2011) 13 Ecc LJ 370, a decision of the Consistory Court of the Diocese of Worcester as to a footpath through the churchyard of *St Mary's Church, Longdon*. In that case the court said that:

*... if there exists a strip of land over a churchyard that is used just as though it were a footpath, the right of the public to use it to cross the churchyard should be presumed to have come into existence at some stage as a result of the due process of law.*

adding (our emphasis):

***... there is no reason in principle why there should not be a public right of way on foot across a churchyard, notwithstanding the effect of consecration. Such a right could have come into existence prior to the land in question being consecrated – either by specific grant or presumed dedication at common law. Alternatively, it could have come into existence following the consecration, again either by virtue of an actual dedication or by***



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***presumed dedication***, authorised in either case by the authority of a faculty – even though, in the latter case, that is almost certain to be a legal fiction.

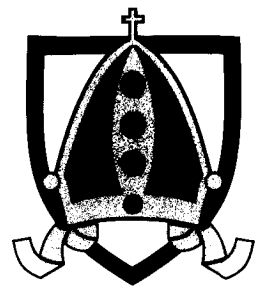
24. St Mary's Longdon expressly acknowledges the concept of presumed dedication, being the "legal fiction" on which Section 31(1) of the Highways Act 1980 is built. It enshrines the principle that, by enacting Section 31(1) in this way, parliament was saying that continuous user of 20 years or more, as of right and without interruption, would be deemed to constitute the dedication of the way/path, whether or not it was actually dedicated, whether or not the owner was empowered to dedicate it and whether or not some other licence, consent or permission (such as a faculty) was required.

25. That principle is well explained the LAC Opinion. In particular:

25.1. Section 13 of the LAC Opinion says:

*... the way becomes a highway by operation of law. As Scott LJ said in Jones v Bates [1938] 2 All ER 237 at 246, "The change of the law brought about by statute is that, upon proof of such user for the requisite period, the conclusion of dedication follows as a presumption juris et de jure, instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway."*

25.2. Sections 15 to 21 of the LAC Opinion set out the legislative history of what is now Section 31(1) of the Highways Act 1980. Earlier versions of that section had distinguished between two situations, one of which required 20 years' continuous use with the proviso that there had to be a person in possession of the land who could dedicate the way/path. The other required 40 years' use with no such proviso. The two provisions were later merged into what became section 31(1) of the Highways Act 1980 *with no such proviso*. This was a clear recognition that parliament intended that Section 31(1) would not depend upon there being a person in possession of the land who was capable of dedicating the way/path (such as an incumbent of a



# Bishopthorpe Parish Council

Chairman: Cllr. Stewart Harrison

Mrs C Godfrey - Clerk  
The Village Hall  
40 Main Street  
Bishopthorpe, York  
YO23 2RB

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Email: bpcclerk@aol.com

church, who would require a faculty in order validly to grant a permanent easement, such as a right of way).

26. Further evidence of the acceptance of the position can be found in the Order Decision dated: 24 May 2013 under reference Ref: FPS/M1900/7/66/M (Inspector Mr Roger Pritchard, relating to a path passing through the churchyard of St John the Baptist's Church, Widford (**the Widford case**)). In that case, the Inspector reviewed the legal precedents and concluded that:

*... if evidence supports a claim for deemed dedication under Section 31 of the 1980 Act, the legal precedents suggest that the claim can be accepted*

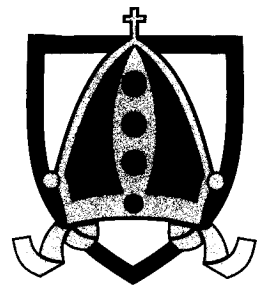
and made a DMMO accordingly.

27. Having established that the authorities demonstrate that a public footpath may be created over consecrated land, the LAC Opinion (paragraphs 30 to 34) suggest that Section 31(8) *may* also be relevant. Section 31(8) says:

*Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.*

In that respect:

- 27.1. It is arguable whether the churchyard in this case was held "for public or statutory purposes" during the relevant period. Such an expression might more readily be used to describe a central government body or local authority undertaking statutory functions for the benefit of the general public.
- 27.2. The LAC Opinion (paragraph 31) nevertheless acknowledges the possibility that an incumbent in possession of a churchyard may be "in possession of such land for public purposes", as does the Inspector in the Widford case.
- 27.3. As the Inspector in the Widford case puts it (in paragraph 31 of his Order Decision):



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*However, notwithstanding whether it applies to the Church of England, if Section 31(8) is to be relevant, it must be demonstrable that the specific public right of way claimed is incompatible with the purposes for which the land over which it passes is held. Section 31(8) does not to my mind provide a blanket exemption. If a body falls within its scope, it still has to show that the particular right of way from which it seeks exemption from deemed dedication would be incompatible with its public or statutory purposes.*

#### 27.4. Paragraphs 32 – 34 of the LAC Opinion say:

*The test is a pragmatic one, to be applied on the facts of the particular case.*

...

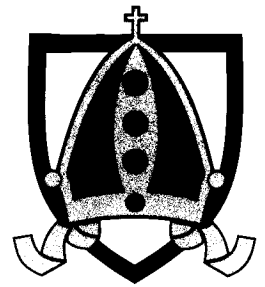
*Where a claimed footpath has been used by the public for more than for more than 20 years, there are likely to be (for both statutory undertakers and churches) evidential problems in proving such incompatibility, whether one looks to what was foreseeable at the start or end of the 20 year period.*

...

*There could, however, be cases where continued use of the path by the public might impede further burials, or the proper functioning of the church and/or the churchyard. Even where the churchyard was closed by Order in Council, so that the public purpose of burial of bodies will have ceased and the existence of the highway could not be said to be inconsistent with future such burials, the footpath might be inconsistent with the future interment of ashes (which is permissible in a closed churchyard). The position is each case will need to be assessed on its own facts.*

27.5. We submit that there is nothing in the present circumstances that would make the use of the footpath incompatible with the functioning of the churchyard. The church has been closed since the 1890s and the building (except for its façade) was demolished then. Burials ceased in the 1920s. As noted in paragraph 5, a significant part of the graveyard was unusable since





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the main village drain was laid through it in 1828. Many of the gravestones have been removed from their original positions, leaving wide spaces between the relatively few that remain, allowing for free passage through the churchyard. This case could be readily distinguished from one where, for example, a public footpath might interfere with the ongoing use of a churchyard for burials.

28. In summary therefore the Parish Council submits that:

28.1. Section 31(1) of the Highways Act 1980 does apply to consecrated land;

28.2. Accordingly, CYC was wrong to exclude from the DMMO the section of footpath from Chantry Lane to Ferry Lane (A to B on the Route Map) for the reason given (because "it relates only to the consecrated land (A-B)");

28.3. The evidence overwhelmingly supports the requirement of actual enjoyment by the public as of right and without interruption for a full period of 20 years, and there is no evidence of a lack of intention during that period to dedicate the path; and

28.4. If Section 31(8) does apply (which is arguable) then, in the circumstances of this case, the existence of a public footpath through the churchyard highway would not be incompatible with the purpose for which the land is or was held at the relevant time.

*Stewart Harrison*

Stewart Harrison

Chairman - Bishopthorpe Parish Council

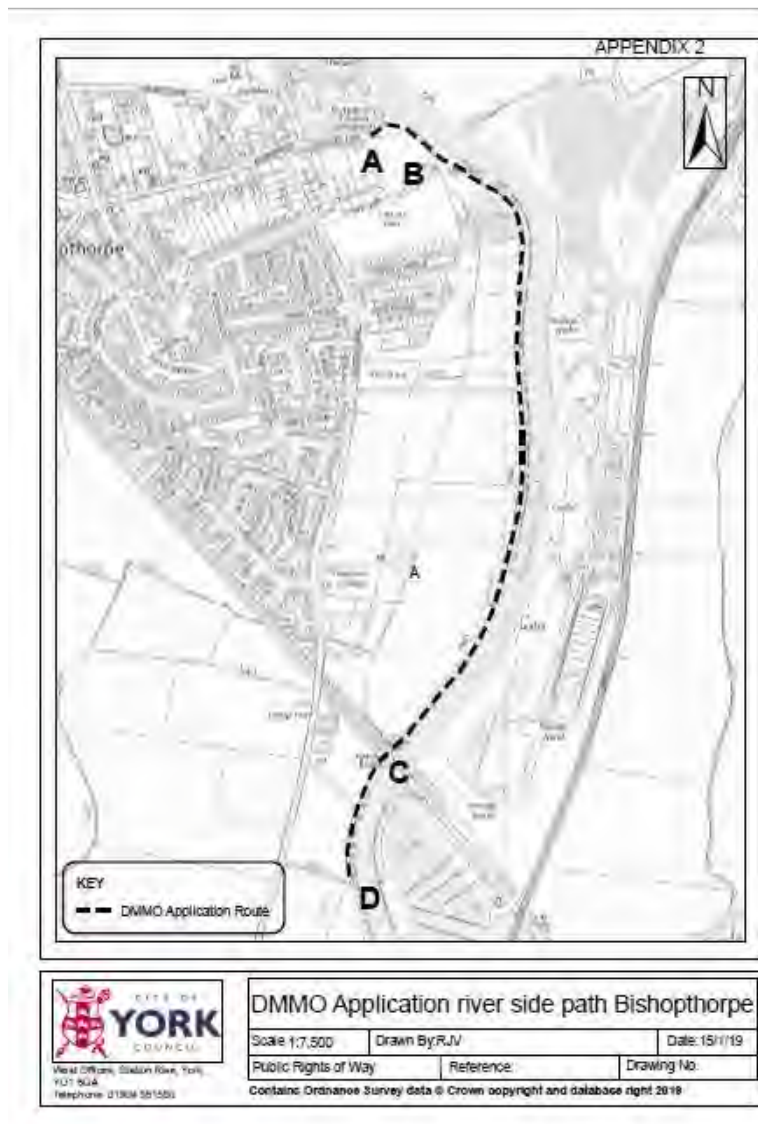
06 July 2020

## DEFINITIVE MAP MODIFICATION ORDER APPLICATION TO RECORD A PUBLIC FOOTPATH BETWEEN CHANTRY LANE BISHOPTHORPE AND ACASTER MALBIS 3

### ADDITIONAL SUBMISSION BY BISHOPTHORPE PARISH COUNCIL

#### INTRODUCTION

1. Applications were made by Bishopthorpe Parish Council (**the Parish Council**) to North Yorkshire County Council and/or City of York Council (**CYC**) in 1994, 2004 and 2006 to make a Definitive Map Modification Order (**DMMO**) in respect of the route from Chantry Lane, Bishopthorpe, to Ferry Lane, Bishopthorpe and beyond.
2. This submission relates only to the section from Chantry Lane to Ferry Lane, shown on the map that accompanied CYC's report and minutes (**the Route Map**) as A to B. The Route Map is reproduced below:



3. The 1994 and 2004 applications differed in that the former related only to the route A to B to C and the latter to the route A to B to C to D.

4. The section A to B (Chantry Lane to Ferry Lane) runs through the churchyard of the former St Andrew's Church. The church has not been used since the 19<sup>th</sup> Century. Most of the building was demolished in 1899. A new church was built elsewhere in the village and is still in regular use. The façade of the former St Andrew's Church is still standing, surrounded by a grassed churchyard. The River Ouse runs on the other side of the footpath A to B.
5. Our understanding is that the churchyard ceased to be used regularly for burials after the "great flood" of 1892 (which apparently washed many bodies away from the graves) and that, since then, the graveyard has been used only on a very few occasions, for burials in old family graves (up to the 1920s) or for the interment of ashes. John R Keble MA (former Vicar of Bishopthorpe) wrote a *History of the Parish and Manor-House of Bishopthorpe*, published in 1905. He commented there (page 29) that:

*The main village drain was made in 1828, under the direction of Mr Raisin, Archbishop Harcourt bearing the larger share of the cost. It is unfortunate that it should have been taken through the churchyard, as it prevented a large part of it from being used.*

6. The church façade and graveyard nevertheless remain as a prominent feature at the end of Chantry Lane, alongside the grounds of the Archbishop's Palace and the river.
7. The land itself was transferred by the Church Commissioners for England to its current owner, St Andrew's Trust Bishopthorpe, by two transfers dated 24<sup>th</sup> February 1999 (after the end of the "relevant period" mentioned in paragraph 18 below).
8. By Executive Member decision on 25 July 2019 York City Council (**CYC**) resolved:
  - 8.1. To approve 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 to the minutes (the Route Map) as a public footpath; and
  - 8.2. To reject the 2006 application because it was not "duly made" and (it appears) because "it relates only to the consecrated land (A-B)".
9. The reference in CYC's minutes to consecrated land is made only in respect of the (rejected) 2006 application but the Parish Council's understanding is that these two resolutions should be read together, with the effect that the DMMO that has been made excludes the section A to B because that section crosses consecrated land.
10. The Parish Council has previously objected to the path from Chantry Lane Bishopthorpe to Ferry Lane Bishopthorpe (A to B) being excluded on this ground (that it is consecrated land).

11. In doing so the Parish Council said that it is debatable whether the path is, or ever has been, consecrated land but the Parish Council also quoted the following extract (the opening paragraph) of an Opinion of the Legal Advisory Commission to the General Synod dated October 2016 (**the LAC Opinion**):

*The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated a highway under section 31 of the Highways Act 1980.*

12. A copy of the LAC Opinion is available on the Church of England's website at:

[https://www.churchofengland.org/sites/default/files/2017-12/churchyards\\_-\\_highways\\_oct\\_2016.pdf](https://www.churchofengland.org/sites/default/files/2017-12/churchyards_-_highways_oct_2016.pdf)

13. The purpose of this statement is to add comment to support the Parish Council's objection.

### **Further supporting comments**

14. The issue of whether the land crossed by the path is, or ever has been, consecrated land is unresolved, though the Parish Council understands informally from the Church of England that at least part of the route A to B shown on the Route Map may not be consecrated land. That is immaterial to the central point of this submission however, which is that there is no reason in law why a DMMO should not be made to record a public footpath over consecrated land.
15. The rationale for our assertion is set out at length in the LAC Opinion. We feel it appropriate however to comment upon the reasons given by CYC in the report (dated 15 July 2019) of the Corporate Director of Economy and Place to the Decision Session – Executive Member for Transport on 25 July 2019 (**the Officer's Report**). The map at appendix 2 of the Officer's Report is the Route Map referred to above.
16. Section 16 of the Officer's Report says, as to the option of including the length A to B (Chantry Lane to Ferry Lane):

*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.*

17. We believe that that statement is wrong in law.

18. Section 31(1) of the Highways Act 1980 says that:

*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.*

19. It would appear from the Officer's Report (see paragraphs 24 and 28 in particular) that there is sufficient evidence to satisfy the requirements of actually enjoyment by the public as of right and without interruption for a full period of 20 years, and that CYC was satisfied that there was nothing that would constitute "*sufficient evidence that there was no intention during that period to dedicate it*". For these purposes we note that the relevant period is 1974 to 1994, though the evidence submitted (51 evidence forms) alleges uninterrupted use between 1930 and 2001. We are accordingly only addressing the issue of consecrated land in this submission.
20. This point is addressed in paragraphs 21 to 34 of the Officer's Report.
21. Paragraph 33 of the Officer's Report places reliance on two cases in support of its argument that, "*once land is consecrated it ...cannot give rise to a public right of way at common law.*", being the cases of St Martin Le Grand, York (1988) (relating to a private easement) and Oakley v Boston (1976) (access over glebe land).
22. We do not think that St Martin Le Grand, York supports that argument. We do not think that Oakley v Boston is relevant to the present case. Specifically:

#### 22.1. St Martin Le Grand

In paragraph 33 of the Officer's Report it is stated that, in St Martin Le Grand, "*existence of a lost grant made by the church could not be presumed*". That is not our reading of the judgement in St Martin Le Grand.

In St Martin Le Grand the court held that a pedestrian right of way across the (consecrated) churchyard had been exercised as of right by the occupiers of the buildings around the churchyard for at least the previous hundred years and "*that it was to be presumed that such right had been conferred by way of lost faculty*".

The issue in St Martin Le Grand was as to the nature of the right of way – was it a permanent easement or one which could be terminated? It was on this point that the lack of a "faculty" (ecclesiastical licence) was relevant. That issue however is of no direct significance to our case, as St Martin Le Grand concerned a private easement and not one which (as in our case) is subject to the deemed dedication principles of the Highways Act 1980.

Paragraph 17 of the LAC Opinion explains further why the decision in St Martin Le Grand is not applicable to the question of whether a public right of way can be created across a consecrated churchyard, distinguishing between Section 2 of the Prescription Act 1832 (which was relevant to that case) and Section 31(1) of the Highways Act 1980 (which is relevant to ours).

## 22.2. Oakley v Boston

The case of *Oakley v Boston*, [1976] Q.B. 270 relates to a private easement over unconsecrated glebe land (and was decided specifically by reference to the provisions of the Ecclesiastical Leasing Acts 1842 and 1858 insofar as they related to glebe land).

We would question the relevance of this case to our case, which relates to a *public* right of way over *consecrated* land. *Oakley v Boston* is not mentioned in the judgment in *St Mary's Longdon* (2011) (see paragraph 23 below), or in the *Widford Order Decision* (2013) (see paragraph 26 below), or in the *LAC Opinion* (2016) (or for that matter in the judgement in *St Martin Le Grand* (1988) (see paragraph 22.1 above).

23. Of direct relevance (but not mentioned in the Officer's Report) is the case of *St Mary's Longdon* (2011) 13 Ecc LJ 370, a decision of the Consistory Court of the Diocese of Worcester as to a footpath through the churchyard of *St Mary's Church, Longdon*. In that case the court said that:

*... if there exists a strip of land over a churchyard that is used just as though it were a footpath, the right of the public to use it to cross the churchyard should be presumed to have come into existence at some stage as a result of the due process of law.*

adding (our emphasis):

*... **there is no reason in principle why there should not be a public right of way on foot across a churchyard, notwithstanding the effect of consecration.** Such a right could have come into existence prior to the land in question being consecrated – either by specific grant or presumed dedication at common law. Alternatively, it could have come into existence following the consecration, again either by virtue of an actual dedication **or by presumed dedication**, authorised in either case by the authority of a faculty – even though, in the latter case, that is almost certain to be a legal fiction.*

24. *St Mary's Longdon* expressly acknowledges the concept of presumed dedication, being the "legal fiction" on which Section 31(1) of the Highways Act 1980 is built. It enshrines the principle that, by enacting Section 31(1) in this way, parliament was saying that continuous user of 20 years or more, as of right and without interruption, would be deemed to constitute the dedication of the way/path, whether or not it was actually dedicated, whether or not the owner was empowered to dedicate it and whether or not some other licence, consent or permission (such as a faculty) was required.

25. That principle is well explained the *LAC Opinion*. In particular:

25.1. Section 13 of the *LAC Opinion* says:

*... the way becomes a highway by operation of law. As Scott LJ said in *Jones v Bates* [1938] 2 All ER 237 at 246, "The change of the law brought*

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27.5. We submit that there is nothing in the present circumstances that would make the use of the footpath incompatible with the functioning of the churchyard. The church has been closed since the 1890s and the building (except for its façade) was demolished then. Burials ceased in the 1920s. As noted in paragraph 5, a significant part of the graveyard was unusable since the main village drain was laid through it in 1828. Many of the gravestones have been removed from their original positions, leaving wide spaces between the relatively few that remain, allowing for free passage through the churchyard. This case could be readily distinguished from one where, for example, a public footpath might interfere with the ongoing use of a churchyard for burials.

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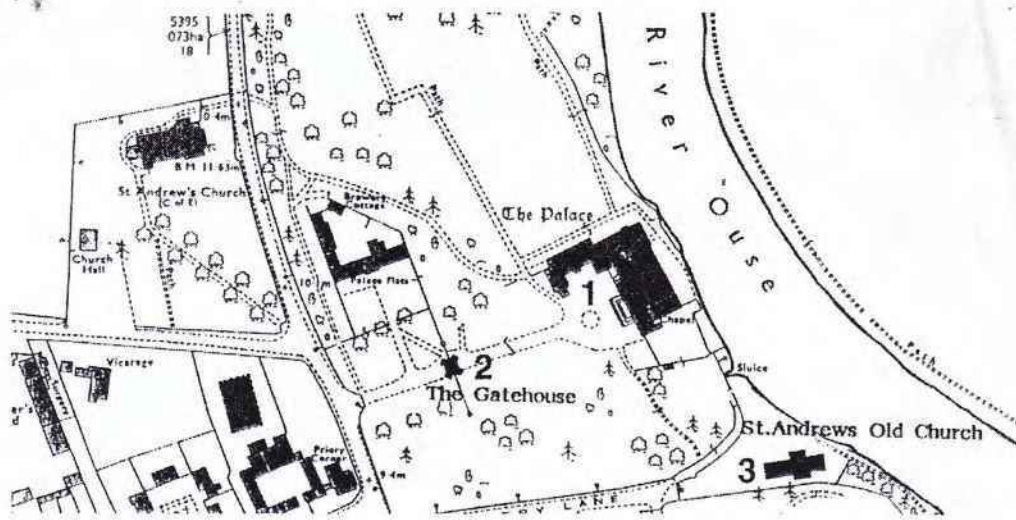
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28.4. If Section 31(8) does apply (which is arguable) then, in the circumstances of this case, the existence of a public footpath through the churchyard highway would not be incompatible with the purpose for which the land is or was held at the relevant time.

Stewart Harrison

Chairman - Bishopthorpe Parish Council

10 September 2021



#### The St. Andrew's Trust Project

Encouraged by English Heritage, the St. Andrew's Trust was formed in 1996 as a local 'trust of last resort' to:

- conserve the riverbank in order to protect St. Andrew's churchyard and its monuments and to safeguard the riverside walk along this beautiful stretch of Bishopthorpe Reach.
- protect the ancient character and atmosphere of the site and further enhance its natural beauty in association with the Countryside section of the City Council.
- preserve and restore the church façade as a dramatic centre piece of the whole project.



Supported by the  
**Heritage Lottery Fund**

## BISHOPTHORPE PARISH COUNCIL

Clerk: A. J. Green  
Tel. York 701133

48, Main Street  
Bishopthorpe  
York  
YO23 2RB

22 October 1999

The Secretary  
St Andrew's Trust,  
C/O Stable Yard,  
Chantry Lane,  
Bishopthorpe,

Dear Sir,

### Bishopthorpe Parish Council Pledge

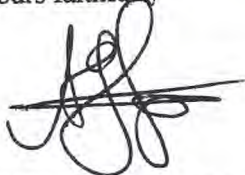
Following the meeting with Russell Wright a donation to the trust was discussed at a recent meeting of the Parish Council.

It was agreed that subject to the following conditions a pledge of £2,000 would be made.

- 1) The pledge of £2,000 is subject to the rest of the shortfall being raised to complete the project as planned.
- 2) Permanent access to the <sup>by a path</sup> footpath leading from Chantry lane to the Church Commissioners land between the Old Churchyard and Ferry Lane must be maintained.
- 3) Public access to the churchyard site must be maintained during the hours of daylight.

I enclose a copy of this letter for your signature and return acknowledging the above

Yours faithfully



These conditions are accepted by St Andrews Trust

Signed John McMullen

Date 8 Nov. 1999

Bideford Parish, Re, [1900] P. 314 (1900)

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## \*314 In Re the Parish of Bideford.



Positive/Neutral Judicial Consideration

### Court

Arches Court

### Judgment Date

2 August 1900

### Report Citation

[1900] P. 314



In the Arches Court of Canterbury.

The Chancellor , Sir Arthur Charles .

1900 Aug. 2.

*Ecclesiastical Law—Jurisdiction—Faculty—Grant of Faculty for use as Public Street of Portion of consecrated Cemetery or Churchyard closed for Burials, and setting back of Cemetery or Churchyard Wall—Retention of Cause.*

The Ordinary has jurisdiction to grant a faculty authorizing a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street. Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening.

The rector and churchwardens of a parish church in the diocese of Exeter, and the corporation of a borough in which a consecrated cemetery forming an addition to the parish churchyard was situate, petitioned the Ordinary for a faculty to authorize a strip of the cemetery being used for widening an adjoining public street, and the boundary wall of the cemetery being set back so as to form the boundary wall between the remaining portion of the cemetery and the widened street. It appeared that the street proposed to be widened was only 16 feet wide, and too narrow for the traffic along it, and that the proposed widening would be not only for the general convenience and safety of the public, but particularly of the rector and his parishioners, to the former of whom and the churchwardens moreover, by way of consideration, a sum of money was intended to be paid by the corporation. It also appeared that the strip of the cemetery proposed to be thrown into the street had been closed for interments under an Order in Council, and that the proposed alteration of the width of the street had been unanimously approved by the parish vestry. The Chancellor of the Diocese of Exeter refused to issue citation, being of opinion that he had no jurisdiction to grant the faculty prayed for. The petitioners appealed to the Arches Court of Canterbury.

The Dean of Arches allowed the appeal, retained the cause, and, the allegations in the petition having been verified by affidavit, decreed a faculty to issue in accordance with the prayer of the petitioners.

**Bideford Parish, Re, [1900] P. 314 (1900)**

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ON October 17, 1899, a petition to lead to the grant of a faculty for the purpose of throwing a portion of the old church cemetery at Bideford, in the county of Devon and diocese of Exeter, into the adjacent public street known as Honestone \*315 Street, and the setting back of the boundary wall of the same cemetery so as to separate the ground proposed to be so thrown into the street from the remaining portion of the cemetery, was lodged in the registry of the Consistory Court of Exeter. <sup>1</sup>

The petition was signed by T. Newton Leeke, the rector, and H. M. Barclay and H. S. Bourne, the churchwardens of the parish of Bideford, and was also signed and sealed on behalf of and by the direction of the town council for the borough of Bideford, and contained averments material to this report to the following effect:—

“That your petitioners, the mayor, aldermen, and burgesses of Bideford (hereinafter referred to as the corporation), are desirous to carry out a much-needed improvement by widening Honestone Street, in the town of Bideford, and for this purpose to take and throw into the street a small portion of the old consecrated cemetery, containing 337 square feet or thereabouts, which adjoins and projects into the said street: a plan shewing the portion of the cemetery proposed to be taken for the improvement being annexed to the petition.

“That your petitioners, the corporation, are prepared to pay to the petitioners, the rector and churchwardens, the sum of 42*l.* as purchase-money for the portion of the cemetery proposed to be taken, and to erect a sufficient boundary wall of the same height as the present wall between Honestone Street and the remainder of the said cemetery.

“That it is proposed that such purchase-money shall be applied in repairing the cemetery walls and putting the cemetery in order under the direction of your petitioners, the rector and churchwardens.

“That the said cemetery has been closed for burials in new graves under an Order in Council. <sup>2</sup>

\*316

“That there are in the portion of the cemetery proposed to be taken, as your petitioners believe, five graves only, the last interment therein having been made in the month of August, 1884, and two head-stones and no more; and these head-stones it is intended to replace in the remaining portion of the cemetery, and to there remove and reinter with the greatest care and decency any human remains which may be found in carrying out the improvement.

“That your petitioners are unable to discover the names of the persons interred in two of the above-mentioned graves, but the representatives of those interred in the three remaining graves are consenting to the said removal (except two persons, and they required each a payment of a sum of money before consenting).

“That the vestry of the parish had unanimously passed a resolution in favour of the proposed improvement, and authorizing the rector and churchwardens to apply for a faculty for sanctioning the same.”

The petition concluded with a prayer for the grant of a faculty for the purposes aforesaid.

1899. March 17. On this day a member of the firm of solicitors for the petitioners, having previously received an intimation from the registrar of the Consistory Court of Exeter that the citation in the suit should be moved for in court, moved before the Chancellor of the Diocese of Exeter (Lewis Tonna Dibdin, Esq.), sitting in court in Lincoln’s Inn (by consent), for citation to issue in the above matter on the petition of the rector and churchwardens and corporation of Bideford for a faculty as therein prayed.

An affidavit verifying the petition on behalf of the petitioners had been lodged in the registry of the Consistory Court of Exeter before the hearing of the motion.

THE CHANCELLOR.

This is a motion for citation on a petition by the rector and churchwardens and corporation of Bideford asking for a faculty to allow a strip of a consecrated burial ground, in which there are several graves and one interment as late as \*317 1884, to be sold for 42*l.* to the corporation, in order that it may be thrown into and form part of a highway. The burial ground was closed some years ago under an Order in Council. Mr. Peard, the solicitor for the petitioners, appearing before me on their behalf,

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has stated that the street which is proposed to be widened is at present only 16 feet wide, and as it forms the main approach from one side of the town of Bideford to the market-place is far too narrow for the traffic which passes along it. I have no doubt that what Mr. Peard tells me is accurate, and subject to the amount of compensation being adequate, as to which there might be something said, and to the consents of those interested in the graves being obtained, which appears to have been done, I should, if I thought I had jurisdiction to grant the faculty, probably do so when the case came on for hearing. At any rate, there could be no doubt that I ought now to issue citation. But, in my opinion, it has long been decided by the Queen's Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses: *Reg. v. Twiss*<sup>3</sup>; *Harper v. Forbes*.<sup>4</sup> I considered the question fully in a case in the diocese of Rochester a few years ago—*In re Plumstead Burial Ground*.<sup>5</sup> Nothing has happened since to change my view. There is, however, a later case, *In re St. Nicholas, Leicester*<sup>6</sup>, in the diocese of Peterborough, where the decision was the other way; and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances, I cannot but feel great diffidence in restating my opinion, and, were it not that the matter concerns my jurisdiction and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point was carried to the Court of Arches, and I hope this will be done in the present case. I have only to add, with reference to the agreement entered into by the corporation, that I cannot see that any power is conferred by the *Public Health Act, 1875 (38 & 39 Vict. c. 55)*, and the Lands Clauses Acts to \*318 enable consecrated land to be devoted to secular purposes. A Provisional Order, which when confirmed would have the effect of an Act of Parliament, would be sufficient; but in my view nothing less than express statutory authority will remove the protection which the law extends to lands once consecrated - a protection which, in the case especially of burial grounds, is surely in accordance with the desire of all of us—that the resting-places of the departed should not lightly, or except for some very great or urgent reason, be disturbed. I must refuse to issue citation in this case.

From the decree entered in pursuance of this judgment the petitioners appealed to the Arches Court of Canterbury.

The inhibition and citation in the appeal issued out of the registry of the Arches Court on June 19 last, and was subsequently duly served at Bideford.

1900. July 25. The appeal was heard before the Dean of Arches (Sir Arthur Charles).

*H. D. Grazebrook*, on behalf of the appellants, petitioners in the Court below. In refusing to issue the citation in this case, the judge of the Court below merely followed his own decision in *In re Plumstead Burial Ground*<sup>7</sup>, where his reasons for declining jurisdiction and dissenting from the views of the Chancellors of the dioceses of London, Chichester, Lincoln, Llandaff, and Peterborough, all of whom have at various times granted faculties similar to that asked for by the petitioners—*The Vicar and Churchwardens of St. Botolph v. The Parishioners of the Same*<sup>8</sup>; *The Vicar and Churchwardens of St. Andrew's, Hove v. Mawn and Others*<sup>9</sup>; 2 Phillimore, Ecclesiastical Law, p. 1415; *The Vicar and Churchwardens of St. John, Cardiff v. The Parishioners of the Same*<sup>10</sup>; *The Vicar and Churchwardens of St. Nicholas, Leicester v. Langton and Others*<sup>11</sup>—will be found set forth at greater \*319 length than in the judgment now appealed from. From this former decision—a decision given by the judge of the Court below when sitting as Chancellor of the Diocese of Rochester—it is clear that he considered himself precluded from exercising the jurisdiction claimed mainly in consequence of the opinion expressed by Dr. Lushington in this Court in *Harper v. Forbes*<sup>12</sup>, and approved of by the judges of the Court of Queen's Bench in *Reg. v. Twiss*<sup>13</sup>, “that when ground is once consecrated and dedicated to sacred purposes no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character.” These propositions were not required for the decision of either of these cases, and are merely dicta. *Harper v. Forbes*<sup>14</sup> was a criminal suit in which the jurisdiction of the Court in cases of faculty did not really come in question; and in *Reg. v. Twiss*<sup>15</sup> - a case of prohibition, where the jurisdiction sought to be prohibited was the jurisdiction to grant a faculty for the erection of buildings for secular purposes on a churchyard—the prohibition was refused on the narrow ground that it was applied for at the instance of a stranger, whilst at the time of the application the Ecclesiastical Court had not exceeded its jurisdiction, and there was no reason for assuming that it would do so. There are two other cases which are relied on by the judge of the Court below as shewing that the jurisdiction of the Ecclesiastical Courts to grant faculties does not extend to cases like the present: *The Rector of St. George's, Hanover Square v. Stewart*<sup>16</sup> and *The Rector and Churchwardens of St. John, Walbrook v. The Parishioners of the Same*.<sup>17</sup> Of these cases, the first amounts to no more than a decision that, for some reason unexplained in the only short report of the case known, the faculty there applied for could not be granted in the absence of consent by the rector and parishioners; and the latter of the two cases, even if it was not decided on the point that the particular application for the faculty there prayed for ought to have been made to the Bishop of London \*320 and not to

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the Consistory Court of London, is at least inconsistent both with the decision of Dr. Lushington in the very same year in *Campbell v. The Parishioners of Paddington*<sup>18</sup>, where a faculty was granted for the erection of a vestry room on a portion of a consecrated churchyard without confining the use of the vestry room to be so erected to religious purposes, and with a similar decision by Sir Robert Phillimore in this Court in *In re Bettison*.<sup>19</sup> There is in fact no direct authority binding the Court either in favour of or against the jurisdiction in this case, and, having especial regard to the circumstances that the cemetery here is closed for burials, so that it is now illegal to bury there, it is submitted that the view taken by the Chancellor of the Diocese of London and the other Chancellors who agree with him is the correct view, and that the judge of the Court below possessed jurisdiction in his discretion to grant the faculty prayed for in this case.

If the Court should decide in favour of the jurisdiction, this is clearly a case where that jurisdiction should be exercised, and the petitioners ask that the Court should follow the precedent in *In re Bettison*<sup>20</sup>, retain the cause, and decree the faculty to issue as prayed. [He also referred to *The Rector and Churchwardens of St. Gabriel, Fenchurch Street v. The City of London Real Property Co.*<sup>21</sup>; *The Rector and Churchwardens of St. Ann, Soho v. The Parishioners of Soho*<sup>22</sup>; The *Cemeteries Clauses Act, 1847*(10 & 11 Vict. c. 65); The *Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), ss. 2, 3, and The *Metropolitan Open Spaces Act, 1881*(44 & 45 Vict. c. 34).]

No appearance had been entered for any respondent, and no person appeared as respondent at the hearing of the appeal.

*Cur. adv. vult.*

Aug. 2. SIR ARTHUR CHARLES.

This is an appeal from the refusal by the Chancellor of the Diocese of Exeter to issue a citation on the petition of the rector and churchwardens of \*321 the parish of Bideford, and of the mayor, aldermen, and burgesses of the town of Bideford, for a faculty to permit of a portion of a disused consecrated burial ground being thrown into the adjoining public highway. The learned judge of the Court below was of opinion that he had no jurisdiction to grant a faculty for the proposed purpose, and on that ground refused the citation. It appears from the petition - the allegations in which, for the purpose of this appeal, must be assumed to be accurate—that the corporation of Bideford are desirous of effecting a much-desired improvement by widening a street in the town of Bideford called Honestone Street, and with that object desire to add to the highway a portion of the old consecrated burial ground, containing about 337 square feet. The plan annexed to the petition, and an enlarged plan produced at the hearing, shew exactly what is proposed to be done. There is no doubt that the street along the boundary of the burial ground is at present inconveniently narrow - it is only 16 feet wide—and that it is quite inadequate for the traffic which passes along it. The street, it may be observed, is the main approach from the rectory, and the whole of one side of the town to the market-place and church, and immediately opposite the burial ground stands the national school. The alteration, if made, would therefore be not only for the general convenience and safety of the public, but particularly of the rector and many of his parishioners, as well as of all persons who use the school.

The burial ground was closed by an Order in Council made on July 4, 1893, the contents of which appear from a previous Order in Council dated May 16, 1893, and giving notice of the proposed making of the subsequent Order. In the piece of land in question there are five graves and two head-stones, and the petitioners have obtained the consent of the representatives of those interred in three of these graves. The representatives of those interred in the remaining two graves cannot be found, but in all these cases the petitioners, should a faculty be granted, undertake decently and reverently to remove the remains to another portion of the ground, and, in the case of the head-stones, to re-erect them in a suitable position to be \*322 approved by the rector and churchwardens. The corporation are prepared to pay for the accommodation asked for, the sum of 42*l.*, to be applied by the rector and churchwardens in repairing the burial ground walls and putting the ground itself in order, and, further, to erect a new and sufficient boundary wall of the same height as the present wall. In the petition this sum of 42*l.* is spoken of as “purchase-money” of the land itself; but what is really desired is not a faculty for the actual sale of the land, but a faculty for the use of the land as a part of the adjoining highway, the ownership of the soil remaining unaffected. The parish vestry has unanimously passed resolutions in support of this application.

Under these circumstances the vestry, the rector, and churchwardens, and the corporation, being all assenting parties, and the alteration proposed being undoubtedly for the convenience of the parishioners and the public, the case appeared to the learned judge of the Court below to be one in which, if it were within the power of the Court, the faculty should be granted, or, at all

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events, a citation be issued. But he was of opinion that he had no jurisdiction. "It has long been decided," he says, "by the Queen's Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses: *Reg. v. Twiss*<sup>23</sup>; *Harper v. Forbes*.<sup>24</sup> I considered the question fully in a case in the diocese of Rochester a few years ago—*In re Plumstead Burial Ground*.<sup>25</sup> Nothing has happened since to change my view. There is, however, a later case, *In re St. Nicholas, Leicester*<sup>26</sup>, in the diocese of Peterborough, where the decision was the other way; and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances I cannot but feel great diffidence in restating my opinion, and were it not that the matter concerns my jurisdiction, and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point were carried to the \*323 Court of Arches, and I hope this will be done in the present case." There is unquestionably a great diversity of practice in the dioceses of this province as to the grant of faculties of this description. Whilst on the one hand the learned judge of the Court below has refused to grant them on two occasions—the first in the diocese of Rochester, and now in the diocese of Exeter—they have been granted in various forms and with various limitations by Dr. Tristram, the Chancellor of the dioceses of London and Chichester, and by the Chancellors of the dioceses of Worcester, Lincoln, Llandaff, and Peterborough. In the diocese of London, in particular, since 1872 they have been repeatedly granted, and a history of the origin of the practice will be found in the judgment of the Chancellor of the Diocese of London in the case of *St. Botolph Without, Aldgate*.<sup>27</sup> The same learned judge, sitting as Chancellor of the Diocese of Chichester, in *In re St. Andrew's, Hove*<sup>28</sup>, gives his reasons at length for holding that, in the case of a churchyard closed for burials, an Ecclesiastical Court has a discretionary power to make an order of the kind now asked for; and in the Leicester case, *The Vicar and Churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester v. Langton and Others*<sup>29</sup>, all the authorities for and against the exercise of such a power were very fully considered by the Chancellor of the Diocese of Peterborough.

I believe I am correct in stating that, with the exception of the two cases to which the learned judge of the Court below referred, all the reported decisions on this subject are decisions of Consistorial Courts. But those two stand on a different footing, being decisions of the Court of Queen's Bench and of the Court of Arches respectively. The learned judge founded his judgment upon them; and if they do in fact decide the point now under consideration they no doubt bind him—as indeed they would also bind this Court. It is necessary, therefore, to examine them carefully, and I will proceed to do so, taking them in order of their date. *Harper v. Forbes*<sup>30</sup> was decided in this Court by Dr. Lushington in 1859. It was there proved \*324 that the churchwardens of a parish at Reigate, with the approval of the vicar, rural dean, and bishop, but without a faculty, had permitted a part of the parish churchyard to be taken into a public road, and a suit was instituted against the churchwardens by a parishioner praying for their canonical correction, and also asking for an order that the churchyard should be restored. At the hearing, the churchwardens did not deny that there had been a violation of the law, nor did they apply for a confirmatory faculty. The suit, therefore, was practically undefended, and the observations of the judge at the outset of the hearing were certainly not necessary to the decision. Nothing, as the learned judge points out in *In re Plumstead Burial Ground*<sup>31</sup>, can be more emphatic than Dr. Lushington's statement of the law—a statement which repeated in substance observations he had made when Chancellor of the Diocese of London in *In re St. John's, Walbrook*<sup>32</sup>; but so far as the decision is concerned, it leaves me free to consider whether the general proposition laid down is applicable to the facts with which I have now to deal—whether, in other words, it can be applied without qualification to consecrated ground where the purpose for which the ground was originally consecrated can no longer be lawfully carried out. In 1869 *Reg. v. Twiss*<sup>33</sup> came before the Court of Queen's Bench. In that case the guardians of the poor of a parish in the diocese of London applied to the Consistorial Court for a faculty—a confirmatory faculty—authorizing the erection on a consecrated burial ground of a chapel for the inmates of a workhouse and of certain other workhouse buildings. Before sentence a stranger to the parish applied for a prohibition on the ground that the Ecclesiastical Court had no jurisdiction to grant such a faculty. The application was refused for two reasons: first, because it was not clear that the faculty when granted would authorize more than the erection of the chapel, which would be a purely ecclesiastical purpose; and, secondly, because the applicant was a stranger to the parish. And the Chief Justice (Cockburn C.J.) in the \*325 course of his judgment, whilst expressing approval of the doctrine or proposition enunciated by Dr. Lushington, distinctly states that the application before the Court would be disposed of "on narrower grounds." There is nothing, therefore, in the decision itself binding on the Court, although the utmost respect is, of course, due to the dicta of the learned judges as to the general law regulating the power of the Ecclesiastical Courts to make orders with reference to the use of consecrated ground. It may be observed that the language of Dr. Lushington and the Chief Justice would, if strictly construed, render it impossible lawfully to grant a faculty for secular even though combined with ecclesiastical uses. Yet such faculties have been repeatedly granted by the Ecclesiastical Courts without objection. It seems to me, therefore, that whilst the dicta in deference to which the learned judge of the Court below acted, no doubt, accurately express in general terms the law upon the subject, they must be read with some sort of qualification, and I say so with the less



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hesitation because my eminent predecessor does not appear to have himself acted upon them in their entirety. Thus I find that within two months of his decision in *In re St. John's, Walbrook*<sup>34</sup>, he granted, in *Campbell v. The Parishioners of Paddington*<sup>35</sup>, a faculty for the erection of a vestry on ground which had been consecrated for a burial ground, but which had never been used and was not intended to be ever used for interments. He points out, it is true, in explanation of his decision, that a vestry room is employed for ecclesiastical as well as secular uses, but he did not limit the grant of the faculty to the former uses. On the contrary, the application being for a faculty for a new and suitable building for vestry or *other* parochial purposes, he granted it for both.

I may note in passing that the case of *St. George's, Hanover Square v. Stewart*<sup>36</sup>, referred to in *Campbell v. The Parishioners of Paddington*<sup>37</sup> as illustrating the position that no faculty can be granted for the use of consecrated ground for any secular purpose whatever, does not appear to warrant quite \*326 so general a proposition. There the parish was cited to appear to shew cause why a faculty should not be granted for the erection of a charity school on part of the churchyard, and eventually a prohibition was granted; but it is not clear upon what ground the Court proceeded. As far as can be gathered from the very brief report, I think the Chancellor of the Diocese of Peterborough is probably correct in his view that there was some "special and accidental impediment" to the grant of a faculty, "such perhaps as interference with some common law right": *The Vicar and Churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester v. Langton and Others*.<sup>38</sup>

There still remains one case to which reference should be made, because it is a decision of this Court. Sir W. Wynne is stated by Dr. Lushington to have refused a faculty to convert a part of the churchyard at Ewell into the public road. But no report exists of the circumstances of the case, and it is at any rate beyond question that at the time of the decision the churchyard must still have been available for the purposes for which it had been consecrated. Now, in the present case the faculty is asked for in respect of ground which can no longer be lawfully used for burials. It remains nevertheless under the jurisdiction of the Ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. For example, it can no longer be built upon either temporarily or permanently ( 47 & 48 Vict. c. 72, s. 3 ; 50 & 51 Vict. c. 32, s. 4 ). The care of it is vested in the churchwardens where there is no burial board, and they are bound to maintain it in order and do the necessary repairs of the walls and fences ( 18 & 19 Vict. c. 128, s. 18 ), and their expenses are to be repaid out of the poor-rate. It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter v. Mountague*<sup>39</sup>; and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty \*327 for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial; but I see no reason why the jurisdiction should not remain although the ecclesiastical purpose can no longer be carried out. And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.

In the result, therefore, I am of opinion that this appeal must be allowed. I think that the discretion which the learned judge of the Court below was asked to exercise was within the limits of the Court's jurisdiction; and if it be matter of discretion, there is no dispute that the faculty is one which ought to be granted. The proper course will, I think, be to follow the procedure adopted by Sir Robert Phillimore in *In re Bettison*<sup>40</sup>; to retain the cause, and, as the allegations in the petition have been verified by an affidavit which was transmitted to this Court with the process and is now in the registry of this Court, to direct a faculty to issue to the rector and churchwardens authorizing the setting back of the present wall and the rebuilding it in the new position indicated on the plan annexed to the petition, upon the terms to which the petitioners have expressed their willingness to submit. The faculty must be subject to a proviso that the remains to be removed shall be reinterred in another portion of the burial ground to be selected by the rector and churchwardens.

Representation

Solicitors for appellants: Peard & Sons .

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**Footnotes**

- 1 The petition was addressed to  
“The Right Reverend Edward  
Henry, by Divine Permission  
Bishop of Exeter.”
- 2 The petition gave the date of  
the Order in Council in  
question as May 16, 1893. An  
Order in Council of that date  
(London Gazette, May 23,  
1893, pp. 2994-5) in fact gave  
notice that an Order in Council  
would be made closing the  
cemetery. The actual Order  
closing the cemetery, with an  
exception as to certain burials,  
appears to have been made on  
July 4, 1893 (London Gazette,  
July 14, 1893 pp. 3978-9).
- 3 (1869) *L. R. 4 Q. B. 407* .
- 4 (1859) *5 Jur. (N.S.) 275* .
- 5 [1895] *P. 225* .
- 6 [1899] *P. 19* .
- 7 [1895] *P. 225* .
- 8 [1892] *P. 161* .
- 9 [1895] *P. 228* , n. (4).
- 10 [1898] *P. 155* .
- 11 [1899] *P. 19* .
- 12 *5 Jur. (N.S.) 275* .
- 13 *L. R. 4 Q. B. 407* .
- 14 *5 Jur. (N.S.) 275* .
- 15 *L. R. 4 Q. B. 407* .
- 16 (1740) *2 Str. 1126* .
- 17 (1852) *2 Rob. 515; 16 Jur. 645*  
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- 18 (1852) *2 Rob. 558* .
- 19 (1874) *L. R. 4 A. & E. 294* .
- 20 (1874) *L. R. 4 A. & E. 294* .
- 21 [1896] *P. 95* .
- 22 Consistory Court of London,  
July 19, 1900. Times  
Newspaper, July 20, 1900.

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23	<i>L. R. 4 Q. B. 407 .</i>
24	<i>5 Jur. (N.S.) 275 .</i>
25	<i>[1895] P. 225 .</i>
26	<i>[1899] P. 19 .</i>
27	<i>[1892] P. 161 .</i>
28	<i>[1895] P. 228 , n. (4).</i>
29	<i>[1899] P. 19 .</i>
30	<i>5 Jur. (N.S.) 275 .</i>
31	<i>[1895] P. 225 , at p. 238.</i>
32	<i>2 Rob. 515 .</i>
33	<i>L. R. 4 Q. B. 407 .</i>
34	<i>2 Rob. 515 .</i>
35	<i>2 Rob. 558 .</i>
36	<i>2 Str. 1126 .</i>
37	<i>2 Rob. 558 .</i>
38	<i>[1899] P. 19 , at p. 27.</i>
39	<i>(1836) 1 Curt. 253 .</i>
40	<i>L. R. 4 A. &amp; E. 294 .</i>

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## GENERAL SYNOD

### LEGAL ADVISORY COMMISSION

#### Public rights of way over land forming part of a churchyard

1. The Commission has been asked whether it is possible for a public right of way across a churchyard to be created. The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated as a highway under section 31 of the Highways Act 1980, but that this will not always be the case.
2. **The first part of this opinion (paragraphs [4] to [36]) sets out how, as a matter of law, a highway may come into existence.** It is necessarily of a technical nature and is intended primarily for legal practitioners and others who are familiar with legal concepts.
3. **The second part (paragraphs [37] to [44]) is concerned with the practical steps that may be available to an incumbent and parochial church council should they wish to prevent a public right of way arising.**

#### PART 1: THE LEGAL BASIS FOR A HIGHWAY

##### Dedication as a highway at common law

4. As a matter of law, a highway is a way over which there exists a public right of passage. A public footpath is a highway, as is a bridleway or a way for vehicles.
5. At common law, a highway can arise in either of two ways:
  - (i) express dedication by the owner of the land in question as a highway, or
  - (ii) inferred dedication based on the fact of public user over a period of time (which need not be of any particular length) coupled with conduct on the part of the landowner such as to indicate that his intention was to dedicate the land in question as a highway.
6. At common law, only a fee simple owner (a person who owns land outright) can dedicate land as a highway because dedication is by nature dedication in *perpetuity*; a person with only a limited interest cannot act so as to bind land in perpetuity. So, at common law, a tenant for life could not expressly dedicate land as a highway; nor could it be inferred that he had done so.
7. Benefice and church property – including any churchyard – is vested in the incumbent in his corporate capacity. In that sense the incumbent is the ‘owner’ of the churchyard. But the incumbent is not an outright owner. An incumbent’s interest is less than that of a fee simple owner; the fee in respect of benefice and church property is permanently in abeyance.<sup>1</sup> An incumbent’s position is equivalent to that of a tenant for life.<sup>2</sup> An incumbent, therefore, does not have the legal capacity necessary to dedicate as a highway land forming part of a churchyard and it cannot be inferred that he has done so.

8. The position at common law, therefore, is that a right of way cannot be created over a churchyard. In a 2013 Inspector's decision letter concerning a proposed addition to the Definitive Map of a footpath over a churchyard, a claim of inferred dedication at common law was rejected.<sup>3</sup> See, too, section 68(2) of the Mission and Pastoral Measure 2011 which provides (subject to exceptions that are not material here), "it shall not be lawful to sell, lease or otherwise dispose of ... any consecrated land belonging to or annexed to a church ...".
9. It is, however, possible for a faculty to authorise the use by a highway authority of part of a churchyard as if it were a highway (or part of a highway). This, it is suggested, was the rationale for the Consistory Court of London holding in *Vicar and One of the Churchwardens of St Botolph without Aldgate v Parishioners of the Same* [1892] P 161 that that the Court had jurisdiction to authorize by faculty the appropriation of a portion of the churchyard required for a proposed widening of the adjacent street.<sup>4</sup> The power of the consistory court to grant a faculty "authorising a suitable use" of land belonging to or annexed to a church is expressly preserved by section 68(15) of the Mission and Pastoral Measure 2011.

### **Presumed dedication under the Highways Act 1980**

10. Section 31 of the Highways Act 1980 provides for dedication of land as a highway to be presumed in certain circumstances. A copy of section 31 is annexed to this Opinion.
11. The facts that have to be made out in order to establish the presumption are that "a way over any land ... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years". "As of right" has its usual legal meaning – namely that the use in question has not been by force, has not been clandestine, and has not been with the permission of the owner (*nec vi, nec clam, nec precario*).<sup>5</sup>
12. Under section 31(1), provided the requisite facts are made out, "the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period of 20 years to dedicate it."
13. There is therefore no need to infer a dedication by an owner: the way becomes a highway by operation of law. As Scott LJ said in *Jones v Bates* [1938] 2 All ER 237 at 246, "The change of the law brought about by statute is that, upon proof of such user for the requisite period, the conclusion of dedication follows as a presumption *juris et de jure*, instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway."
14. Dedication arises by virtue of the operation of the subsection: there is no requirement that the person in possession of the land in question has *power* to dedicate it. That this is the correct construction appears to be supported by a number of considerations.

*Legislative history of section 31*

15. First there is the legislative history of what is now section 31 of the 1980 Act. Its legislative predecessor, section 1 of the Rights of Way Act 1932, set out two bases upon which a statutory presumption of dedication would arise. The first required 20 years' uninterrupted user, with the proviso that the presumption would be defeated if "*during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such a way.*" It is therefore clear that under the 1932 Act, a mere 20 years' uninterrupted user could not have resulted in a highway being established across a churchyard (or indeed over land subject to a strict settlement).
16. However, section 1 of the 1932 Act also provided a second basis whereby dedication would be deemed to have occurred. This required 40 years' uninterrupted user. If such user were made out, then a conclusive presumption of dedication arose irrespective of whether there was a person with capacity to dedicate.
17. A comparison may be made with section 2 of the Prescription Act 1832 and the two periods of user there. It was held in *Re St Martin Le Grand, York* [1990] Fam 63, that the provisions of the 1832 Act would not give rise to an easement over a churchyard. But section 2 of the 1832 Act is readily distinguishable from the relevant provisions in the 1932 and 1980 Acts. Section 2 of the 1832 Act prevents the defeat of a "claim which may be lawfully made at the Common Law etc. to any Way or other Easement" where the requisite period of user can be shown. The restriction to a "claim which may be lawfully made at the Common Law" would exclude an easement of way over a churchyard, as no such easement could be granted at common law. But the relevant provisions of neither the 1932 nor the 1980 Acts are restricted in this way to claims that can be made at common law. The decision in *St Martin Le Grand* is therefore not applicable to the present question.
18. Taking the legislative history of section 1 of the Highways Act 1980 further, its predecessor, section 1 of the Rights of Way Act 1932, was amended by the National Parks and Countryside Act 1949. The second of the two bases giving rise to a presumption of dedication (i.e. 40 years' user) was entirely repealed. The first basis (20 years' user) was amended so as to remove the proviso that a way would not be deemed to have been dedicated if "*during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such a way.*"
19. This followed a recommendation from the Hobson Report that the statutory machinery for establishing rights of way should be simplified. The relevant part of the report stated,
 

*"We recommend that after 20 years' use of a way by the public 'as of right and without interruption', that way shall be deemed in all cases to have been dedicated as a highway. This will cover entailed estates and would do away with the existing requirement that in such cases proof of 40 years' public use must be adduced."* (Cmnd 7208, para. 56).

Introducing the 1949 Act, the Minister said,

*“...in future there is a presumption of dedication of a right of way after 20 years user in all cases”* (Hansard HC Deb, vol 463, ser 5, col 1485).

20. The result of the amendments made to section 1 of the 1932 Act was that 20 years' public user as a highway was of itself enough to give rise to the statutory presumption of dedication, irrespective of whether a fee simple owner had been in possession of the land throughout that period.
21. Section 31(1) of the Highways Act 1980 is essentially a re-enactment of section 1 of the 1932 Act as so amended. That being so, one would expect its effect to be the same as its predecessor: namely that 20 year's uninterrupted user (absent positive evidence of there being no intention to dedicate) will give rise to a statutory presumption of dedication in all cases, irrespective of the legal capacity of the person in possession.

*Provision for land in possession of tenant for life*

22. Secondly, the specific provision made in section 33 of the 1980 Act in relation to land in the possession of a tenant for life casts light on the statutory intention behind section 31(1). It gives those with interests in remainder or reversion a statutory right to bring claims in trespass to prevent the acquisition of a public right of way over land as if they were in possession. Were it the case that the statutory presumption of dedication in section 31(1) only applied where there was a person with legal capacity to dedicate at common law (which a tenant for life generally lacks), then there would have been no need for section 33 (Protection of rights of reversioners).
23. The position therefore is that the (non)existence of a fee simple owner has no bearing on the question of whether section 31(1) is capable of applying. If that is so, then section 31(1) is in principle capable of applying in the case of land forming part of a churchyard vested in an incumbent (even though, at common law, he would not have the capacity to dedicate such land as a highway). In the 2013 Inspector's decision letter referred to in para 3 above, this was accepted to be the position.<sup>6</sup>
24. If that is so, one needs to consider whether any of the other provisions of section 31 have the effect of excluding land forming part of a churchyard from the statutory presumption of dedication after public use for 20 years.

*Exclusionary provisions*

25. Section 31(1) expressly excludes from its operation “a way of such character that use of it by the public could not give rise at common law to any presumption of dedication”.
26. It is suggested in *Newsom*<sup>7</sup> that a path across land forming part of a churchyard would be excluded from the operation of section 31(1) by these words because, at common law, a presumption of dedication could not arise in respect of the way in question given the lack of legal capacity on the part of the owner of the land and

because dedication would be inconsistent with the sacred uses on which the land was held. But it does not seem that the exclusionary words in section 31(1) do in fact have that effect.

27. In *Attorney- General v Brotherton* [1992] AC 425, the House of Lords held that the equivalent provisions of the 1932 Act are concerned with the *physical* nature of the way in question; so that, for example, the statutory presumption of dedication could not arise in respect of a navigable river. The subsection is not concerned with the legal nature of the way but with whether its physical character is such that use of it by the public could give rise at common law to any presumption of dedication.<sup>8</sup>
28. Turning to subsection (7) of section 31, it is true that it provides a definition of “owner” for the purposes of the foregoing provisions of the section and that “owner” is defined as “the person who is for the time being entitled to dispose of the fee simple in the land”. An incumbent of a benefice would not, therefore, be within the meaning of “owner” for the purposes of the earlier provisions of the section<sup>9</sup>; and the wording of subsection (7) suggests that the parliamentary draftsman did not have in mind the particular position of incumbents.
29. But that does not take one very far. The provision of section 31 which operates so as to turn a way into a highway – subsection (1) – makes no reference to any owner. Where the requisite period of user is established (and unless there is sufficient evidence that there was no intention during the period to dedicate it), the way is simply deemed to have been dedicated as a highway. There does not even need to be a known owner.<sup>10</sup> The definition of “owner” in subsection (7) is not material for the purpose of the operation of subsection (1).
30. Finally, consideration needs to be given to subsection (8):

“Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”

As expressed in the 2013 Inspector’s decision letter referred to above,

*“subsection (8) provides a means whereby a specific class of landowner can defeat a claim for deemed dedication if they can demonstrate that the claimed right of way would be incompatible with the public or statutory purposes for which they hold the land over which it would pass”*.<sup>11</sup>

31. An incumbent in whom a churchyard is vested is a corporation in possession of land. Given that all who are resident in a parish have a right of burial in the churchyard of that parish and, more broadly, all consecrated land is held for sacred purposes and for the benefit of the parishioners at large, there would seem to be a good case of saying that an incumbent is in possession of such land for public purposes.
32. However, even assuming that subsection (8) applies to Church of England churchyards, this will only be relevant *“if the existence of a highway would be*



*incompatible with those public or statutory purposes*". The test is a pragmatic one, to be applied on the facts of the particular case. As explained in the case of a railway undertaking, "...a public highway could not be dedicated if at the relevant time it was reasonably foreseeable that such dedication was incompatible with the object of the statutory undertaker".<sup>12</sup>

33. Where a claimed footpath has been used by the public for more than for more than 20 years, there are likely to be (for both statutory undertakers and churches) evidential problems in proving such incompatibility, whether one looks to what was foreseeable at the start or end of the 20 year period. On the facts of the Inspector's decision letter referred to above, it was "*not convincingly demonstrated to the Inspector that the public walking along the claimed path through Widford churchyard is incompatible with the purposes for which that land is held*", so that the claim of deemed dedication under section 31 of the Highways Act 1980 was upheld.<sup>13</sup>
34. There could, however, be cases where continued use of the path by the public might impede further burials, or the proper functioning of the church and/or the churchyard. Even where the churchyard was closed by Order in Council, so that the public purpose of burial of bodies will have ceased and the existence of the highway could not be said to be inconsistent with future such burials, the footpath might be inconsistent with the future interment of ashes (which is permissible in a closed churchyard). The position in each case will need to be assessed on its own facts.

### *Conclusion*

35. The conclusion therefore is that land forming part of a churchyard can after 20 years use by the public as of right be deemed to have been dedicated as a highway under section 31 of the Highways Act 1980, but that this will not always be the case: it will depend on the facts of the particular case.

### **Ancient paths**

36. Where a public footpath or other highway existed over land before that land was consecrated as a churchyard, that highway will have continued in existence in spite of the fact that the land had become a churchyard. There may be a number of such ancient paths in existence.

## **PART 2: PRACTICAL GUIDANCE TO INCUMBENTS AND PCCs**

### **The definitive map**

37. If a footpath across a churchyard is already shown on the definitive map kept by the local authority under section 53 of the Wildlife and Countryside Act 1981, it is suggested that only in the rarest cases would it be sensible for the incumbent and parochial church council to challenge this. Where it is proposed to seek a modification of the definitive map, the incumbent and PCC should obtain legal advice before proceeding.

### Steps incumbents and PCCs might take to prevent the deemed dedication of highways arising

38. Some parishes may understandably wish to resist the acquisition by the public of a right of passage across the churchyard.<sup>14</sup> Of course if the path has already become a public footpath by use for 20 or more years, there may be nothing that can now be done to safeguard the position, and the taking of steps may positively encourage users to apply for a public path to be registered.
39. There are, however, three steps which parishes should consider taking, each of which should have the effect of preventing a public right of way being acquired.
40. Total prevention of access for a period of time each year should have the effect of preventing a public right of way arising. That is because it would amount to bringing the public's right to use the path 'into question' for the purposes of section 31(2) of the Highways Act 1980. Where there are gates, this can readily be done by the closure of all gates once a year.<sup>15</sup>
41. Putting up clear notices to the effect that use of the path by the public is permitted by the incumbent and PCC, but that such permission may be withdrawn at any time, would probably suffice to make the user permissive, and thus not "*as of right*", the latter being a requirement under subsection (1) of section 31.<sup>16</sup>
42. Putting up of clear notices prohibiting entry (save for access to the church) would also probably negative use "*as of right*" under subsection (1)<sup>17</sup>, although such a prohibitive notice can be expected to annoy users of the path, and could be counter-productive.
43. The effectiveness of putting up permissive or prohibitory notices to protect churchyards has not been tested in the courts.<sup>18</sup>

### Other cases

44. Finally, there will be some parishes where the establishment of a public footpath through a churchyard is not seen as problematic. Indeed benefits may be perceived through securing highway authority funding for the maintenance of such a path.

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<sup>1</sup> Co Lit 341a: "the fee simple is in abeyance, as Littleton saith". See also *Re St Gabriel's, Fenchurch Street* [1896] P 96 per Tristram Ch at 101-102: "churchyards are by the law placed under the protection and control of the Ecclesiastical Courts and the freehold of the churchyard is in the rector, the fee being in abeyance; but the freehold is vested in him for the use (in so far as may be required) of the parishioners. Subject to that use, he is entitled to receive the profits arising from the churchyard; but he cannot by law make any appropriation of the soil of the churchyard. Such appropriation can only be made for limited purposes by a faculty issued from the Ecclesiastical Court." See also *Re St Paul's, Covent Garden* [1974] Fam 1, 4 and *Re Tonbridge School Chapel (No. 2)* [1993] 2 All ER 339, 342.

<sup>2</sup> Co Lit 341a: "... a parson or vicar, for the benefit of the church or his successor, is in some cases esteemed in law to have fee simple qualified; but to do any thing to the prejudice of his successor in many cases, the law adjudgeth him to have in effect but an estate for life". In *Barker v. Richardson* (1821) 4 B & Ald 579 it was held that a presumption of a grant of an easement - in that case, an easement of light - could not be made because the grant, if it had been made, would have been made by a rector who was described as "a mere tenant for life" and who had no power to make such grant. Abbott C.J. said, at p. 582: "Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

The reform of the law relating to real property brought about by the Law of Property Act 1925 has not changed the essential position in that regard. Before the 1925 Act came into force, it was possible for an interest less than a fee simple to exist as a legal estate. Under section 1 of the 1925 Act, that ceased to be the case and all estates, interests and charges in or over land other than an estate in fee simple absolute in possession, or a term of years absolute, took effect as equitable interests. The effect of the 1925 Act was to turn the incumbent's estate into an equitable interest; the Act did not have the effect of enlarging the incumbent's estate so that it became a fee simple. See *Re St Paul's, Covent Garden* [1974] Fam 1 at 4E, per Newsom Ch.

<sup>3</sup> Ref: *FPS/M1900/7/66/M*, 24 May 2013, para 19 (concerning the churchyard of St John the Baptist, Widford, Hertfordshire). In paras 15-18 the Inspector referred to, and purported to limit the application of, dicta contained in *In re St Mary's, Longdon* (2011) 13 Ecc LJ 370, Worcester Consistory Court.

<sup>4</sup> Per Tristram Ch at 169, referring to an earlier decision of his: "I therefore ordered the boundary fence of the churchyard to be placed back, and granted, by faculty, to the local authorities the use of a strip of the churchyard outside the new boundary fence for a public footpath, so long as it might be required for the public use; and in case of its not being so required, I ordered that it should revert to the use of the church.

I found, on inquiry in the registry, that my predecessor had granted one faculty of the kind; and, since the granting of the Kensington faculty, it has been the uniform practice of this Court, upon a proper case being made out by evidence, to grant by faculty to the local authorities the use of strips of the churchyard for enlarging adjoining thoroughfares upon similar terms, and this practice has been followed in several other Diocesan Courts."

For more recent decisions see *In re St. John's, Chelsea* [1962] 1WLR 706; *In re St. Mary the Virgin, Woodkirk* [1969] 1WLR 1867.

<sup>5</sup> *Jones v Bates* at 245.

<sup>6</sup> At para 23.

<sup>7</sup> GH Newsom & GL Newsom, *Faculty Jurisdiction of the Church of England*, London 1993, p. 151-2.

<sup>8</sup> In his speech, Lord Oliver said, "I cannot, for instance, think that any reader of Alfred Lord Tennyson would have regarded the Lady of Shalott, as she floated down to Camelot through the noises of the night, as exercising a right of way over the subjacent soil."

<sup>9</sup> Given the absence of such an "owner", it is not possible to use the procedure for depositing a map under section 31(6) of the Highways Act 1980 in order to negative an intention to create a right of way over a churchyard.

<sup>10</sup> "... the Act has got rid of all the trouble and difficulty inherent in the task of inducing the tribunal of fact to give a solemn finding of an act of dedication at some past date, which was, as a rule, wholly imaginary, and often by an imaginary owner", per Scott LJ in *Jones v Bates* at 246.

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<sup>11</sup> At para 27.

<sup>12</sup> *British Transport Commission v Westmorland County Council* [1958] AC 126, at 152 and 156.

<sup>13</sup> At para 33 and 46.

<sup>14</sup> Sub-sections (3) to (6) of the Highways Act 1980 provide means by which the owner or reversioner may take steps to prevent the accrual of public rights over land. But “owner” bears the meaning given in subsection (7): the person who is entitled to dispose of the fee simple. In the case of a churchyard vested in an incumbent there is no such person, so that sub-sections (3), (5) and (6) have no application; nor is the incumbent’s interest that of “a tenant for a term of years, or from year to year”, nor is he (or anyone else) “a person for the time being entitled in reversion to the land”, so that sub-section (4) similarly has no application (perhaps another indication that the draftsman did not have in mind the position of churches).

<sup>15</sup> “Occasional closure to all comers” was instanced as a way of defeating a claim to use “as of right” by Lord Walker in *R (Beresford) v City of Sunderland* [2003] UKHL 60 ; [2004] 1 AC 889, para 83. The annual closure of gates was specifically mentioned by Lord Hoffmann and Lord Neuberger in *R (Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28; [2008] 1 AC 221 paras 37 and 89.

<sup>16</sup> See the observations of Lord Walker in *Beresford*, above, para 72

<sup>17</sup> See *Winterburn & anor v Bennett & anor* [2016] EWCA Civ 482

<sup>18</sup> There is a counter-argument, to the effect that since sub-sections 31(3) to (5) make express provision for owners and reversioners to post or give notice “that the way is not dedicated as a highway”, such notice cannot be given in other ways. It is considered unlikely, that such a counter-argument would succeed before an Inspector or the courts. As to sub-section (6), it is the “owner” of land who may deposit a map and statement with the appropriate council such as to amount to sufficient evidence to negative an intention to dedicate. That sub-section is incapable of being resorted to in respect of churchyards, and it is unlikely that notice given to the appropriate council other than under sub-section (6) would be regarded as sufficiently drawn to the attention of users to prevent deemed dedication of a public footpath.

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## Highways Act 1980

### 31 Dedication of way as highway presumed after public use for 20 years

(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 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.

(1A) Subsection (1)–

(a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but

(b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.

(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 erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land . . . , and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, . . . declarations in valid form made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time--

(i) within the relevant number of years from the date of the deposit, or

(ii) within the relevant number of years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(6A) Where the land is in England—

(a) a map deposited under subsection (6)(a) and a statement deposited under subsection (6)(b) must be in the prescribed form,

(b) a declaration is in valid form for the purposes of subsection (6) if it is in the prescribed form, and

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- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 20 years.
- (6B) Where the land is in Wales—
- (a) a map deposited under subsection (6)(a) must be on a scale of not less than 6 inches to 1 mile,
- (b) a declaration is in valid form for the purposes of subsection (6) if it is a statutory declaration, and
- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 10 years.
- (6C) Where, under subsection (6), an owner of land in England deposits a map and statement or lodges a declaration, the appropriate council must take the prescribed steps in relation to the map and statement or (as the case may be) the declaration and do so in the prescribed manner and within the prescribed period (if any).
- (7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5), (6), (6C) and (13) "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsections (6), (6C) and (13)) is situated or, where the way or land is situated in the City, the Common Council.
- (7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.
- (7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.
- (9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.
- (10) Nothing in this section or section 32 below affects section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement), . . .
- (10A) Nothing in subsection (1A) affects the obligations of the highway authority, or of any other person, as respects the maintenance of a way.
- (11) For the purposes of this section "land" includes land covered with water.
- (12) For the purposes of subsection (1A) "mechanically propelled vehicle" does not include a vehicle falling within section 189(1)(c) of the Road Traffic Act 1988 (electrically assisted pedal cycle).

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- (13) The Secretary of State may make regulations for the purposes of the application of subsection (6) to land in England which make provision—
- (a) for a statement or declaration required for the purposes of subsection (6) to be combined with a statement required for the purposes of section 15A of the Commons Act 2006;
  - (b) as to the fees payable in relation to the depositing of a map and statement or the lodging of a declaration (including provision for a fee payable under the regulations to be determined by the appropriate council).
- (14) For the purposes of the application of this section to land in England "prescribed" means prescribed in regulations made by the Secretary of State.
- (15) Regulations under this section made by the Secretary of State may make—
- (a) such transitional or saving provision as the Secretary of State considers appropriate;
  - (b) different provision for different purposes or areas.

## Consecrated Land and Public Rights of Way

First published as Crossing God's Acre in Waymark Winter 2007.

There are many examples of public rights of way passing through churchyards, yet English law is quite clear that a public right of way cannot usually arise at common law across consecrated land. Sue Rumfitt looks at the present law and how some of these routes came to be recorded as rights of way in the past.

### **Alleged Dedication**

The question of an alleged dedication of a public right of way across a churchyard infrequently arises. It remains one of those issues usually debated by rights of way officers at an academic level only. However, since people commonly walk through Church of England churchyards in towns and villages and since public footpaths, and, sometimes, public bridleways or even roads appear to exist through such churchyards it is inevitable that from time to time applications will be made to add rights of way across churchyards to definitive maps. Applicants can quite often point to paths through other churchyards that are recorded on the definitive map as supportive evidence that an unrecorded right can exist over consecrated land and should be recorded – however it is rarely the case that paths through churchyards are or were public rights of way.

To understand why this is so, it is necessary to understand the legal effect of consecration and the implications on the capacity to dedicate land as a public highway.

### **Capacity to Dedicate**

When land is consecrated, or more properly subjected to the Sentence of Consecration, it is declared that the land is separated from other land and set apart from all common and profane (in the sense of “not sacred”) uses and is designated and consecrated for the purposes of a burial ground for ever. At this point the land changes legal character and it is submitted that it ceases to be land over which a right of way could arise at common law.

In an Order Decision dated 5 March 2007 <sup>1</sup> Inspector Mrs Erica Eden had to consider whether or not a bridleway was wrongly recorded on the definitive map and statement by being shown through the grounds of the Old Rectory at Westwell, Oxfordshire and whether it should instead be shown in part through the churchyard. The Parochial Church Council argued (para 11 of the Order Decision) that there was at the material time no owner with capacity to dedicate and the particular circumstances of the case were that the freehold of the churchyard had been vested in the Rector since the creation of the church and churchyard in the 12th century. In all such cases, this ‘vesting’ is not a freehold estate, i.e. an estate in fee simple absolute in possession but rather the fee is held by the incumbent ‘in abeyance’ meaning that the incumbent cannot convey or create any legal estate or interest in the land without the authority of an Act or other legal Measure authorising it. Counsel for the owners of the Old Rectory agreed that the incumbent could not at any time have granted a



freehold or leasehold interest or an easement including a right of way in respect of any part of the churchyard (para 12 of the Order Decision). In the event Mrs Eden concluded (para 110):

“In considering the evidence overall, I think it is necessary to turn first to the submissions concerning whether a bridleway could be dedicated across the churchyard. I have studied the submissions and given much thought to the arguments made. I am convinced that there is no capacity for the dedication of a right of way across consecrated ground unless it has been used for such a long time that dedication might be presumed to have occurred before the consecration of the churchyard.... Dedication, whether express or implied, is integral to the existence of a public right of way.”

It might be argued that section 31 of the Highways Act 1980 could be used to overcome the fact that at the material time there was no owner with the capacity to dedicate a right of way to the public. However, section 31 (1) commences with the words, “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...”. It is submitted that a path through a consecrated churchyard is an example of a way of such character that use of it by the public could not give rise at common law to a presumption of dedication. At common law it has been held that dedication could be presumed, even in circumstances where the ownership of the land is unknown; perhaps the most well-known authority for this occurs in *Mann v Brodie*: “Where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting in the belief that the way had been dedicated and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.”<sup>2</sup> An authoritative highway law text book even commented: “The presumption arising from long uninterrupted user of a way by the public is so strong as to dispense with all inquiry as to the actual intention of the owner of the soil ....”<sup>3</sup> Whilst the common law sought ways to overcome the difficulties presented by the legal fiction that some past landowner had dedicated a right to the public, by inferring dedication from long user and by extending the doctrine to cover land even where the details of landownership were unknown, it could not overcome the position where landownership was known and the owner was constrained from dedicating a right of way; as in the case of consecrated land.

Additionally, section 31(8) states that: “Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes”. Arguably the Church of England is in possession of consecrated land for public and statutory purposes and those purposes are incompatible with the use of the land as a public highway – it would not be possible to bury in a public highway.

### **Rights by Other Means**

So, if it is impossible for a public highway to arise across a churchyard, how come so many definitive maps show rights of way through churchyards? There may be a number of reasons. As Mrs Eden considered, it is possible for the dedication of the right of way to pre-date the forming of the church and churchyard. In such cases the Sentence of Consecration would not apply to the pre-existing highway, even if it runs through the land that became the churchyard. A more likely reason is that the right of way ran alongside the edge of a churchyard, which was then extended by the consecration of land the other side of the right of way. In such cases the right of way would appear

to cross the churchyard but legally would remain separate from it. In future it is intended to extend the churchyard at Biddenham in Bedfordshire and the new churchyard will be separated from the old by a public footpath (already on the definitive map), which would then appear to run through the churchyard, whereas in fact the churchyard will have been extended.

### **Churchways**

There is the possibility of a mistake having been made in the recording of the right of way on the definitive map. Historically many churches and churchyards were accessed by “churchways”, which were (and are) not highways. However it seems quite likely that when the original definitive maps were compiled under the National Parks and Access to the Countryside Act 1949, few people were actively aware of the precise distinction between a highway and a churchway.

Halsbury’s Laws of England <sup>4</sup> defines a churchway as, “A right may exist by custom for parishioners to go to and from their parish church. Such a way is known as a churchway. It is distinguished from a highway in so far as no one but a parishioner can be legally entitled to use a churchway whereas every member of the public has the right to use a highway.” Case law has held that it is no longer possible to dedicate a churchway <sup>5</sup>, and such churchways as there are have existed actually or presumptively since time immemorial.

Confusingly, the 1835 Highway Act Section 5 defined highway to mean “all roads, bridges, (not being county bridges) carriageways, cartways, horseways bridleways, footways, causeways, churchways and pavements...”. Pratt and Mackenzie (page 144 note (K)) helpfully clarified this as meaning that “the common law definition of the term highway must be read into this statutory definition; and, therefore, the word ‘highway’ in this Act comprehends all roads, bridges etc, which are highways. Roads and bridges which are not highways are not affected by the Act; churchways which are common only to the inhabitants of a particular house, village or parish, are not highways at common law.” So it would seem that any particular route to a church, may or may not be a highway and, as ever, the status had to be determined from the facts of any particular case.

Churchways themselves ran only to the churchyard gate and did not extend over the churchyard; any path from the churchyard gate within the churchyard is simply an internal path and not an extension of the churchway. It seems unlikely that, unless the inclusion of a right of way across a churchyard was challenged at the point it was originally included in a definitive map, in depth investigations were made as to the precise status of the route and quite likely that some routes to churches and across churchyards were included in error. (Whether it would not be possible or even desirable to remove such paths from the definitive map is a topic beyond the scope of this article.)

### **Highways**

Which leaves the question of how a path across a churchyard might actually become a highway. It has been suggested that the grant of a faculty <sup>6</sup> could create a right of way across a churchyard <sup>7</sup>. Arguably, a right of way might be presumed to exist if a grant of a faculty could also be presumed to exist. The question of whether or not a faculty for a path had been granted in the past arose at the Westwell inquiry; Mrs Eden concludes that apart from a temporary faculty in 1992 there was no evidence of one having been granted. Interestingly she notes (para 13 of the Order Decision) that, “it was agreed by both Counsels that even if a faculty had been granted for a path it could not have

created a permanent and irrevocable public right of way over consecrated ground. It could only create a path which would be by leave or licence.”. A faculty would not authorise a public right of way across the churchyard or dedicate the land as a highway. Use by the public of a path created by leave or licence would be precario and therefore a public right of way could not arise over it, either at common law or under section 31.

In circumstances where a churchyard is no longer consecrated ground a faculty granting a right of way may be more analogous to an overt act of dedication of the route to the public by the landowner and therefore may create a right of way; but it is not completely clear if the exercise of the faculty is irreversible, as it would need to be for the dedication of a public right of way. This issue does not seem to have arisen in the Courts recently and in general the use of land in churchyards, whether consecrated or otherwise, for the passage on foot by members of the public is allowed and in some cases actively encouraged, provided that the public respect the burial grounds that they pass through and the fabric of memorials and buildings.

### **Conclusion**

This remains a thorny issue and any reader dealing with a claimed right of way through a churchyard, consecrated or not, is advised to seek specialist legal advice on the issues raised – the overlap of highway and ecclesiastical law being complex and almost certainly beyond the experience of most local authority lawyers and rights of way officers.

### **Author’s note**

In preparing this article for publication I am indebted to David Cheetham the Registrar of the Diocese of St Albans for his assistance. Any errors however remain my own.

Sue Rumfitt

November 2007

1. FPS/U3100/7/19 and reported in *Byway and Bridleway Extra* of 16.5.2007↔
2. Lord Blackburn in *Mann v Brodie* (1885) 10 App.Cas 378 at 386↔
3. Pratt and Mackenzie’s *Law of Highways*, fifteenth edition 1905 page 33↔
4. Volume 21 *Highways Streets and Bridges* fourth edition reissue para 6↔
5. *Farquhar V Newbury RDC* (1909) 1 Ch 12 CA↔
6. A permission from the Consistory Court of the Diocese↔
7. *Churchyards and coffin ways* RWLR section 11 pp 17-26 1993 J.D.C. Harte↔

## Postscript

After publication of this article, a Worcestershire Order involving a churchyard was confirmed and elements of the Inspector's decision are contrary to the views above. The Inspector's report can be seen on the Planning Inspectorate website.

## Consecrated Land II

First published as Crossing God's Acre – Again Or, The paths of glory lead but to the grave <sup>1</sup>

In a follow-up piece to her article Consecrated Land/Crossing God's Acre in Waymark 2007, Sue Rumfitt looks at the implications of the decision 'In re St. Martin Le Grand, York <sup>2</sup> on the difficult issue of public rights of way across consecrated land.

The original Crossing God's Acre article Waymark Volume 20 Issue 3 winter 2007 generated the largest 'post-bag' I have ever had and I am very grateful to those who took the trouble to contact me. Several people drew my attention to an Order Decision for a Worcestershire case <sup>3</sup> that had been published after Waymark had gone to press <sup>4</sup>.

In the Worcestershire case Inspector Martin Elliott had to consider whether or not a public footpath had arisen over the graveyard of St Mary's church in Alfrick. The original application for a Definitive Map Modification Order (DMMO) had been refused by Worcestershire County Council and the applicant appealed to the Secretary of State. Inspector Mrs Helen Slade considered the appeal <sup>5</sup> and on her recommendation the Secretary of State directed the Council to make the DMMO. The DMMO was objected to, resulting in an inquiry held on 20 November 2007. The County Council took a neutral stance with the case for the confirmation of the DMMO being presented by the applicant, who was represented by Counsel.

At the inquiry the applicant submitted that consecrated ground was not held for public or statutory purposes but for ecclesiastical purposes, that the Church did not owe a public duty and was not accountable under public law and that the land was not held for public purposes, nor was it in public ownership and as a consequence the provisions of Section 31(8) of the Highways Act 1980<sup>6</sup> did not apply. The applicant further relied upon In re St. Martin Le Grand, York ('Re St Martin') on the question of whether or not a faculty <sup>7</sup> was needed for a right of way to subsist, and if so, whether or not one could be presumed.

Re St Martin was heard before the Consistory Court <sup>8</sup> of the Diocese of York and concerned a private right of way over a churchyard to adjoining printing works, the churchyard having been closed to burials for many years. The petitioners (the owners of the printing works) sought rulings as to the extent of their rights and where necessary a faculty to ensure the future use of the right and to extend the right to the petitioners' licenses and to visitors to their premises. In a very long judgment the Chancellor first considered whether or not the court had jurisdiction to rule on the matter of the right of way (as being essentially a secular rather than an ecclesiastical matter). He concluded that it

did in cases such as this where a ruling on the right of way was necessarily ancillary to the application for a faculty.

Whilst *Re St Martin* concerns a private, rather than a public, right of way the consideration of the principles involved are relevant to public rights of way cases. Initially the Chancellor concluded that:

“...the appropriate form of prescription in relation to the present case is that under the doctrine of lost modern grant (including a presumed faculty) rather than by use from time immemorial. I am therefore satisfied that a right of way on foot, both with and without trolleys, over the whole of the churchyard from Coney Street at one end to the printing works at the other has been established.”

This seems to support the view that a faculty could be presumed and that it would lead to the establishment of an easement. However, the attention of the court was not drawn to the Court of Appeal case of *Oakley and another v Boston*<sup>9</sup> (“*Oakley v Boston*”). This case involved a claimed private right of way over glebe<sup>10</sup> land. The Court of Appeal held:

“Since no evidence had been produced to the court that the Ecclesiastical Commissioners must have known of any acts of user over the pathway in which the incumbent had acquiesced it could not be presumed that the commissioners had given the necessary consent to a grant by the rector which had subsequently been lost. Accordingly a valid grant by the rector could not be presumed...”

Whilst *Oakley v Boston* did not concern consecrated land, the circumstances mirror *Re St Martin* in that the incumbent was not in control of the fee simple absolute and therefore had no capacity to grant an easement without the consent, express or implied, of the Ecclesiastical Commissioners. Since *Oakley v Boston* was not put to the Chancellor in *Re St Martin* we cannot know whether it would have affected his conclusions about the applicability of the doctrine of lost modern grant to the circumstances of a private right of way over consecrated land.

Returning to *Re St Martin*, later in the judgment the Chancellor concluded:

“...that a full legal easement of way could not have been acquired in the present case. I have previously indicated my view that the case falls to be considered under the doctrine of prescription by lost modern grant, there being a presumption of the grant of faculty at some time. I consider that as a matter of law such a faculty could not have conferred an easement, but it could have conferred a licence of indefinite duration.”

Therefore, the private right arising is not an easement, but a licence of indefinite duration, which may be for all practical purposes as good as an easement, but in law does not confer the same rights as an easement. In respect of this the Chancellor notes that:

“...the licence can be terminated by faculty if the ordinary<sup>11</sup>, acting through the consistory court considers that the licence should be terminated.”

It is difficult to conclude that this could amount to an easement in perpetuity.

In the Order Decision dated 5 March 2007<sup>12</sup> Mrs Eden noted that both Counsel at the inquiry before her agreed that a faculty “...could not have created a permanent and irrevocable public right of way over consecrated ground. It could only create a path which would be by leave of licence.” The

conclusion reached by the Chancellor in *Re St Martin* albeit concerning a private right of way seems to support this view.

There would appear to be no modern case law on the direct circumstances of public rights of way arising through user across consecrated land. These two order decisions issued by Inspectors on the face of it seem to conflict. Mrs Eden concluded that she was convinced that there is no capacity for the dedication of a right of way across consecrated land, whereas Mr Elliott confirmed a DMMO to add a public footpath across consecrated land. There is a significant difference between the two cases. Mrs Eden was considering the possibility that a bridleway was wrongly shown on the definitive map as going across the grounds of the Old Rectory at Westwell and that it should instead have been shown through the churchyard, i.e. that a public right of way subsisted over the churchyard prior to the coming into effect of the National Parks and Access to the Countryside Act, 1949. Mr Elliott was considering the matter of deemed dedication under the operation of what is now section 31 of the Highways Act 1980<sup>13</sup>. Arguably the operation of section 31 defeats the proposition that if there was no landowner with the capacity to dedicate during the relevant period then the claim by the public that rights existed automatically failed. This raises the issue of the precise meaning of the wording of section 31(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...”

The cases of *Oakley v Boston* and *Re St Martin* establish that dedication of a right of way over consecrated land cannot be presumed at common law, as the most that could be established would be a revocable licence. As to whether or not section 31 operates to overcome this problem there is some guidance in *Jaques*<sup>14</sup> where it was held that the fact that the twenty-year period included a period of time when the land had been requisitioned (for the war) and, at that time there was no person owning the land with capacity to dedicate, defeated the claim. In the case of consecrated land there is nobody with the capacity to dedicate a right of way in perpetuity.

Inspector Susan Doran in a more recent Order Decision<sup>15</sup> considers the case of *Re St Martin* but in the matter before her she concludes that there is no evidence to show that the footpath (already shown on the definitive map for the area) passing through a graveyard was not already dedicated to the public prior to the consecration of the land in July 1877. Having regard to the judgment in *Trevelyan Trevelyan v Secretary of State for the Environment Transport and the Regions* 2001 EWCA Civ 266 she confirms her decision to confirm the DMMO with modifications – thus the footpath in the graveyard remains on the definitive map.

The position remains far from clear and as previously advised any reader dealing with a claimed right of way through a churchyard, consecrated or not, is advised to seek specialist advice on the issues raised.

Sue Rumfitt

November 2008

## Postscript

An interesting case in Hertfordshire considering the addition of a footpath through a churchyard in Hertfordshire.

[[http://www.planningportal.gov.uk/uploads/pins/row/documents/fps\\_m1900\\_7\\_66\\_interim.pdf](http://www.planningportal.gov.uk/uploads/pins/row/documents/fps_m1900_7_66_interim.pdf) PINS interim decision] (order proposed for modification)

August 2012

1. Elegy Written in a Country Churchyard, Thomas Gray (1716-1771)↔
2. [1990] Fam. 63 (St Martin)↔
3. FPS/E1855/7/15 of 14 December 2007↔
4. In a further “churchyard” case, FPS/C1245/7/7 of 2 April 2008, Inspector Barney Grimshaw refused to confirm a deletion DMMO to delete a footpath through St Peter’s Churchyard at Eype, Dorset.↔
5. Appeal Reference NATROW/E1855/529A/05/35↔
6. S. 31(8): “Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes.”↔
7. A permission from the Consistory Court of the Diocese↔
8. The Consistory Court is a type of ecclesiastical court, in this case within the Church of England. Before the reforms of the mid 1800s it had wide jurisdiction including over matters that we would now see as secular (such as probate and defamation). Today the principal business of the court is the dispensing of faculties, though it may also hear the trial of clergy below the rank of bishop accused of immoral acts or misconduct.↔
9. [1976] QB 270↔
10. Historically glebe was land or property that provided an income to meet the financial needs of Church of England clergy↔
11. The ordinary is the Bishop of the Diocese↔
12. Discussed in detail in the original Crossing God’s Acre article Consecrated Land↔
13. Whilst s.31 HA 80 derives from The Rights of Way Act 1932, that Act was amended by s.58 NPACA 49↔
14. Jaques v SoS for the Environment [1995] JPL 1031 (1994) 15 FW 3,3↔
15. FPS/A4710/7/65M 7 August 2008 reported in Byway and Bridleway 2008/6/71↔



# Order Decision

Inquiry and site visit held on 20  
November 2007

by **Martin Elliott BSc FIPROW**

an Inspector appointed by the Secretary of State  
for Environment, Food and Rural Affairs

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**Decision date:**  
14 December 2007

## Order Ref: FPS/E1855/7/15

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Worcestershire County Council Footpath No. 709 Alfrick Modification Order 2006.
- The Order is dated 14 December 2006 and proposes to add a public footpath at Alfrick to the definitive map and statement for Worcestershire County Council as identified on the Order map and in the schedule.
- There were 6 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to a modification set out below in the Formal Decision.**

## Preliminary Matters

1. The Order relates to an application made by Mr G P Brooke on 22 December 2004 for the addition of a public footpath at Alfrick. The application was rejected by the County Council and the applicant appealed to the Secretary of State under Schedule 14 of the Wildlife and Countryside Act 1981. The Secretary of State subsequently upheld the appeal and directed the Council to make an order resulting in objections being made. The Council adopted a neutral stance at the inquiry and the case in support of the Order was made by Mr D Elwin QC on behalf of the original applicant.
2. At the inquiry Mr D Elwin QC made an application for an award of costs against the Parochial Church Council and the Reverend Bullock. This application is subject to a separate decision.
3. Mrs Tebbit, representing a number of petitioners, made the point that she had received two letters from the Planning Inspectorate (16 November 2007) advising her that Simon Burn Solicitors had submitted their statement of case on 15 November 2007 and an additional statement on 16 November. Mrs Tebbit contended that the late submission did not provide sufficient time to consider the statements; this was contrary to advice given by the Inspectorate that proofs of evidence should be submitted four weeks before the start of the inquiry. As such an element of unfairness had been introduced which should be acknowledged. Mrs Tebbit did not seek an adjournment, although this was offered, and indicated that she did not wish to delay the proceedings. Mr Duncan also made the point that he had been provided with a limited time to study the submissions.
4. In response Mr Elvin QC advised that the main bundle of documents was a collation of those already in existence and that the bundle contained nothing



- new. The main bundle contained only two new items, namely witness statements which replicated the substance of earlier evidence and legal submissions which were not required to be submitted in advance. The later letter provided further legal submissions in relation to whether or not issues already considered and determined should be reargued.
5. In my view the late submission of documents could result in a party being prejudiced. However, although the advice is that proofs should be submitted four weeks in advance, there are no rules applying to Orders submitted to the Planning Inspectorate before 1 October 2007. Furthermore, the bundle of documents submitted on 16 November 2007 did not in my view contain anything new of material significance which had not already been available; the bundle provided a chronological collection of documents. There is no requirement for legal submissions to be submitted in advance. Taking all of the above into consideration I do not think that anyone will have been prejudiced.
  6. Parts I and II of the Schedule to the Order refer to the Order route commencing on the east side of the C2233 road. In my view this is incorrect since the route commences on the west side of the road; the Council acknowledged that there had been an error in describing the route. I do not think that anyone will have been prejudiced by this error since the intentions of the Order remain clear. The Order, if confirmed, will be amended accordingly.
  7. The submission from Mr Duncan requested that the decision made by Defra, which I understand to be reference to the overturning of the decision by Worcestershire County Council as a consequence of an appeal under Schedule 14 of the 1981 Act, should be overturned and the application rejected. It should be noted that I have been appointed to determine the Order before me, the direction at the Schedule 14 stage is not a matter for further consideration.

### **Main issues**

8. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i) of the 1981 Act. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates. The test to be applied to the evidence is on the balance of probabilities.
  9. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
  10. Section 31(8) of the 1981 Act provides that nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.
-

11. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public.
  12. Mr Duncan, for the Parochial Church Council and the Reverend Bullock, did not challenge the claim that members of the public had walked the Order route for the full twenty year period of 1984 to 2004. However, it was not accepted that the path existed in any form prior to 1976. The case for the objector was confined to the legal issue of deemed dedication in the context of the Pastoral Measure 1983 and the effect of that Measure on section 31 of the Highways Act 1980.
  13. Mr Elvin QC submitted that issues already addressed at the Schedule 14 appeal stage, with the Secretary of State agreeing with the inspector's recommendation, should not be reargued. The points made by the objectors did not go to the evidence but related to the ability to dedicate a footpath in the context of section 31 of the Highways Act 1980 and consecrated ground. These issues had been raised fairly and squarely and could not be raised again. Had the Secretary of State been considered to be wrong the appropriate course of action was to seek Judicial Review however, the process of the making of an order had gone ahead.
  14. I was referred to the case of *Watts v Secretary of State for the Environment and another* [1991] 1 PLR 61 (*Watts*) which was considered to set out the criteria for the application of estoppel:
    - i) where the issue involves a mixture of fact and law the whole matter must be put fairly and squarely before the tribunal;
    - ii) the tribunal must fully address the matter
    - iii) the tribunal must make an unequivocal decision on the matter, and
    - iv) the fact that the first three conditions are fulfilled should be clear on the face of the decision.
  15. Mr Duncan asserted that the inquiry was part of the appeal process and the inspector, at the Schedule 14 stage, was misdirected and in error; there was no distinction in the elements of the appeal process. In the interests of natural justice the arguments should be heard. Mrs Tebbit agreed with the response of Mr Duncan. Mr Elvin QC thought that Mr Duncan's response was incorrect since the objection to the addition of a footpath had already been considered.
  16. In my view an appeal under Schedule 14 of the Wildlife and Countryside Act 1981 has a definite purpose, to decide whether or not there is a sufficient case to warrant the making of an order. The inspector, if appointed, in making their recommendation, is not taking a firm view on the evidence submitted as a consequence of the appeal but assessing the sufficiency of that evidence to justify the making of an Order. If there are sufficient grounds then an order should be made so that the case for the order can be tested at a public inquiry if necessary. Whilst the Secretary of State may agree with any recommendation made at the Schedule 14 stage no firm decision is made. The sole unequivocal decision relates to the Secretary of State directing the Order
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Making Authority into making a modification order; that is not the same as making a decision on the evidence. In making that decision the Secretary of State makes it clear that the decision to direct the Council to make the Order is given without prejudice to any decision that may be given by the Secretary of State in exercise of his powers under Schedule 15 (see correspondence 15 November 2006 tab 14 of Bundle prepared by Simon Burn Solicitors). Making an order provides an opportunity for the evidence to be tested and for other evidence to be submitted for consideration. As such the criteria, as set out in *Watts*, are not applicable in respect of appeals made under schedule 14 where an unequivocal decision has not been made on the evidence. The inquiry is not part of the appeal process but is held to consider objections made to the Order under schedule 15 of the 1981 Act.

17. In view of the above I deem it necessary for those issues which were raised at the Schedule 14 stage to be reargued but only in respect of those matters put before me.

## Reasons

### *Submissions in support of the Order*

18. The applicant contended that the objectors were relying on Section 31(8) of the Highways Act 1980. The applicant submitted that consecrated ground was not held for public or statutory purposes but for ecclesiastical purposes. The Church did not owe a public duty and was not accountable under public law; whilst the Church may take into account the public good the land was not held for public purposes nor was it in public ownership.
19. It was thought that the basis advanced by the objectors was misconceived:
- i) The presumed dedication did not require the actual dedication, disposal or alienation of consecrated ground. The Highways Act 1980 operated generally to create highways through long user absent of a contrary intention to do so. There was no disposal or actual dedication involved.
  - ii) The Pastoral Measure 1983 was not directed to the issue of dedication but directed to issues arising from redundant churches.
  - iii) The decisions of the Ecclesiastical Courts did not go as far as suggested by the objectors and actually supported the possibility of presumed dedication and presumed faculty.
20. In *Re St Martin Le Grand, York* [1990] Fam. 63 (*St Martin*) the Chancellor of York had to consider the specific issue of a right of way over a churchyard. The Chancellor considered the question of the existence of a right of way only because it was ancillary to the undoubted question as to the issue of a faculty. The question was raised as to whether a faculty was needed and if so if one could be granted. Having concluded that a faculty could be granted the Chancellor held that a grant could be presumed. The Chancellor made it clear that presumption was a matter for secular law and that a faculty could be presumed. Mr Elvin QC submitted that there was therefore no basis for precluding the presumption of dedication; if necessary it could be presumed to be dedicated by a faculty. Other authorities relied upon by the objectors did not assist on the direct questions addressed in *St Martin le Grand*.
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21. It was noted from *St Gabriel, Fenchurch Street v City of London Real Property* [1896] that while the fee simple to consecrated ground may be in abeyance the incumbent has a legal interest in the freehold of a churchyard akin to a life interest. Whilst there was no issue of seeking appropriation from the incumbent there was no reason why the incumbent would be unable to take steps to prevent the presumption of dedication from arising.
  22. The case of *Batten v Gedye* (1889) 41 Ch.D. 507 also confirmed the right of the incumbent to control access to a churchyard. Where the benefice is vacant there was nothing preventing the priest in charge or the Parochial Church Council to prevent the time running under section 31 of the Highways Act 1980. Even if there were no incumbent the control rested with the Ordinary. Furthermore, the Parochial Church Council had the management and maintenance of the fabric of the church and churchyard and would be able to take appropriate action; this would include the erection of notices. There was no suggestion that the church could not have prevented access before 2004.
  23. It was further submitted that the application of section 31 of the 1980 Act was not contrary to the purposes of the church. There was nothing objectionable in the principle of having a footpath through a churchyard; there existed two other footpaths which were more intrusive and had existed since 1949. Although it was suggested that footpaths were not to be expected to pass through a churchyard this was irrelevant in the context of section 31. If allowing a footpath was contrary to the purpose of the church then the 1976 faculty, for a licensed footpath, would no doubt never have been granted. In *British Transport Commission v Westmorland CC* [1958] A.C. 126 there was no power to create footpaths incompatible with the purpose of the railway, not whether a specific procedure had been followed. The issue was the application of section 31 of the 1980 Act to consecrated ground and any significance of the faculty jurisdiction. The reference to 'purpose' in section 31(8) added nothing to the debate.
  24. As regards the Pastoral Measure 1983, the section relied upon by the objectors dealt specifically with redundant churches; that was clear from the heading and also from section 56(1). Section 56(2) related to disposals which ought to follow other procedures. In any event, the presumption did not infringe the provision in section 56(2) against selling, leasing or otherwise disposing of a church or consecrated ground. Furthermore it did not preclude the presumption referred to in *St Martin le Grand*. The point was made that Mr Duncan did not dispute that the provisions were inferring that there was a need for a faculty but, the Pastoral Measure went no further than dealing with redundant churches.
  25. Overall it was submitted that the principles of section 31 of the Highways Act 1980 could be reconciled with the principles governing consecrated ground. Moreover, the law should lean against exempting parts of the community from general law without good reason.
  26. In respect of comments relating to the case of *Attorney General ex rel Yorkshire Derwent Trust v Brotherton* (1992) 1 All ER 230 (*Brotherton*), and the conclusions drawn by the inspector in the report to the Secretary of State being misplaced, this dealt with the 1932 Rights of Way Act. *R v Oxfordshire County Council and v Oxfordshire County Council and another ex part*
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*Sunningwell Parish Council* [1999] 3 All ER 385 (*Sunningwell*) had been misunderstood by Mr Duncan and there was no confusion that the inspector had confused consecrated and glebe land. The significance of the case, as considered correctly by the inspector, was the definition of as of right.

27. Mr Elvin QC noted the points made by Mrs Tebbit in respect of authority over the churchyard and made the point that the church had had twenty years to manifest its intention not to dedicate a right of way. There was no evidence of any lack of intention and this was a question of acquiescence. Mr Elvin QC also noted correspondence from the Worcester Diocesan Register and took the view that the letter only reiterated the points made by Mr Duncan.

### ***Submissions in opposition to the Order***

28. Mr Duncan, on behalf of the Reverend Andrew Bullock and the Parochial Church Council, asserted that the footpath had never been dedicated as a highway. A private path had been sanctioned under a licence dated 19 March 1976 granted to Malvern Hills District Council by the Rector authorised to enter into the agreement by a faculty issued 23 January 1976. The path was to enable the elderly residents of newly constructed bungalows to pass more conveniently to the centre of the village.
29. Mr Duncan contended that, whilst members of the public other than, and in addition to, those entitled to use the path, that use did not satisfy the requirements of section 31 of the Highways Act 1980. This was because the land over which the path passes formed part of the churchyard and as such was consecrated land.
30. Churches and consecrated land were protected by section 56 of the Pastoral Measure 1983. This stated that it was unlawful to 'sell, lease or otherwise dispose of any church or part of a church or the site or part of the site of any church or any consecrated land belonging or annexed to a church except in pursuance of powers under this Part or Section 30'. The creation of a public footpath abridged the rights of ownership over the surface of the land and was therefore a disposal in accordance with section 56(2). If the Order route was declared as a footpath this would prevent burials from taking place and this would be a permanent alienation. The suggestion that section 56 only applied to redundant churches was a misinterpretation of that section. Section 56(3) made it clear that a faculty was required to make use of any part of the church unless redundant.
31. The Pastoral Measure 1983 had the effect of prohibiting the creation of any interest in consecrated land except with a licence granted under the authority of a faculty. Such a provision was not curtailed by section 31(1) of the Highways Act 1980 which was a deeming provision as opposed to a statutory power contained within the Pastoral Measure; section 56 of the Pastoral Measure took precedent over section 31 of the Highways Act 1980. It was established that only with the authority of a faculty could a private or public right of way be established over a consecrated churchyard.
32. Apart from section 56(2) of the Pastoral Measure 1983 there was a line of authority dating back to the 19<sup>th</sup> century (*re St. Paul's Covent Garden* [1974] Fam 1, *re St. Clement's Leigh on Sea* [1988] WLR 720 and *re St Martin Le Grand, York* [1990] Fam 63). All the cases established that an incumbent had
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- no legal power to grant a right of way over a churchyard but that in all cases a faculty was requisite in order to vest such a right in individuals or the public at large. The faculty jurisdiction in this respect was demonstrated in *Batten v Gedge* (1889) 41 Ch. D 507. In *St Martin le Grand* certain presumptions were made based on the facts of the case. The circumstances in respect of the current case were entirely different since it related to a licensed private footpath under the authority of a faculty.
33. The fact that there were other footpaths crossing the churchyard was not contested although there was no evidence as to how the footpaths came into existence. This could have been after the grant of a faculty or could predate the faculty procedure. The footpaths clearly predated the Pastoral Measure 1983. Footpath 535 ran along the boundary of the churchyard and was not intrusive. Footpath 532 had been in existence for many years and passed between the graves. However, a path along the southern boundary would be intrusive and damage the sanctity of the churchyard. It was submitted that it was undesirable for footpaths through churchyards to be used for through routes; footpaths were provided to lead to the church.
34. The inspector determining the appeal under Schedule 14 of the 1981 Act had misapplied Section 31(1) and Section 31(8) of the Highways Act 1980.
- i) The granting of a faculty limiting the user of the way negatives an intention to dedicate a way for the benefit of the public.
  - ii) The acts or omissions of those with a limited interest (the incumbent, the Parochial Church Council and the District Council) are for this purpose immaterial.
  - iii) Under section 31(8) it would be *ultra vires* for the incumbent, the Parochial Church Council or any other body within the Church of England to dedicate a public right of way without an appropriate faculty.
  - iv) The establishment of a highway under section 31(1) was incompatible with the exercise of the faculty jurisdiction.
35. The reliance by the inspector upon *Attorney General ex rel Yorkshire Derwent Trust v Brotherton* (1992) as to the lack of capacity to dedicate was misplaced. The House of Lords was concerned with the construction of section 1 of the Rights of Way Act 1932 in the context of waterways; the terms of the Act differed materially from section 31 of the Highways Act 1980. In the context of churchyards there was an established procedure by way of petition to the Consistory Court or the Diocese whereby appropriate rights may be established.
36. The inspector had also relied on *R v Oxfordshire County Council and another ex parte Sunningwell Parish Council*, but failed to make the distinction between consecrated and unconsecrated land. For the purpose of the appeal there was a distinction between unconsecrated parochial land and consecrated land which was governed by section 56(2) of the Pastoral Measure 1983. In supposing that the same legal restrictions applied the inspector was mistaken and vitiates the conclusions reached at paragraph 99 of the Schedule 14 report and onwards.
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### ***Consideration of submissions***

#### *Pastoral Measure 1983 and the requirement of a faculty*

37. Section 56 of the Pastoral Measure is entitled '*Churches not to be closed or disposed of otherwise than under this Measure*'. Whilst the Measure does infer that a faculty may be required for authorising other suitable uses, those other uses are not stipulated. Nevertheless the Measure clearly relates to the disposal of redundant churches or the site of any church. There is nothing which can be read from the section which indicates that a public right of way could not be presumed to be dedicated without a faculty.
38. In dedicating a right of way there is nothing before me to suggest that the land over which the way would pass is being sold, or disposed of. The dedication of a right of way would result in a right over private land, the ownership would not change. For these reasons I do not accept that the Measure prohibits the creation of an interest in the form of a public right of way without a faculty. If, as it is argued, the existence of a footpath would prevent burials it appears to me, from the 1976 agreement, that the prospect of such burials are already limited as a consequence of the agreement. The grounds for termination of the said agreement are that the Licensee defaults on the requirement to maintain a footpath, and a fence if required by the Grantor. This does not suggest to me that the church intended, during the operation of the agreement, to conduct burials in this part of the churchyard. In any event, as suggested at the inquiry, if there was any intention to carry out burials in this part of the churchyard then any footpath could be diverted subject to meeting the relevant criteria.
39. As regards the precedent of section 56 of the Pastoral Measure over section 31 of the 1980 Act, I have concluded that the Measure relates to redundant churches and churchyards. Furthermore, I am of the view that dedication of a highway does not amount to disposal of land. As such I cannot agree with the view that section 56 has precedent over section 31 of the Highways Act 1980 since it does not relate to the particular issue. In any event Section 31 provides for a statutory dedication, subject to certain criteria; it is not a deeming provision but a statutory provision. Once the criteria have been met and in the absence of a contrary intention to dedicate it is presumed that the landowner intended to dedicate the way as a highway. There is nothing to suggest, in presuming the dedication of a way, that other actions, such as the granting of a faculty, should occur.
40. In respect of *St Martin Le Grand*, whilst the circumstances vary from those in relation to the Order route, there is a clear indication, as a consequence of use as of right, that a faculty could be presumed to be granted. As such the absence of a faculty should not be seen as an obstacle to dedication under section 31 of the Highways Act 1980. As outlined above, once the necessary criteria have been met, the way is presumed to have been dedicated. I accept that there may be some circumstances when a faculty may be required such as to provide for an express dedication, that is not the case in respect of the Order route.
41. As regards the other authorities relied upon by Mr Duncan *re St Paul's Covent Garden* [1974] Fam 1 specifically relates to the entering into a lease for use of
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parts of the churchyard for use as a car park. In *re St Clement's Leigh-on-sea* [1988] WLR 720 relates to the express grant of an easement which could not be granted without obtaining a faculty. The cases do not deal with the dedication of a right of way through presumption as is the case with section 31 of the 1980 Act. I do not think that the cases offer any assistance in demonstrating the need for a faculty in respect of presumed dedication. *Batten v Gedye* (1889) 41 Ch.D 507 clarifies the faculty jurisdiction but does not deal in any way with the establishment of rights through presumed dedication. However, the case does offer clarification in respect of the ability of an incumbent to take action for trespass and in my view therefore able to take action to prevent the presumed dedication of a way.

*Incompatibility of section 31(1) of the Highways Act 1980 with the faculty jurisdiction*

42. Mr Duncan argued that section 31(1) of the 1980 Act was incompatible with the faculty jurisdiction. I deal with use as of right and the lack of intention to dedicate at paragraphs 50 to 57 below. The remaining part of the section outlines that the provisions do not apply to a way of such a character that use of it could not give rise at common law to a presumption of dedication. I have outlined above at paragraph 11 the requirements for dedication at common law. In my view there is nothing to prevent the express dedication of a highway over a churchyard, accepting that this would normally be by way of a faculty. The granting of such a faculty would in my view equate to an express dedication of the way and there would seem to be nothing which would prevent the other requirements for dedication at common law from being met. A faculty may also be presumed (paragraph 40 above) and therefore give rise to implied dedication. As such there is nothing before me which indicates that the way is of such a character that use could not give rise at common law to a presumption of dedication. Arising from this, and the fact that a faculty can be granted or implied, I am of the opinion that this part of section 31(1) is not incompatible with the faculty jurisdiction since dedication at common law can apply.

*Highways Act 1980 Section 31(8)*

43. I have recited the relevant section at paragraph 10 above. I note the assertion that section 31(8) would be *ultra vires* for the incumbent, the Parochial Church Council or any other body within the Church of England to dedicate a public way without a faculty. In my view the church and churchyard is not in public ownership. Whilst the church may be used for the public benefit that is not the same as being in the possession of the public or being held for statutory purposes. As a consequence I do not consider that the section is relevant to land owned by the church.
44. Although I have concluded that section 31(8) is not applicable I consider it appropriate to consider matters of incompatibility since the issue has been raised. It is noted that a private agreement exists for the establishment of a footpath for use by certain individuals along the line of the Order route. In entering into such an agreement the then Rector must have given consideration to the appropriateness of such a route. Had the path been incompatible with the churchyard it would appear unlikely that such an agreement would have been entered into and a faculty granted. Furthermore,
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it is noted that two footpaths already exist through the churchyard; there is no evidence that these footpaths are intrusive or that the Order route would be any more intrusive than these. As suggested footpath 535 passes along the northern boundary of the churchyard. In my judgment the Order route follows the southern boundary and since it passes closer to the boundary of the churchyard it is less intrusive than footpath 535 and in particular footpath 532 which cuts through the middle of the churchyard. As such I cannot accept the dedication of the Order route would be incompatible with the purpose of the churchyard.

45. I note the observations in relation to footpaths through churchyards (paragraph 33) and that it was normal for footpaths to churches and churchyards to provide access to such destinations only. However, there is no general presumption that this should be the case. It should be recognised that public footpaths are highways over which the public have a right to pass and repass for reasonable purposes incidental with their use. Whatever the circumstances there exists two public footpaths which pass through the churchyard which, it has been accepted, are not intrusive. The existence of the Order route, as a through route, does not in my view result in the route being intrusive.

#### *Brotherton and Sunningwell*

46. I note the comments by Mr Duncan in relation to the above cases and the reliance of the Inspector at the Schedule 14 stage in support of the conclusions. As I have outlined above the recommendation made at that stage is not a matter for my consideration. However, the cases have been raised in relation to limited aspects of the objection promoted by Mr Duncan and it is therefore necessary to comment in this context.
47. *Brotherton* concerned itself with the construction of section 1 of the Rights of Way Act 1932, albeit in the context of a way over water. As Mr Duncan pointed out, and considered in *Brotherton*, the Act was aimed at the specific mischief of settled land lacking an identifiable owner. Section 31 of the Highways Act 1980 encompasses section 1 of the 1932 Act but with the requirement for there to be a landowner with a capacity to dedicate a way being removed. When considering the dedication of a route in accordance with the 1981 Act the issue of capacity is therefore not a relevant matter. In making my decision *Brotherton* does not offer any assistance.
48. In respect of *Sunningwell* whilst the case related to the claim for a village green on glebe land I attach no significance to this in relation to the Order before me. The case does not assist in relation to the acquisition of public rights over consecrated land. Nevertheless *Sunningwell* clarifies the definition of use as of right, a requirement for a statutory dedication under the 1980 Act. As of right is defined simply as use without force, secrecy or permission.

#### ***Evidence of User***

##### *When the right to use the way was brought into question*

49. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a
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reasonable opportunity of meeting it. Evidence suggests that the formal application under the Wildlife and Countryside Act 1981 dated 22 December 2004 was made following a public meeting at which public rights on the Order route were denied. Sections 7A and 7B (as inserted by section 69 of the Natural Environment and Rural Communities Act 2006) clarifies that an application for a definitive map modification order is, of itself, sufficient to bring a right of way into question for the purposes of section 31(2) of the Highways Act 1980. The right to use the way was clearly brought into question in 2004 and no evidence is before me to suggest otherwise. This sets a relevant twenty year period of 1984 to 2004.

*Evidence of use 1984 to 2004*

50. A number of signed statements submitted by the supporter of the Order indicate use of the way, by the public, without interruption during the relevant twenty year period. This was not disputed at the inquiry and there is nothing before me to suggest that the use did not take place. There is no evidence that those using the way did not use the way as of right. Whilst the granting of the licence in 1976 to use the way by some might be construed as permission, the use with permission by some does not preclude use by others from being without permission. None of those who have provided statements suggest that their use was with any permission.
51. Mr Duncan outlined that no part of the case, on behalf of his clients, challenged the claim that members of the public, other than those entitled to use the route under the terms of the 1976 licence, had used the way. However, it was disputed that any path existed prior to 1976 but that this was not relevant in relation to the inquiry. In respect of earlier use, this is not a matter for my consideration since the relevant period is 1984 to 2004 but there is certainly evidence of use from at least 1976.
52. In my view, although the evidence is not substantial, the evidence, on balance, demonstrates use of the way by the public as of right and without interruption for a full period of twenty years such as to raise the presumption that the way had been dedicated as a public footpath.

*Evidence of Landowners intention*

53. For there to be sufficient evidence that there was no intention to dedicate the way, other than those specifically provided for in section 31 of the Highways Act 1980, there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that he had no intention to dedicate.
  54. Mr Duncan asserted that the grant of a faculty limiting user by a particular group negated an intention to dedicate a way for the benefit of the public at large. Mr Duncan noted the assertion that no attempt had been made to deter or prevent those with a private right from using the licensed private footpath. In response Mr Duncan made the point that there were practical difficulties in identifying those who had a legitimate right to use the route and those who did not.
  55. In my view the faculty which relates to a licence between the District Council and the incumbent of the benefice of Alfrick with Lulsley and Suckley provides
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for access to a limited number of persons. Whilst those using the way in accordance with the licence may be aware of its existence, this is not known, there is no evidence that the public using the way had any knowledge of the faculty or licence. In any event there is no evidence provided from the faculty or licence of any reference to the fact that there was no intention to dedicate a way for the public. Since the faculty and licence makes no reference to such an intention they cannot be seen as providing sufficient evidence of a lack of intention; noting in addition that they were not brought to the attention of those using the way. The granting of a faculty alone does not evidence a lack of intention; as outlined above there must be some overt acts such as to disabuse the public of a right to use the way.

56. No other evidence has been put before me to suggest that those using the way were challenged or prevented from using the way during the relevant period. I note the assertions of Mr Duncan, that it was difficult to identify those not using the way in consequence of the licence, but other actions could have been taken, such as the erection of appropriately worded notices, to demonstrate a lack of intention.
57. I conclude that there is no evidence which is sufficient to demonstrate a lack of intention to dedicate the way as a public footpath.

#### ***Dedication at common law***

58. In the light of my findings that the Order route can be presumed to be dedicated under section 31 of the Highways Act 1980 it is not necessary to consider whether the route has been dedicated at common law.

#### ***Summary***

59. In summary section 56 of the Pastoral Measure does not demonstrate the need for a faculty to be provided for a way to be presumed to be dedicated. The land over which the Order route passes is not to be disposed of or sold and therefore a faculty is not required, in this context, for any dedication. There is nothing before me to suggest that the faculty provision is incompatible with section 31(1) of the Highways Act 1980 since dedication of the Order route is possible under common law. In addition the faculty provisions do not demonstrate use was not as of right nor any lack of intention to dedicate. Further, there is no conflict with section 31(8) since the churchyard is not land held for public or statutory purposes and the section is not applicable. In any event there is nothing to suggest that the Order route is incompatible with the land over which it passes.
60. The evidence of use satisfies the requirements for a statutory dedication. Although I have found that there is no conflict with the presumption of dedication and the faculty provision, and that the Pastoral Measure does not override section 31 of the 1980 Act, a faculty could in any case be presumed. The evidence as a whole leads me, on balance, to conclude that a public footpath has been dedicated along the Order route.

#### **Other Matters**

61. Mrs Tebbit made the point that the licensed status of the footpath and the level of use of the way had worked satisfactorily for the past thirty years. The
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church had been implicated in the pursuit of the application and there was now an obligation to protect the church and churchyard. This was not a matter relating to a footpath but as to who determined what took place; this should remain with the Priest and the Parochial Church Council. Whilst I note these comments they are not matters which I can take into account in making my decision. The written representations made reference to a planning application for development in Alfrick. This and the circumstances surrounding the application and that for the Order are not for my consideration.

### **Conclusion**

62. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with one modification.

### **Formal Decision**

63. I confirm the Order subject to the following modification:

- At Parts I and II of the Schedule to the Order, at line one, delete the words 'east' and insert the words 'west'.

*Martin Elliott*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Mr D Goode                                      Worcestershire County Council, County Hall, Spetchley  
Road, Worcester, WR5 2NP

### **In support of the Order:**

Mr D Elwin QC                                      Of Counsel, instructed by Simon Burn Solicitors, 107  
Promenade, Cheltenham, Gloucestershire, GL50 1NW

### **In opposition to the Order:**

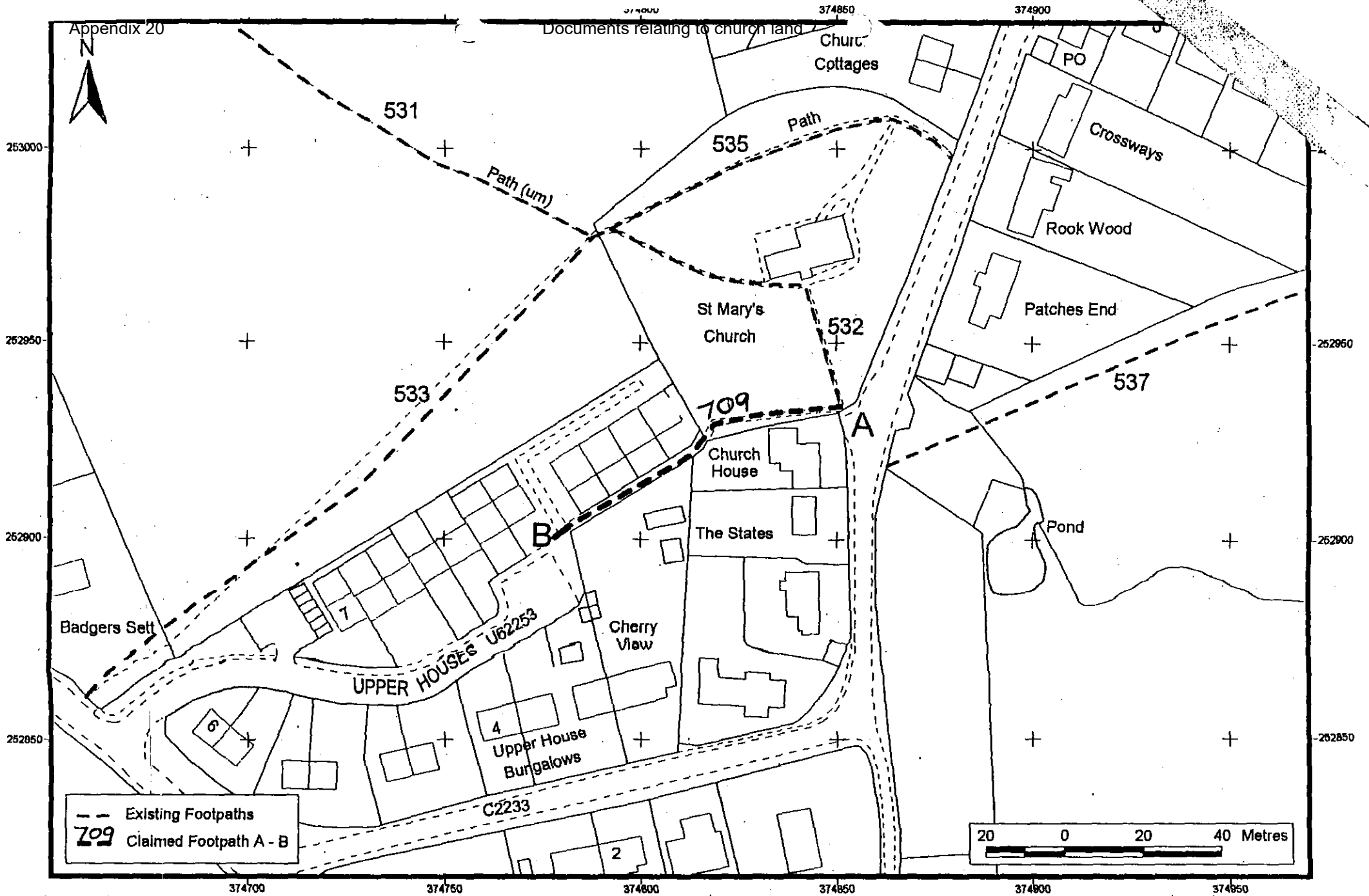
Mr A Duncan                                      Representing the Reverend Andrew Bullock and the  
Parochial Church Council of Alfrick, Whatley Weston &  
Fox, 15 & 16 The Tything, Worcester, WR1 1HD

Mrs C A Tebbit                                      The Briar, Crews Hill Court, Alfrick, Worcester, WR6  
5ES

Mrs P Dawson                                      Upper Mythes, Alfrick, Worcester, WR6 5HH

## **DOCUMENTS**

- 1      Correspondence from Worcester Diocesan Registry 16 November 2007
- 2      Correspondence from Whatley Weston and Fox 19 November 2007
- 3      22 No. photographs taken 14 November 2007






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# Order Decision

Site visit made on 16 July 2012

by **Roger Pritchard MA PhD MRTPI**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 07 August 2012

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## Order Ref: FPS/M1900/7/66

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Widford 17) Modification Order 2010.
- The Order is dated 19 November 2010 and proposes to modify the Definitive Map for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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## Procedural Matters

1. The Order relates to an anomaly on the Definitive Map and Statement ('the DMS') for Hertfordshire. No path passing through the churchyard of St John the Baptist's Church ('the Church'), Widford, is recorded on the current Definitive Map, the relevant date for which is 1986. There is, however, a record of such a path in the Definitive Statement, the entry for which reads, '*...commences from county road just W of St John the Baptist's Church thence N through churchyard to junction with BR16*'.
2. This anomaly was highlighted by an application relating to another nearby path. The County Council, as Order Making Authority ('the OMA'), undertook the relevant investigations that it has a duty to carry out under the 1981 Act. These led it to conclude that, as a consequence of events specified in sections 53(3)(c)(i) and (iii), Order should be made under section 53(2)(b) to add a footpath to the Definitive Map whilst modifying the Definitive Statement to describe a path on a different route from that referred to above.

## The Main Issue

3. The main issue is whether the discovery by the OMA of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown on the DMS subsists over land in the area to which the Map relates. The test to be applied to the evidence is the balance of probabilities.
  4. The OMA presented its case on the basis of a claim for inferred dedication under common law. Dedication at common law requires consideration of three issues –
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- Whether any current or previous owners of the land in question had the capacity to dedicate a highway;
- Whether there has been express or presumed dedication by the landowners; and
- Whether there has been acceptance of the highway by the public.

Evidence of the use of a path by the public as of right may support a presumption of dedication and may also show acceptance by the public.

## **Reasons**

### ***Background***

5. The claimed path starts on the B1004, Widford Road, at a lych gate that is the main entrance to the churchyard. It runs north for some 35 metres to the Church porch before swinging for a further 10 metres around the Church's south-west corner. To this point, the path is well-defined, has a gravelled surface and is up to 2 metres wide. The path then runs for around a further 25 metres across mown grass to exit the north west corner of the churchyard by a kissing gate. It then descends a steep flight of steps for around 15 metres before meeting Public Bridleway B.R.16, which at this point runs east-west behind and below the churchyard. The total length of the claimed path is some 85 metres.

### ***The objections***

6. Three objections were unresolved when the Order was submitted to the Secretary of State for confirmation. One, from a local resident, L James, appears to misunderstand the purpose of the Order, erroneously believing that it diverts an existing farmland path into the churchyard. The OMA sought clarification of this objection but none has been received. This objector also has concerns about dogs and dog faeces in the churchyard. I appreciate these concerns but they are outside the scope of the matters before me.
7. Nevertheless, this objection also raises the issue of the safeguarding of churchyard. This matter is at the heart of the other two objections, which come from the current incumbent and churchwardens of the Church and from the Registrar of the St Albans Diocese<sup>1</sup>. Although both question the weight which the OMA has afforded to the documentary evidence supporting its case for the Order, their objections rest primarily on the legal argument that it is impossible to identify any current or previous owner of the churchyard who had the capacity expressly to dedicate a highway over this land. In these circumstances, neither can there be presumed dedication and the test for dedication at common law must fail.

### ***The documentary evidence***

#### *Pre-20<sup>th</sup> Century Evidence*

8. The OMA relies on documentary evidence from the early 20<sup>th</sup> century onwards. The objectors criticise this reliance but, as the OMA rightly points out, dedication under common law sets no specific timescale. Evidence that can demonstrate that a route had been used for a century or more would be well

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<sup>1</sup> Until August 2011, this post was held by Mr David Cheetham. On his retirement, the post has been taken over by Mr Lee Coley.

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within what the Courts have held is sufficient time to support dedication under common law.

#### *The Finance Act 1910*

9. The earliest documentary evidence to which the OMA refers is the Finance Act 1910. The Act sought to levy a tax on any increased value when land was sold. A national survey was conducted to establish baseline values. Details were recorded in field and valuation books for individual hereditaments. Provision was made for recording a deduction in value where hereditaments were crossed by Public Right of Ways (PRoWs).
10. The claimed path is shown on the survey's base map (the Ordnance Survey 2<sup>nd</sup> Edition, probably dating from 1898). It is in Hereditament 406, which comprises the Church and churchyard. A deduction of £65 for PRoWs is recorded for this hereditament. Although – as is usual in these circumstances – no details of the PRoW(s) are recorded, I agree with the OMA that it is difficult to see that the deduction can refer to any route other than the claimed path. That conclusion is strengthened by the recording of the claimed path across the churchyard on successive Ordnance Survey maps. These, whilst they cannot be determinative of a route's status, nevertheless show no path across the churchyard other than that now claimed.
11. The objectors suggest that the Finance Act evidence should be discounted on the grounds that it does no more than record the opinion of the then incumbent, who would have been unaware of any legal distinctions that might apply to paths running across churchyards. I have no doubt that the objectors are correct in their assessment of the limits of the incumbent's knowledge. However, the drawing up of Finance Act surveys was closely controlled and surveyors were given detailed instructions as to the criteria to apply. Nevertheless, I accept that that some degree of local variation in survey methodology can occur and that it is possible, if no objections were made, that a PRoW across a churchyard could have been recorded, irrespective of any legal limitations.
12. The objectors also make the additional point that if the claimed path were 2 metres wide throughout, it would impinge on some late 19<sup>th</sup> century graves. The Council accepts that it is unlikely that a right of way would pass over graves but suggests that the recorded width of the claimed path be amended to allow it to narrow in the vicinity of the graves. If confirmed as made, I see no objection to the Order being modified in this manner.

#### *Definitive Map Records*

13. Following the National Parks and Access to the Countryside Act 1949, the OMA undertook the procedures to produce the first Hertfordshire DMS. Critical to these were Parish Surveys, undertaken by parish councils or sometimes by user groups such the Ramblers. The claimed path appears on a survey conducted by a local representative of the Ramblers and is recorded as a '*Right of way through churchyard west side of church to connect with stile*'.
  14. However, for whatever reasons, the path that was shown on the draft DMS was not the claimed path, which I have no doubt both existed and was that recorded by the Ramblers' surveyor. Instead, a path was shown running parallel to the western edge of the churchyard, a route that required crossing
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- the churchyard's front wall at a point where there was no access. The Draft Statement for the recorded path reads as set out in paragraph 1.
15. No objections were made to the route for Widford 17 as recorded and it so appeared on the First DMS for Hertfordshire, the relevant date for which is 1953. Moreover, the balance of probabilities strongly points to the OMA then being convinced that a PRoW existed across the churchyard but that due to clerical/cartographic error, an incorrect route was recorded.
  16. Although the Special Review of the DMS, required by the Countryside Act 1968, was abandoned in Hertfordshire in 1984, an amended DMS was produced in 1986 that showed all changes to the First DMS which had no outstanding objections. The Special Review Draft Map shows a path following the route recorded on the first DMS, but this path did not appear on the final Map. No evidence for this omission has been presented to me. The recorded path, however, continues to appear on the final Statement in the form already set out.
  17. No objections or representations relevant to the recorded or claimed paths were made during the process of Special Review. The objectors suggest that the former's deletion from the final Map may reflect a realisation that there were legal bars to the establishment of a PRoW across the churchyard. I find this proposition implausible. Apart from the lack of any representations raising this issue, the retention of the recorded path on the revised Statement contradicts this argument. Furthermore, if the OMA had deleted the recorded route on the legal grounds put forward by the objectors, I see no reason why that part of Footpath 17 north of the kissing gate (and thereby outside the churchyard) was not retained to provide a link into the Church from B.R.16.
  18. It is more probable that either the recorded route was omitted through clerical error, or, when drawing up the final revised Map, the draughtsman realised that the recorded route was practically impassable. However, the discrepancy was not resolved before publication.
  19. Although it made no objection to the recorded route during the preparation of the Special Review, after publication of the revised DMS in 1986, Widford Parish Council ('the PC') made representations to the OMA that the recorded route of Footpath 17 was incorrect. The PC contended, supported by user evidence, that there had never been a path through the churchyard other than that which follows the route of the path now claimed. The OMA recorded its agreement with the PC and stated that it would amend the DMS. However, the OMA took no action until the process that led to the current Order began in 2009.

### ***User Evidence***

20. The Church is of 14<sup>th</sup> century origin and local people will have therefore been walking to it for some hundreds of years. The OMA has submitted three statements by long-standing local users that support the case that, for decades, the public has been using the claimed path without challenge. The user evidence also suggests that the path has been used not only to access the Church and churchyard, but also as a through route between Widford Road and what is now B.R. 16.
  21. Although this user evidence is limited, it not disputed by the objectors. They accept that the public has used the path unhindered for many years and that
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no steps have ever been taken to challenge or restrict that use. Indeed, they welcome public use of the path, providing it is accepted that it has not been as of right but has always been, and must always be, on a permissive basis.

### ***Conclusions on the Documentary and User Evidence***

22. The objectors suggest that the documentary evidence in support of the claimed path is unconvincing and limited in time-scale. I do not agree. For at least a hundred years – if not substantially longer - there is substantive and substantial evidence that a route has existed across the churchyard that corresponds to that of the claimed path. Furthermore, nothing in the documentary evidence suggests that the public's use of the claimed path had ever been brought into question prior to the objections to the Order before me. Nor have any steps ever been taken by the Church authorities to challenge or prevent the public's use of the claimed path.
23. I therefore conclude that, on the balance of probabilities, the documentary and user evidence would meet the second and third tests for presumed dedication under common law.

### ***Legal submissions***

24. The fundamental difference between the OMA and the objectors is whether there is a power to dedicate a right of way over consecrated ground. Both parties have put extensive legal submissions to me on this point. However, the main legal issues underpinning this case seem to be –
- Can express dedication of a right of way under secular law (and therefore by inference presumed dedication) be applied to a way over consecrated ground?
  - If the answer to the above is No, are there are other processes by which a right of way can be created over such land?; and
  - If there are other processes expressly to dedicate a right of way over consecrated ground, do these carry with them the inference that presumed dedication can also be claimed?
  - If the answers to the second and third questions above are Yes, my findings on the supportive weight of documentary and user evidence should lead me to the conclusion that the Order should be confirmed.
25. With respect to the first question, both parties' submissions focus on whether a Church of England incumbent has powers to dedicate a right of way. The objectors argue that incumbents hold their benefices under terms that make disposal of the fee simple, and thereby express dedication of a right of way, impossible as section 31(7) of the 1980 Act defines 'an owner' as someone who is entitled to '*...dispose of the fee simple.*'
26. The need for a current or previous owner of the land to have the capacity expressly to dedicate a highway is reinforced by case law. The statement by Laws J in *Jaques*<sup>2</sup> that, '*...a right of way cannot arise under section 31 [of the 1980 Act] if at some time during the relevant period there is no person at all having the legal right to create a public right of way*' seems clear on this point.

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<sup>2</sup> *John Kearsley Jaques v Secretary of State for the Environment* [1994] QBD

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27. However, other legislation suggests that incumbents do have powers expressly to dedicate a highway under specific circumstances. Section 11(1) of the Church Property (Miscellaneous Provisions) Measure 1960 (as amended) empowers incumbents to '*...dedicate for the purpose of a highway...*' land belonging to their benefice. This power is not unfettered. Incumbents have to seek the consent of their bishop and Diocesan Board but, more significantly, it only applies to '*...any land forming part of the garden, orchard or appurtenances of the residence house of the benefice and any land contiguous thereto...*'
28. The 1960 Measure therefore does not apparently apply to consecrated land or buildings, i.e. normally the church and churchyard. I find this distinction unsurprising given the nature and status of consecrated land. Consecrated land has been declared, under a Sentence of Consecration, to be separated from other land and set apart from all common and profane uses and dedicated to the service of God for sacred purposes for ever. Land can only be de-consecrated by a statutory process (e.g. under section 22 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991).
29. The restrictions of the 1960 Measure and the assumed exclusion by the terms of section 31(7) of the 1980 Act cause me to draw the strong inference that incumbents do not possess a power of express dedication in respect of consecrated land. In these circumstances, I conclude that any way so claimed will be, as section 31(1) states, '*...of such a character that use of it could not give rise at common law to any presumption of dedication*'.
30. The OMA seems not to dispute this point. Instead, it contends that an alternative power to dedicate a public right of way over consecrated land exists under ecclesiastical law. That alternative comprises the submission of a petition to the Diocesan Consistory Court, which has the power to grant a 'faculty' or permission for the use of consecrated land. The power to grant a faculty is not unlimited. There is a general presumption against the use of consecrated ground for secular purposes. I will not try to rehearse where the boundary of secular purposes might lie. However, case law strongly suggests that one permitted use would be to allow a part of a churchyard, which is still consecrated, to be '*...thrown into the public highway...*'<sup>3</sup>
31. It is a general principle that a highway, once established, can only be extinguished through statutory process, e.g. an Order under section 118 of the 1980 Act or an application to a Magistrate's Court under section 116. Furthermore, there are specific criteria, which relate to the public's need for the way, that have to be met for such an Order or application to succeed. However, a faculty can subsequently be set aside if it is considered just and expedient to do so. The criteria applicable to setting aside a faculty seem to me to be weighed more heavily on the needs of the Church as 'owner' of the consecrated land than those of the public as would be given precedence where the extinguishment of a PRoW is being considered.
32. Furthermore, I agree with the objectors that a faculty granted by a Consistory Court equates less to the irrevocable right to pass and re-pass associated with the dedication of a public highway than to the transitory circumstances that may be associated with a landowner's establishment of a permissive path. I

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<sup>3</sup> E.g. *Morley Borough Council v St Mary the Virgin, Woodkirk (Vicar and Churchwardens)* [1969] 3 All ER 952 and *St John's, Chelsea Re* [1962] 2 All ER 850

take this view despite evidence that some faculties have been granted in circumstances where it is difficult to see the 'permission' being practically, if not legally, withdrawn<sup>4</sup>.

33. I therefore agree with the objectors that the process by which a faculty may be granted does not equate sufficiently to the process of expressed dedication, or the criteria that need to be taken into account. Moreover, if there is no power expressly to dedicate a right of way over consecrated land, I conclude that a way over such land equally cannot be successfully claimed by presumed dedication under the common law. That conclusion arises both from the lack of any owner with the power to dedicate, but also the general point that if presumed dedication under common law were possible, the criteria to be applied could, and probably would, conflict with the conditions that result from the consecration of land. It is difficult to see how these two processes could be reconciled given the different jurisdictions that would apply.
34. Nevertheless, I recognise that my conclusion is weakened by any clear-cut legal precedents. Neither the OMA nor the objectors have put to me any case law that is specific to establishing a right of way over consecrated ground by means of presumed dedication. Both parties have, however, cited decisions on other Orders.
35. The OMA refers to a decision in 2008 (Ref. FPS/C1245/7/7) to refuse to confirm an Order to delete from the DMS a footpath that runs through a churchyard where the Order's supporters took the same view as the objectors to the Order before me, i.e. that as, the path crossed land under the jurisdiction of Ecclesiastical Courts, it cannot give rise to a presumption of dedication at common law. The Inspector disagreed and, although there were significant differences from the Order before me – the churchyard appears to have been extended and consecrated after the PRow had been established – his conclusions were clear. *'There are means available by which rights of way can properly be established across such church land and indeed many examples of such routes throughout the country. If the means exist by which a right of way can be dedicated, I see no reason why such dedication cannot also be presumed in such circumstances.'*
36. By contrast, the objectors refer to a Schedule 14 report (Ref. NATROW/X0225/529A/09/12) in 2010 recommending allowing an appeal to direct an OMA to make an Order to add two footpaths to the DMS. In the course of his recommendation, which was accepted by the Secretary of State, the Inspector commented about a section of one of the footpaths, *'In respect of the section of route which crosses consecrated ground, it is my view that this cannot have been dedicated as a public right of way. When a building or land is consecrated it is declared under the Sentence of Consecration that it is separated from other land and set apart from all common and profane uses and dedicated to the service of God for sacred purposes (such as a burial ground) for ever. This would suggest that nobody would have the capacity to dedicate a permanent public right of way over consecrated land and that even the grant of a 'faculty', that is a permission from the Consistory Court of the Diocese, would effectively only result in permissive use of a route rather than use as of right as required by the 1980 Act.'*

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<sup>4</sup> I would cite the Morley case already quoted where the faculty granted involved the construction of a road scheme on consecrated ground.

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37. However, as the OMA emphasises, in the absence of any specific case law, no decision by an Inspector or by the Secretary of State can represent a binding precedent. Moreover, in this context, I observe that the two cases quoted were decided by the same Inspector, illustrating the uncertainty inherent to this matter.
38. I also recognise that there are many cases where public rights of way cross churchyards. Nevertheless, the circumstances by which such ways may have been established can vary greatly. The right of way may pre-date the consecration of the land. Elsewhere, as occurred here when the first DMS was drawn up, the lack of any objection might have encouraged an assumption of dedication to be taken forward, irrespective of the legal position.
39. Nevertheless, on balance, my conclusion remains that it has not been proven that it is possible to establish a right of way by means of presumed dedication over consecrated land.
40. That conclusion would thereby suggest that the Order should fall and that I should refuse to confirm it. However, as I pointed out in my brief description of the claimed path, not all of it is over consecrated ground. The northernmost stretch, beyond the kissing gate, is outside the churchyard and provides a link to B.R.16. Furthermore, my conclusions on the documentary and user evidence and my findings that the restrictions on which I base my rejection of the claimed path within the churchyard do not apply over unconsecrated ground, lead me to the conclusion that the Order should be confirmed so far as it applies to the northernmost section. I recognise that the result will be a short section of footpath ending at the boundary of the churchyard. However, there seems to me to be no reason why an entry to a churchyard should not be an appropriate terminus for a PRow.
41. I will therefore confirm the Order with respect to that part of the claimed path outside consecrated ground, whilst deleting the greater part of the path within the churchyard. Footpath 17 will thereby be added to the Definitive Map, if on a more limited basis, whilst the current Definitive Statement will be modified to remove any reference to a path passing through the churchyard.

## Conclusions

42. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications.

## Formal Decision

43. The Order is proposed for confirmation subject to the following modifications –
- In **Part 1** of the SCHEDULE to the Order, **Modification of Definitive Map, DESCRIPTION OF PATH OR WAY TO BE ADDED –**
    - Delete the whole of the following section and substitute –
    - *‘Commences from kissing gate at the north west corner of the churchyard of St John the Baptist’s Church, Widford at TL 4131 1582 (Point C on the Order Plan) then continues generally north for approximately 15 metres to the junction with Widford Bridleway 16 at TL 4131 1583 (Point B on the Order Plan).*

*Width: 2 metres between TL 4131 1582 and TL 4131 1583*

*Limitations: None*

- In **Part II** of the SCHEDULE to the Order, **Modification of Definitive Statement**, Variation of particulars of path or way –

- Delete the section referring to Widford 17 and substitute –

- *'A new Statement shall be recorded for Widford 17 as follows:*

<i>Path No.</i>	<i>Status</i>	<i>HCC Map Ref</i>
<i>017</i>	<i>FP</i>	<i>HCC 47</i>

*'Commences from kissing gate at the north west corner of the churchyard of St John the Baptist's Church, Widford at TL 4131 1582 then continues generally N for approximately 15 metres to the junction with BR 16 at TL 4131 1583.*

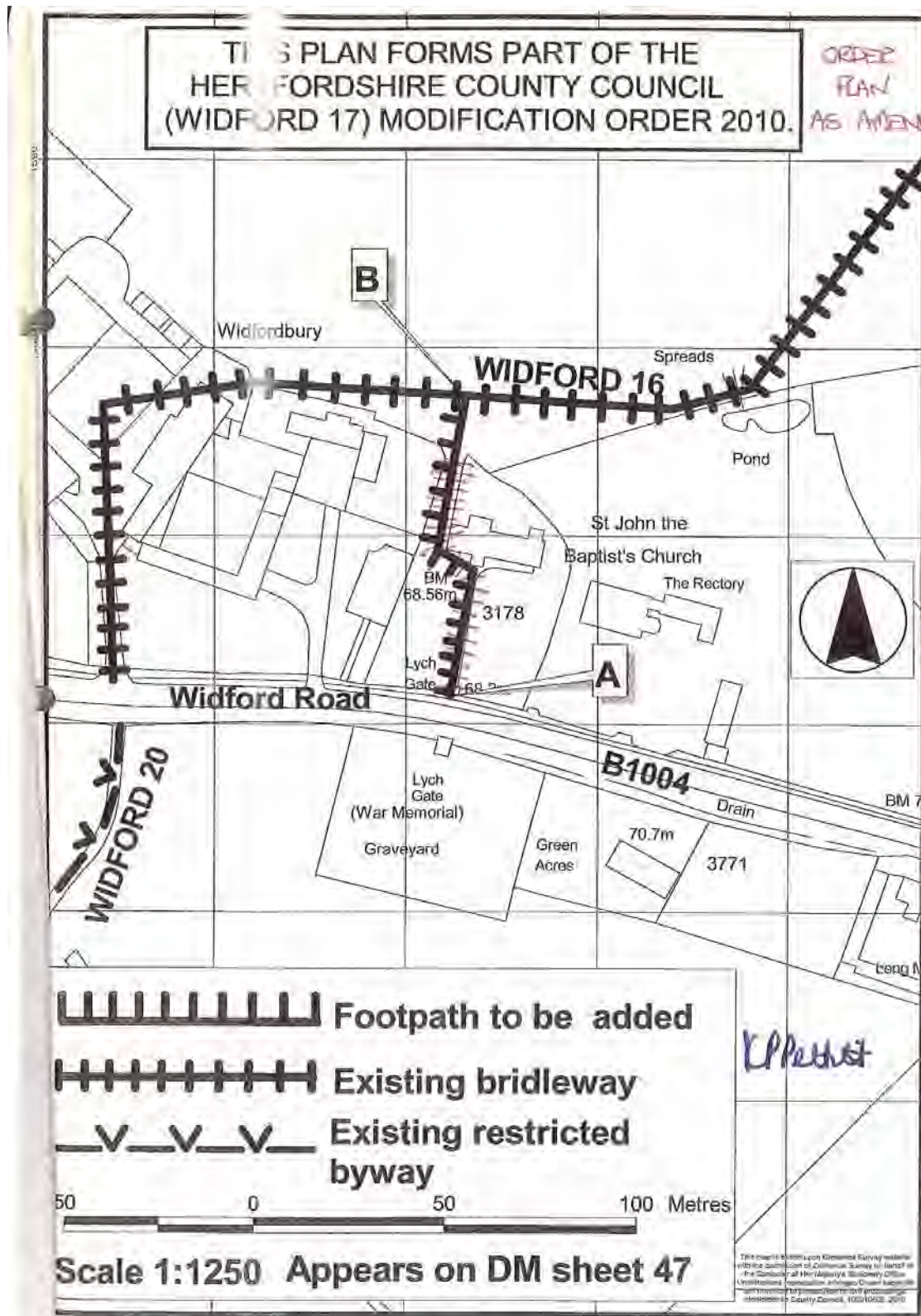
*Width: 2 metres between TL 4131 1582 and TL 4131 1583*

*Limitations: None*

44. Since the Order, as proposed for confirmation, would not show by far the greater part of the way as proposed in the Order as submitted, I conclude that the restriction set out in paragraph 8(1)(b) of Schedule 15 to the Wildlife and Countryside Act 1981 should apply. Paragraph 8(2) of the Schedule thereby requires that notice shall be given of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Roger Pritchard*

INSPECTOR



Map not to original scale






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# Order Decision

Inquiry into Published Modifications held on 16 April 2013

**by Roger Pritchard MA PhD MRTPI**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 24 May 2013

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## Order : Ref: FPS/M1900/7/66/M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Widford 17) Modification Order 2010.
- Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- The Order is dated 19 November 2010 and proposes to modify the Definitive Map for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of my proposal to confirm the Order subject to deleting that part of the claimed path that runs through the churchyard of St John the Baptist, Widford.

**Summary of Decision: I have confirmed the Order as made and without the modification that I formerly proposed.**

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## Preliminary Matters

1. The effect of the Order as made was to remedy an anomaly on the Definitive Map and Statement ('the DMS') for Hertfordshire. No path passing through the churchyard of St John the Baptist's Church, Widford ('the churchyard') is recorded on the current Definitive Map, although there is a record of such a path in the Definitive Statement. The County Council, as Order Making Authority ('the OMA'), concluded that an Order should be made under section 53(2)(b) to add a footpath through the churchyard to the Definitive Map whilst modifying the Definitive Statement to describe a path on what it believed to be the correct route.
  2. The OMA presented its case on the basis of a claim for inferred dedication under common law. I concluded in my Decision Letter (DL) that, for at least a hundred years, there had been substantive and substantial evidence that a route had existed across the churchyard that corresponded to that of the claimed path. Furthermore, no steps had ever been taken by the Church authorities ('the Church'), either at parish or diocesan level, to challenge or prevent the public's use of the claimed path. Nor was there any suggestion that the public's use of the path had ever been brought into question prior to the Church's objection to the Order.
  3. However, I also concluded, in support of the Church, that it was not possible to establish a right of way by means of inferred dedication under common law over consecrated land. I took this view primarily because there was, in my view, no current or previous owner of the land who had the capacity expressly to dedicate a highway. I therefore proposed to confirm the Order only in
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respect of the small stretch of claimed path beyond the northern boundary of the churchyard.

4. The Church welcomed the decision. However, the proposed modification produced four objections, from the OMA who largely repeated its case for the original Order, from Mr Westley and Mr Pagan, who had presented user evidence for the claimed path, but also from the Ramblers' Association ('the RA'), who had not commented on the original order. The RA's representations are that not only could a path be established through the churchyard by inferred dedication under common law but that there was sufficient evidence for deemed dedication under section 31 of the Highway Act 1980 following 20 years uninterrupted user as of right.
5. My DL followed written representations and an unaccompanied site visit. Having considered the objections to the proposed modification, I concluded that, despite the dependence on legal submissions, there were matters on which I needed clarification. I therefore asked for a Public Local Inquiry ('PLI') to be held into the objections. This took place at Widford Village Hall on 16 April 2013. Submissions were made by the OMA, the Church and the RA.

## **Reasons**

### ***Unchallenged matters***

6. I shall begin by briefly identifying those matters on which my conclusions in the original DL were not challenged. No party disputed my decision to confirm the Order in respect of that part of the claimed path to the north of the churchyard which provides a link to Bridleway B.R.16. Nor did anyone challenge my conclusions on the use of the claimed path as set out in paragraph 2 above.

### ***Challenged matters***

#### *The proof of consecration*

7. The RA asked what proof there was that the churchyard was consecrated ground. Paragraph 28 of the DL sets out the process by which land is consecrated today. No Sentence of Consecration exists for the churchyard at Widford. This is to be expected for a church as old as St John the Baptist. Although the present buildings date from around 1400 AD, the Church submitted evidence that a church building had existed on this site since at least 1000 AD. Moreover, archaeological excavations suggest that burials had been taking place in the area of the churchyard for at least as long. Furthermore, a church must be consecrated before it can become the church of a separate parish, which Widford has been for many centuries.
8. The RA also expressed doubts as to the boundary of any consecrated ground and suggested that the claimed path might have been excluded from any act of consecration. There was no evidence to this effect and, as the Church explained, it is unlikely that such an exclusion would have been made. The balance of probabilities is strongly in favour of the presumption that the whole of the churchyard had been consecrated ground for many centuries. I therefore conclude that there is no reason for me to amend my assumption that the churchyard, including the land over which the claimed path passes, is consecrated.

*Could the claimed path have existed before the churchyard was consecrated?*

9. It is accepted by all parties that if it can be demonstrated that a public right of way existed over land before any act of consecration, that act cannot extinguish the right. Because of the age of the church, it is difficult to distinguish between any date of consecration and when and how any public rights of way could have come into being. Nevertheless, again on the balance of probabilities, I find it most likely that the path which arrives at the north west corner of the churchyard was established to access the church for the purposes of worship and other religious functions. That finding is reinforced by the claimed path's place in the wider, local rights of way network. Widford village can be reached from the north via other paths and there is an absence of any links to the south that might directly connect with the southern entrance to the churchyard. I therefore conclude that there is no persuasive evidence that the claimed path existed as a right of way before the establishment of the church and the consecration of the churchyard around it.

*The process by which a right of way over the churchyard could be dedicated*

10. There are three means by which a right of way can be dedicated. The DL dealt primarily with whether a public right of way can be established over consecrated ground by inferred dedication under common law. It did so because inferred dedication was the means by which the OMA sought to establish a public right of way across the churchyard at Widford. My reasons for rejecting a claim made on this basis are set out in paragraph 3 above. However, because of the submissions put to me by the RA, I now need also to consider the alternative processes of express and deemed dedication.

*Express dedication*

11. Whether the Church can expressly dedicate a right of way across consecrated ground is intimately associated with the process by which a faculty for works in a church or churchyard can be granted. This process and the restrictions upon it are discussed in paragraphs 30 – 33 of the DL. I came to the conclusion that although the Church, through the Diocesan Consistory Court, could grant a faculty for access over consecrated ground, because the granting of a faculty was revocable, it more closely paralleled a licence rather than the permanent dedication of a public right of way.
12. The RA referred me to a more recent decision in the Worcester Consistory Court, *Re St Mary's, Longdon*<sup>1</sup>. In that decision, having reviewed conflicting authorities, Chancellor Mynors concluded that a public right of way could be established over consecrated ground through the granting of a faculty. The OMA supported the *Longdon* judgement, although describing the faculty as enabling the dedication of a right of way rather than achieving dedication itself. The distinction may be important: if a faculty dedicates, the process would be directly akin to express dedication, whereas if it is evidence of an intention to dedicate, it is more likely to support inferred dedication under common law.
13. The Church disputed Mynors Ch's findings in respect of a power to dedicate a public right of way by means of faculty (as opposed to creating a permissive path by licence). It pointed out that Diocesan Consistory Courts were independent of one another, as reflected in their (sometimes) conflicting decisions. Moreover, although faculty judgements can be reviewed in the

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<sup>1</sup> *Re St Mary's Longdon* (2011) Ecc LJ 370

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Court of Arches of the Province of Canterbury, no such review had taken place in the *St Mary's Longdon* case.

14. Notwithstanding the disagreement as to the powers of a faculty, no faculty has ever been sought or granted at St John the Baptist, Widford to establish a path across the churchyard. That alone persuades me that there has never been any express dedication of the claimed path by the Church, a fact agreed by all the parties. However, the RA also sought to persuade me that the *Longdon* judgement supports the case for the faculty jurisdiction to sustain a case for inferred dedication at common law.

*Inferred dedication under common law*

15. Central to the RA's submission in respect of inferred dedication under common law is that in the *Longdon* judgement, Mynors Ch also put forward the concept of a presumed (or sometimes 'lost') faculty. In essence, his argument was that where the evidence, for example on the basis of unchallenged user, would support inferred dedication under common law, '*...there is no reason in principle why it cannot be presumed that a faculty was granted.*' Mynors Ch seems to have come to this view on the basis that, historically, faculty jurisdiction was not exercised systematically and that many works that ought to have required a faculty were carried out without such explicit permission.
16. The RA thereby contended that, since I had already concluded that there was '*substantive and substantial evidence*' that a route equivalent to the claimed path had existed for at least a hundred years and had been used by the public without challenge, Mynors Ch's conclusions with regard to a presumed faculty would support inferred dedication under common law at Widford.
17. For a case for inferred dedication under common law to succeed, the onus of proof must lie with the claimant to demonstrate that the facts, taken as a whole, demonstrate that the correct inference was that there was an intention to dedicate. The Courts have accepted that whilst long user can be evidence of an intention to dedicate it cannot raise a presumption of dedication.
18. I am persuaded that the existence of a relevant faculty, if combined with long and unchallenged user, might be sufficient to sustain a claim for inferred dedication under common law. However, the details of the faculty would be relevant to the strength of that claim. The faculty could limit user, for example to parishioners or some other group, or have elements of permission, or introduce restrictions that would not exist on a right of way, for example with regard to dog walking. Any of these might defeat a claim for inferred dedication. There would have to be no doubt that what was being granted was of the character of a public right of way to enable it to cross the boundary from a licence granting permission to the acknowledgment of a right. The dedication of the public's right to walk a defined path is unambiguous: a faculty could be conditioned to result in something that is more limited. Where no relevant faculty exists or has ever been sought, it therefore seems to me a bold step to adopt Mynors Ch's '*...legal fiction...*' (his own words) that sufficient user should lead to the presumption of a faculty that would create a right of way.
19. I concluded in paragraphs 31 – 33 of the DL that inferred dedication under common law was not possible across consecrated ground because of the absence of an 'owner' who could expressly dedicate. I would now temper this conclusion to a degree by accepting that, under specific circumstances, a faculty could create the conditions, if combined with sufficient user, for a case
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for inferred dedication. However, those conditions do not exist at St John the Baptist, Widford. The case for inferred dedication under common law therefore continues to fall.

*Deemed dedication under section 31 of the Highways Act 1980 ('the 1980 Act')*

20. Although the RA has contended that the claimed path could be established as a right of way by inferred dedication under common law, the thrust of its submission is that a right of way has been created through deemed dedication under section 31 of the 1980 Act. I do not intend to rehearse in detail the RA's arguments. The main points are, firstly, that -

- i) The Rights of Way Act 1932 ('the 1932 Act') addressed the issue of the capacity to dedicate where there was no relevant owner by introducing a provision (in its Section 1(2)) that where 40 years' use could be demonstrated, a right of way would nevertheless be deemed conclusively to have been dedicated, irrespective of the presence of a relevant owner. This contrasted with the provision in Section 1(1) of the 1932 Act where a shorter period of 20 years was specified only if there was a person in possession of the land with the capacity to dedicate;
- ii) The National Parks and Access to the Countryside Act 1949 ('the 1949 Act') amended the 1932 Act by removing both the distinction between 40 and 20 years' user (in favour of the latter) and the condition on ownership set out in Section 1(1) of the 1932 Act. The outcome was that, irrespective of any issue of ownership, '*...in future there is a presumption of dedication of a right of way after 20 years user in all cases...*<sup>2</sup>; and
- iii) The 1980 Act carries forward the provisions of the 1949 Act in its Section 31(1) such that there are no circumstances in which the absence of a person with the capacity to dedicate can prevent a right of way arising through deemed dedication.

22. The RA supports its contention with reference to a number of judgements, particularly those of Lord Hoffman in the *Sunningwell*<sup>3</sup> and *Godmanchester*<sup>4</sup> cases. In respect of the latter, the RA asks me to set aside my conclusion in paragraph 26 of the DL that I should follow the ruling of Laws J in the *Jaques* case.<sup>5</sup> The RA argues that nobody dedicates under Section 31(1). Instead, the highway is deemed to be dedicated. There is therefore no necessity for an owner to have the capacity expressly to dedicate a right of way as is necessary to allow inferred dedication at common law. In these circumstances, the powers of a faculty, by whom it can be exercised, in what circumstances and whether it grants a right or a licence, become irrelevant.

23. In respect of all the above points, I agree with the RA's submission. My previous conclusion in respect of the need for a person with the capacity to dedicate where deemed dedication under section 31(1) is cited was, on reflection, incorrect. I also note that the Church offered no evidence against the RA's submission on this matter, and that the OMA agreed with the RA's fundamental proposition.

<sup>2</sup> Quotation from the speech of Lewis Silkin MP, introducing the Bill, *Hansard* HC Deb, vol 463, ser 5, col 1485.

<sup>3</sup> *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335

<sup>4</sup> *R on the application of Godmanchester Town Council and Dr Leslie Drain* [2007] UKHL 28

<sup>5</sup> *John Kearsley Jaques v Secretary of State for the Environment* [1994] QBD

24. Nevertheless, there are other issues associated with Section 31 of the 1980 Act on which the RA made submissions which I need to consider. In particular, -
- iv) The meaning of the words in Section 31(1) '*...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.*' The RA argue that these words must apply to the character of the way rather than the land over which it passes and, furthermore, that they cannot be interpreted as re-introducing the common law tests to the process of deemed dedication as to do so would undermine the fundamental purpose of Section 31; and
  - v) That the reference to 'owner' in Section 31(7) has no relevance to Section 31(1), where there is no reference to 'owner', but is instead associated with Sections 31(3), (5) and (6) whereby, where an owner exists, means by which they may prevent the acquisition of rights are set out.
25. In respect of both the above points, I again agree with the RA's submissions and conclude that there is nothing in respect of the character of the claimed way at Widford as set out in Section 31(1) or with regard to the application of Section 31(7) that would defeat the claim for deemed dedication.

*The meaning and application of Section 31(8)*

26. There remains, however, the relevance of Section 31(8) and whether it applies to consecrated ground in general and this case in particular. This Section reads,
- (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way a way over that land as a highway if the existence of a highway would be incompatible with those purposes.*
27. The RA argues that Section 31(8) in no way conditions the application of Section 31(1) because under the latter '*...the corporation or other body or person in possession of the land does not dedicate in any case.*' However, it seems to me that Section 31(8) has a different rationale, more akin to Sections 31(3), (5) and (6). Namely it provides a means whereby a specific class of landowner can defeat a claim for deemed dedication if they can demonstrate that the claimed right of way would be incompatible with the public or statutory purposes for which they hold the land over which it would pass.
28. I am reinforced in this conclusion by the RA's submission at its footnote 29. The RA there contends, that Section 31(8) does not '*...so free up the law as to allow a landowner to make an express dedication, if the land is held for statutory purposes with which the existence of a highway would be incompatible.*' I agree, but the conclusion I draw from this is not that Section 31(8) in anyway conditions the process of deemed dedication but rather that it provides a means, available only in very specific circumstances, where the acquisition of rights can be prevented. To argue otherwise would seem to me to create the nonsensical situation where some landowners are prevented from expressly dedicating a right of way by the nature of the activities for which they are responsible, but are unable to use that limitation against deemed dedication.
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29. Nevertheless, even if one accepts my interpretation of Section 31(8), the circumstances in which it could be applied must be limited and specific. Two, separate conditions must be met.
30. The first is that the land be held for public or statutory purposes. The RA argues that the church and churchyard are not governed by Section 31(8) as they are not held for '*...public purposes...*' However, the Church of England does not have the same status as '*...any other denomination or religious organisation...*' It is established by statute and, as such, has a position in law that is fundamentally different from other religious organisations, which are essentially voluntary bodies formed by association. Not only does Parliament legislate with respect to the powers of the Church of England but it has delegated statutory powers to the Church that currently operate through the General Synod. In that sense, the Church of England might be said to hold land under statutory purposes albeit particular ones.
31. However, notwithstanding whether it applies to the Church of England, if Section 31(8) is to be relevant, it must be demonstrable that the specific public right of way claimed is incompatible with the purposes for which the land over which it passes is held. Section 31(8) does not to my mind provide a blanket exemption. If a body falls within its scope, it still has to show that the particular right of way from which it seeks exemption from deemed dedication would be incompatible with its public or statutory purposes.
32. The RA and the OMA both argue that there is no reason why a public right of way through Widford churchyard should be incompatible with the purposes for which the Church holds this land<sup>6</sup>. They point to the fact that there are many examples where rights of way have been established across churchyards, including ground which is consecrated and where there may already be burials. I accept that. It is also undisputed that the Church has accepted and will continue to accept that persons cross the churchyard at Widford openly, without permission and unhindered by any restrictions or any indications, for example by way of signage, that any restrictions exist. Nor was it clear to me what restrictions on the public's access to the churchyard the Church might want to introduce in the future. (Some suggestion was made of problems with dog walkers, but it was not clear what the Church wanted to do or how it would accomplish this.)
33. In these circumstances, I find it difficult to see how Section 31(8) could be used to defeat a claim for deemed dedication in this specific case. Even if the Church of England is a body to which this section applies, it has not been convincingly demonstrated to me that the public walking along the claimed path through Widford churchyard is incompatible with the purposes for which that land is held.

#### *Conclusions on deemed dedication under Section 31*

34. The RA invited me to draw a conclusion as to whether the tests for deemed dedication under Section 31 of the 1980 Act had been met – setting aside the special issues of ecclesiastical law. On the assumption that the date of challenge to the public's use of the path through the churchyard is taken as when the Church objected to the making of the Order, i.e. 2010, there would

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<sup>6</sup> Both the RA and the OMA actually argue the general point that any path through a churchyard would be compatible with the purposes for which such land is held. However, it seems to me that this is an unnecessary extension of Section 31(8). All I have to be concerned with is whether the claimed path is incompatible with the purposes for which Widford churchyard is held.

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seem to me to be no issues that would defeat a claim for deemed dedication under normal circumstances. There is clear evidence of 20 years prior user of the path by the public of right without force, secrecy or permission. Nor is there any evidence that the Church has ever brought to the attention of the public that their use of the claimed path was not as of right.

35. Do I therefore come to the conclusion that the claimed path, Widford 17, has been established by deemed dedication under Section 31 of the 1980 Act and that the DMS should accordingly be amended in the terms of the Order as made?
36. Unfortunately, the matter is not so straightforward. The Church did not specifically dispute the RA's submissions in respect of Section 31 at the PLI, but at the heart of its case is the reiteration that the jurisdiction of statute law cannot override ecclesiastical law when applied to consecrated ground. In summary, based on the dictum of 'one law, two jurisdictions,' ecclesiastical jurisdiction had precedence where and when the use of consecrated ground is concerned.

#### *Churchyards and public rights of way*

37. At this point, I need to address the self-evident fact that there are dozens, probably hundreds, of public rights of way that run through churchyards and thereby pass over consecrated ground. Even if one sets aside instances where the right of way may have pre-dated the establishment of the churchyard or its consecration, there are still many examples where public rights of way running through churchyards have been recorded on DMSs since that process was first undertaken in the early 1950s and long after the churchyard may have been consecrated.
38. It therefore seems to me that the question is not whether a right of way can co-exist with a churchyard or consecrated ground: it self-evidently can and does in numerous instances. Nor do I dispute that the Church could by means of a faculty create conditions for the inferred dedication at common law of a right of way across a churchyard. (I am less persuaded that the granting of a faculty is a form of express dedication but that issue is not material to this case.) It also seems to me that, by inaction, the Church could acquiesce, knowingly or unknowingly, in the establishment of a right of way by inferred or deemed dedication – and that it has probably done so in many cases across England.
39. Rather the issue that this case raises is whether the Church has the power, for whatever reason, to prevent the deemed dedication of a right of way if it chooses to object to that process. That question seems to me to depend not only on the specifics of Section 31 and how they might be applied to any particular case, but on the more general issue as to whether the Church of England is exempt from this legislation.

#### *The application of Section 31 of the 1980 Act to Church of England land and property*

40. There are two fundamentals in discussing this issue. The first is that there is nothing in Section 31 or the 1980 Act in general that bites on this matter. The second is that no party has directed me to any judgement that gives guidance. There may, however, be two precedents that I ought to consider.



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41. The first is the position of Crown land. Crown land is exempt from the provisions of the 1980 Act unless there is a specific agreement that these should apply. In the absence of such an agreement, deemed dedication cannot take place over such land. (Although inferred dedication under common law is possible.) Is the Church of England in a similar position? The answer seems to me to be no. Not only is Church of England property not included within the definition of Crown land, but there is a general and well-accepted process by which statute is applied or disapplied to Crown land. No such parallel seems to exist with regard to the land and property of the Church of England.
42. The second is the ecclesiastical exemption with regard to listed building legislation as set out in the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 that derives from Section 60 of the Planning (Listed Buildings and Conservation Areas) Act 1990. Essentially, for a number of ecclesiastical buildings, not necessarily only those owned by the Church of England, listed building control over their fabric (though not planning control) is transferred to the provisions of the Faculty Jurisdictions Act, i.e. changes can be approved by means of an application for a faculty as already discussed. However, the listed building arrangements also seem to me to lend little assistance to the Church's case if only because they point to the need for specific legislative provision to disapply statute law. No such disapplication exists in respect of the 1980 Act.
43. I therefore conclude that neither of these examples lends any weight to the case that Section 31 does not apply to Church property or consecrated ground. I would also go further and suggest that whilst the dictum of 'one law, two jurisdictions' provides strong support for ecclesiastical precedence in ecclesiastical matters, it is unlikely to create circumstances where ecclesiastical law takes precedence over statute law in secular matters. The dedication of a public right of way seems to me to be a secular matter.
44. If Section 31(8) applied to the Church of England and, in any specific case, the claimed path could be demonstrated to be contrary to its purposes, a defence against deemed dedication might be provided. However, I conclude that the latter condition is not met here where the Church has been unable to demonstrate convincingly how its interests would be materially harmed by the application of statute law.

*Conclusions on the challenged matters*

45. My conclusions are that –
- a) The findings of the DL in respect of the case for inferred dedication at common law of a right of way at Widford churchyard are not overturned by the objections to my proposed modification, i.e. that such a claim cannot be supported;
  - b) But, if evidence supports a claim for deemed dedication under Section 31 of the 1980 Act, the legal precedents suggest that the claim can be accepted;
  - c) The evidence at Widford does support such a claim in terms of twenty years' uninterrupted user as of right without force, secrecy or permission prior to the date of challenge; and
  - d) Therefore, the DMS for Hertfordshire should be amended to include the whole of the path (known as Widford 17) put forward in the original Order
-

and the stretch within the churchyard deleted by my proposed modification should be restored.

**Conclusion**

46. Having regard to these and all other matters raised at the PLI and in the written representations, I conclude that the Order should be confirmed without the modification I previously proposed and in the form in which it was originally made by the OMA.

**Formal Decision**

47. The Order is confirmed as originally made.

*Roger Pritchard*

**INSPECTOR**

## **APPEARANCES**

### FOR THE ORDER MAKING AUTHORITY:

Brendon Lee	Solicitor, Hertfordshire County Council
Ian England	Definitive Map Officer, Hertfordshire County Council
Rosalind Emrys-Roberts	Rights of Way Officer, Hertfordshire County Council

### FOR THE DIOCESE OF ST ALBANS

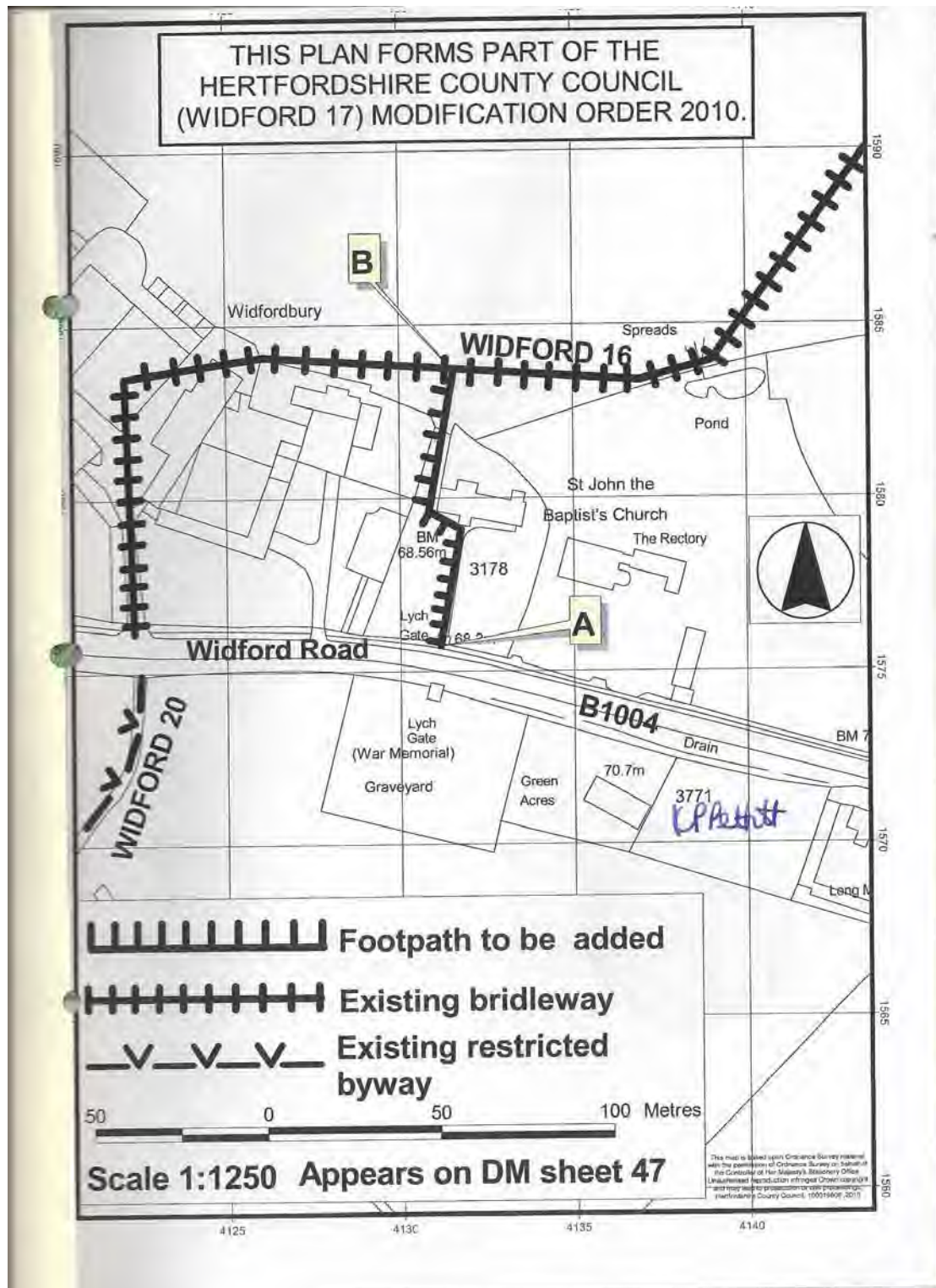
Lee Coley	Diocesan Registrar, Diocese of St Albans
David Cheetham	Former Diocesan Registrar, Diocese of St Albans
David Scott	Churchwarden, Parish of Widford

### OTHER PERSONS:

Mark Westley	Area Footpath Secretary, Hertfordshire and North Middlesex Area, Ramblers Association
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## **ADDITIONAL DOCUMENTS PRESENTED AT THE INQUIRY**

1. Pp 27-31 of Pratt and Mackenzie's *Law of Highways* (17<sup>th</sup> Ed., 1923) on the powers of Public Trustees and Corporate Bodies with regard to the Dedication of Highways. Submitted by Mr Westley.
2. Closing submission by Mr Lee



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## \*270 Oakley and Another v Boston



No Substantial Judicial Treatment

### Court

Court of Appeal (Civil Division)

### Judgment Date

5 June 1975

### Report Citation

[1975] 3 W.L.R. 478

[1976] Q.B. 270



Court of Appeal

Megaw and Orr L.JJ. and Goulding J.

1975 June 4, 5

*Easement—Prescription—Right of way—Lost modern grant—Glebe land—Approval of Ecclesiastical Commissioners necessary for valid grant of easement by incumbent—No evidence of knowledge by commissioners of acts of acquiescence by incumbent—Whether approval to be presumed— Ecclesiastical Leasing Act 1842 (5 & 6 Vict. c. 108), s. 20 (as amended by Statute Law Revision (No. 2) Act 1888 (51 & 52 Vict. c. 57), s. 1 Sch. )— Ecclesiastical Leasing Act 1858 (21 & 22 Vict. c. 57), s. 1*

*Ecclesiastical Law—Ecclesiastical property—Disposition—Easement—Right of way—Right to grant—Whether to be presumed— Ecclesiastical Leasing Act 1842, s. 20 — Ecclesiastical Leasing Act 1858, s. 1*

A strip of land belonging to the plaintiffs had been glebe land until 1952. In 1973 the plaintiffs brought an action against the defendant, the owner of adjoining land, claiming an injunction to restrain him from trespassing over the strip. The defendant claimed a right of way based on prescription under the [Prescription Act 1832](#) and lost modern grant. The judge rejected the defendant's claim based on the Act of 1832 on the ground that although there had been continuous user \*271 of the strip by the defendant's predecessors in title up to 1962 the user since 1962 had been insufficient. As to lost modern grant, he held that, having regard to the powers given to incumbents by the Ecclesiastical Leasing Acts the incumbent of the glebe land had been a capable grantor. He found lost modern grant established and gave judgment for the defendant.

On appeal by the plaintiffs: -

Held:

**Oakley v Boston, [1976] Q.B. 270 (1975)**

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(1) that the combined effect of the Ecclesiastical Leasing Acts 1842 and 1858 was that at all times since 1858 the incumbent of the glebe land had, subject to the necessary consents and approval, been empowered to grant a right of way over the strip to the defendant's predecessors in title post, pp. 277C - 278A, C-D, 283A).

But (2), allowing the appeal, that by [section 20](#) of the Act of 1842 and [section 1](#) of the Act of 1858 the approval of the Ecclesiastical Commissioners had been required before there could be a valid grant of an easement, that there was no direct evidence of any such approval; and that, in the absence of evidence of knowledge on the part of the commissioners of acquiescence by the incumbent of the glebe land in acts over the strip which would otherwise have been acts of trespass, it could not be presumed that they had given their approval to a grant by the incumbent of a right of way over it (post pp. 279E, 280H - 281A, D, 285E-F).

*Per* Goulding J. There are considerable difficulties in applying a doctrine of acquiescence to persons in a fiduciary position who have an active duty to others to fulfil before they can exercise their powers (post, p. 285D-E).

The following cases are referred to in the judgment:

*Barker v. Richardson* (1821) 4 B. & Ald. 579 .

*Dalton v. Angus & Co.* (1881) 6 App.Cas. 740 . H.L.(E.).

*Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528; [1971] 2 W.L.R. 711; [1971] 2 All E.R. 475, C.A. .

The following additional case was cited in argument:

*Pugh v. Savage* [1970] 2 Q.B. 373; [1970] 2 W.L.R. 634; [1970] 2 All E.R. 353, C.A. .

APPEAL from Judge Harrison-Hall sitting at Ashby-de-la-Zouch County Court.

The plaintiffs, Harold Whittall Oakley and Hazel Louise Oakley, appealed from the judgment of Judge Harrison-Hall dismissing their action (commenced on July 27, 1973) against the defendant, Frederick John Boston, for an injunction and damages for trespass. Their grounds of appeal were that the judge had erred in law in presuming, from user prior to 1952, a lost modern grant of a right of way between points marked "A" and "B" on the plan annexed to the particulars of claim since at all material times prior to such date the plaintiffs' property had been glebe land and (i) the incumbent had had no power to grant a right of way there-over, (ii) alternatively, the incumbent had only had power to make such a grant with the consent of the Church Commissioners which consent could not be presumed on the evidence.

The facts are stated by Megaw L.J.

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*Kenneth Farrow* for the plaintiffs. [Section 1 of the Ecclesiastical Leasing Act 1858](#) gave an incumbent power to "sell or convey in exchange or by way of partition, or otherwise dispose of, all or any part or parts of "glebe land, but that did not include power to grant an easement in fee simple. [Reference was made to *Barker v. Richardson* (1821) 4 B. & Ald. 579 ; [Ecclesiastical Leasing Act 1842, ss. 1, 4, 7, 20 and 21](#) .] "Other property" in section 1 of the Act of 1858 does not include easements. If the Act of 1858 had given power to incumbents to grant easements, there would have been no reason to enact section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 . This is borne out by precedent 53 in the *Encyclopaedia of Forms and Precedents*, 3rd ed., vol. 9 (1946), p. 117, which indicates that conveyancers considered that, if a statutory undertaker wanted to acquire such an easement, it was necessary for it to exercise its powers under the [Lands Clauses Consolidation Act 1845](#) . [Reference was made to *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 .]

Alternatively, the power of an incumbent to grant an easement could only be exercised subject to the consents or approval specified. The court cannot properly presume that such consents or approval were given. The presumption that the Church Commissioners gave their consent should be established with the same strictness as is necessary to prove the grant as against the incumbrancer himself.

*John Trenhaile* for the defendant. "Land" could include an easement in 1858: see [Interpretation Act 1889, s. 3](#) and *Blackstone's Commentaries* , 17th ed. (1830), vol. II, p. 21. "Other property" in section 1 of the Ecclesiastical Leasing Act

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1858 would include the items referred to in section 4 of the Act of 1842, which include easements. Section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 may have been enacted to abolish the limitations imposed by section 9 of the Act of 1842. Alternatively, it may have been enacted *ex abundante cautela*. As precedent 53 in the *Encyclopaedia of Forms and Precedents*, 3rd ed., vol. 9, p. 117, it was not uncommon for alternative powers to exist side by side in this way, especially for alternative powers to exist side by side with those provided by the [Lands Clauses Consolidation Act 1845](#), which were often cumbersome and accordingly not very popular.

Where the factual basis exists for the presumption that the incumbent made the grant of the easement, there is no reason why it should not be presumed also that the appropriate consents were given, in accordance with the presumption *omnia rite esse acta praesumuntur*.

[The court asked counsel for the defendant for further assistance in relation to ground (ii) of the appeal.]

It is a question of which is the right way of looking at it. After 20 years, so long as the court is satisfied that there was a capable grantor, it must infer that a grant was made. Once it has arrived at that position, it must assume not only that the grant was made but also that it was made by a deed which was in all respects a proper deed.

The way in which the plaintiffs put it is that before the court will make that assumption it must be satisfied that the deed, if deed there was, was proper in all respects. The signature of the party to the deed is the best evidence that consent was given but that signature can only be found on \*273 the deed which *ex hypothesi* has been lost. The defendant relies on the technicalities of the doctrine of lost modern grant. If there was such a deed, how did it come into existence?

Alternatively, where one finds 48 years' user, the courts will be slow to find a trespass. They will fall over backwards to assume a lawful origin for the user, and, therefore, that all necessary concomitants must have been satisfied. It is very difficult to see how the incumbent could have avoided reporting the grant to the Ecclesiastical Commissioners if their consents were necessary, since the incumbent must be presumed to have discharged his duties.

If one assumes a deed, why not assume that everything that needed to be done was done?

*Farrow* in reply. The defendant has not been quite accurate with regard to the plaintiffs' second way of putting it. Consent is not just a matter of procedure. The court must be satisfied that there was a capable grantor, but here this is a composite body: the incumbent and the commissioners. There would be other cases where the granting of an easement required the co-operation of more than one person, for example, where there was a tenant for years. Mere user against a tenant for years would not be binding against the landlord. The court would have to have some evidence that the landlord was aware of the user. Again, in the case of joint owners the co-operation of more than one person is required before there can be an effective grant.

The mere fact that the fee is vested in the incumbent is irrelevant: the court is concerned not with ownership of the fee but with the ability of the incumbent to grant an easement.

The court should treat the servient tenement here as though it had been subject to a tenancy until 1952. The adverse user would be binding on the tenant, but not, without further evidence, on the "other part" of the capable grantor.

[MEGAW L.J. Is it not for the plaintiffs to show that that other party did not consent?]

The defendant has to show established user and a capable grantor.

*Trenhaile*. As to the analogy of landlord and tenant, see *Gale, Easements*, 14th ed. (1972), p. 164. The defendant relies on *Pugh v. Savage* [1970] 2 Q.B. 373. The fact that the servient tenement is let is a factor to be considered, but it is not fatal to prescription against the fee.

MEGAW L.J.

This is an appeal against the judgment of Judge Harrison-Hall given in the Ashby-de-la-Zouch County Court on December

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19, 1974.

The plaintiffs, Mr. Harold Whittall Oakley and his wife Mrs. Hazel Louise Oakley, by an action which was started in the Chancery Division of the High Court and was transferred to the county court, claimed an injunction against the defendant, Mr. Frederick John Boston, to restrain him from trespassing on the plaintiffs' land. The defence was that the defendant was not trespassing, because he was entitled to a right of way over that part of the plaintiffs' land over which his alleged trespasses had taken place. The judge dismissed the claim, holding that the defendant had a right of way. The plaintiffs appeal.

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The plaintiffs are the owners of a property known as the Old Rectory at Appleby Magna in Leicestershire. It consists of a house which was formerly used as the rectory, and a substantial area of land surrounding it. At the south-east corner of the land there is a short and narrow projection, part of the plaintiffs' land - a tongue of land protruding in an easterly direction. At the tip of this tongue lies the boundary with the defendant's land. Immediately beyond the boundary at the tip of the tongue on the defendant's land there used to be a cottage, called Laundry Cottage. It has been demolished. The disputed right of way runs from the boundary at the tip of the tongue for the length of the tongue, between points "A" and "B" as marked on the plans annexed respectively to the statement of claim and the defence. At the western end of the tongue the alleged right of way abuts on to public footpaths which run to the west, and also to the east to the village of Appleby Magna, through the plaintiffs' land. The right of way claimed, if established, would enable the defendant to make his way from his own land over the plaintiffs' land without trespassing, so as to be able to use the public footpaths.

It is not necessary to go into detail as to the respective titles of the plaintiffs and the defendant. They are not in dispute. Until 1952, what is now the plaintiffs' land was glebe land. It was vested in the rector of Appleby Magna, in his capacity as corporation sole. On June 27, 1952, the whole of that land was conveyed, no doubt with all necessary consents under statutory powers, to a Mr. Cooper. It thereupon ceased to be glebe land. The plaintiffs became the owners of the Old Rectory and the surrounding land on April 8, 1965. The defendant became the owner of the land on which Laundry Cottage had stood, with its small area of surrounding land, on January 25, 1962. It had previously since 1956 belonged to the defendant's father. The defendant was the owner, since 1956, also of another piece of land abutting on, and lying to the south of, the southern boundary of the Laundry Cottage property. It was, however, in respect solely of his ownership of the Laundry Cottage property that the defendant asserted his right of way. According to his defence in the action, the Laundry Cottage land had constituted the dominant tenement and the plaintiffs' land the servient tenement in respect of the alleged right of way running for the short distance consisting of the length of the tongue of land which I have described. From the plans, it appears to me (though I do not think that the detail matters) that the length of the right of way claimed is some 30 or 35 yards. It was nowhere near the house, the Old Rectory.

It is not necessary to go into the evidence. Indeed, it is not possible, as we have not been provided, rightly in the circumstances, with any note of evidence. The judge's findings of fact are not in dispute. He held that the defendant had established that from a date prior to 1927 (counsel before us agreed, I think, that on the evidence it went back at least to 1914) there was a continuous use of this way - that is, between points "A" and "B" - up to the year 1962, and that that use would have been sufficient to have established the defendant's claim to a right of way under the provisions of the [Prescription Act 1832](#) if the action had been commenced in 1962. For the purposes of the Act of 1832, however, it is necessary that the period of use should have continued up to the time when the action was commenced. **\*275** That did not apply in this case, because the judge held that there had not been sufficient use of the way on the part of the defendant since 1962. So the defendant's claim, in so far as it was based on the Act of 1832, failed. The defendant has not served a cross-notice, or sought to challenge that finding. As it was a finding of fact, it might well have been a difficult burden to undertake, just as it would have been difficult for the plaintiffs to challenge the finding of sufficient continuous user for many years up to 1962.

However, the defence asserted the claim to a right of way on another basis: the doctrine of the lost modern grant. On that basis, on the judge's findings of fact, the defendant was not put out of court by reason of the inadequacy of the user in the last 11 years before the action was brought, that is, from 1962 to 1973. For, unlike the requirements of the Prescription Act 1832, the doctrine of lost modern grant does not contain, as an essential element, proof of continued sufficient user up to the time of action brought. (We are not concerned here with any question such as that of abandonment.) As regards lost modern grant, however, the plaintiffs asserted that the defendant was unable to substantiate his claim for a different reason. It was



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contended that, since the plaintiffs' land, over which the right of way was alleged, had been glebe land up to 1952 (and it is conceded that it was), the incumbent of the glebe land had had no lawful power to grant an easement. Therefore, the court could not presume a lost modern grant made at any time preceding June 27, 1952, and no such grant could be presumed to have been made, and lost, after that date since the period would be quite inadequate. Alternatively the plaintiffs contended that if, contrary to their primary submission, there was a power during the relevant period to grant an easement, such power, depending on statutory provision, could be exercised only if certain consents or approvals were given, in particular the approval of the Ecclesiastical Commissioners, and that it was not open to the court to presume that such consents or approvals, necessary for a valid grant, had been given.

The argument for the plaintiffs begins with the judgment of Abbott C.J. in *Barker v. Richardson (1821) 4 B. & Ald. 579*. This appears to have been the only authority cited to the judge, and it is clear that he did not have the advantage of the detailed exposition of the statutes which has been developed before us. It may well be that the potential subtleties of argument had not been foreseen. The judge therefore did not have the books available, nor the advantage which we have had in being able to look at the texts of statutes and decided cases and textbooks. In *Barker v. Richardson* it was held that a presumption of a grant of an easement - in that case, an easement of light - could not be made because the grant, if it had been made, would have been made by a rector who was described as "a mere tenant for life" and who had no power to make such grant. Abbott C.J. said, at p. 582:

"Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, \*276 and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

The judge in the present case expressed the plaintiffs' argument succinctly in these terms:

"Until 1952 the servient land was glebe land and accordingly the plaintiffs rely on *Barker v. Richardson, 4 B. & Ald. 579*. It is thus argued that since it is essential to a lost modern grant that there be a capable grantor as well as a capable grantee the fact that the rector was the presumed grantor made it impossible for a grant to be made. The rector as the owner of the parson's freehold had not power to dispose of the fee simple without the consents necessary for a disposal. If this case is right and is still sound law then it is accepted that the rector was not a capable grantor."

The judge went on to reject the plaintiffs' submission on the ground that subsequently to the decision in 1821 in *Barker v. Richardson, 4 B. & Ald. 579*, power had been given by the Ecclesiastical Leasing Acts (1842 and 1858) to incumbents

"to sell, convey or exchange thereunder any part of the land which belonged to the incumbent including glebe land provided that certain provisions and consents to the sale took place."

Having dealt with the alternative submission on behalf of the plaintiffs as to the "certain... consents," to which submission I shall return later, the judge held that, on the basis of a lost modern grant, on the facts as found, the defendant had established the right of way asserted by him. So judgment was entered for the defendant.

The plaintiffs' appeal is based on two grounds. The first ground is that the judge was wrong in his conclusion that subsequent statutes had overtaken the decision in *Barker v. Richardson, 4 B. & Ald. 579*. The later statutes, it was contended, did not give any power to an incumbent of a benefice, whether with or without consents of other persons, to make a grant of an easement in fee simple. The statutes permitted other things to be done, such as leasing or selling or exchanging the glebe land or part of it, subject to restrictions and consents, but it did not give power to grant an easement in fee simple. On that point, for reasons which I shall give in a moment, I think that the plaintiffs' submission is not right.

The second, alternative, ground, on which I have come to the conclusion that the plaintiffs' submission is right, so that the appeal should succeed, is that, assuming against the plaintiffs that there is a statutory power to grant an easement in fee simple, that power can only be exercised subject to specified consents or approval and the court cannot properly presume that

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such consents or approval had been given; yet, without them, any purported grant would be invalid.

I return to the plaintiffs' first ground. The plaintiffs concede that since 1858 an incumbent has had statutory powers, subject to certain consents, to sell or convey in exchange or by way of partition, or otherwise dispose of, glebe land. \*277 Section 1 of the Ecclesiastical Leasing Act 1858 so provides. To that extent, says counsel, the judge was right in the passage which I have cited from his judgment as to power "to sell, convey or exchange" and so forth. But, counsel submits, such statutory power did not include a power to grant an easement, and the court may not presume a lost modern grant of an easement, even though the other conditions for such presumption are satisfied, if the presumed grantor did not have power lawfully to grant an easement over the land. The mere power to convey, exchange or dispose of land is not sufficient for this purpose. True, in the great majority of cases a person who had the power to convey land would also have the power to grant an easement over that land. But not necessarily so, and, it is submitted, this is one of those cases in which it is not so.

I would for myself accept, for the purposes of this appeal, that a mere power to sell or convey or otherwise dispose of land would not be sufficient if the person so empowered was not also empowered to grant an easement over the land. To that extent I agree with the argument of counsel for the plaintiffs. Where I part company with him on this issue is that I do not accept that the rector of Appleby Magna had no such power. I am satisfied that since the enactment of the Ecclesiastical Leasing Act 1858 he had power, subject to certain consents (which gives rise to the second point), to grant easements such as rights of way over the glebe land. The relevant words of the Ecclesiastical Leasing Act 1858 are to be found in section 1:

... absolutely to sell or convey in exchange or by way of partition, or otherwise dispose of, all or any part or parts of such lands, houses, mines, minerals, and other property,..."

The word "such" relates back to the beginning of the section, which shows that the section is concerned with lands, etc., or other property which are authorised to be leased by the provisions of an earlier Act, the Ecclesiastical Leasing Act 1842. When one looks back to that Act, one finds that section 1 deals with lands and houses. What, then, is the "other property" to which the Act of 1858 plainly refers as being comprised in the provisions of the Act of 1842? I think that counsel for the defendant is right in his submission that at least one item of such "other property" is to be found in section 4 of the Act of 1842. I shall read an extract from that section (as amended), omitting much of the plethora of words which appear in the section as enacted:

"It shall be lawful for any ecclesiastical corporation, aggregate or sole,... with such consent and under such restrictions as are hereinafter mentioned, by any deed or deeds duly executed, to grant by way of lease... any liberties, licences, powers, or authorities to have, use, or take,... any wayleaves... and other ways, paths, or passages,... or other like easements or privileges, in, upon, out of or over any part or parts of the... lands belonging to such corporation, in his or their corporate capacity,..."

So far as the Act of 1842 was concerned, the power was merely to grant those types of property by way of lease, not by way of grant of fee simple, but the Act of 1858, section 1, to which I have already \*278 referred, added the power absolutely to sell or otherwise dispose of such "other property."

Counsel for the plaintiffs submitted that this conclusion - that the Act of 1858 should be construed as extending to give power to grant rights of way - should not be reached because, if it did give such power, it would be remarkable that section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 should have been enacted. That section, expressly granting power to an incumbent to grant an easement over any land which forms part of the property of the benefice, would, it is suggested, have been superfluous and unnecessary if the power already existed in the Act of 1858. Counsel for the defendant submits that section 9 of the Measure of 1960 is not, on any view, superfluous because, at the least, it abolishes the limitations of section 9 of the Act of 1842. In any event, however, I do not find the argument of superfluity of sufficient weight to require revision of what I regard as the clear, combined effect of the relevant provisions of the Acts of 1842 and 1858.

Accordingly, in my opinion, since 1858, and at all times between 1858 and 1952, the rector of Appleby Magna for the time being, subject always to the necessary consents and approval, was empowered to grant a right of way over the glebe land to the defendant's predecessors in title. Subject, therefore, to the question of consents, in my judgment the judge was entitled, on his findings of fact, to hold that, on the basis of lost modern grant, the defendant had established the right of way.

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In this context I think that it is helpful to refer to a passage, to which we were referred by counsel, in the judgment of the court in *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 . Buckley L.J., delivering that judgment, said, at p. 552:

”In our judgment *Angus v. Dalton...* (1881) 6 App.Cas. 740 decides that, where there has been upwards of 20 years’ uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made.”

The second ground of the appeal involves supposing against the plaintiffs that which, in my view, has to be decided against them. This is the point which I have already considered: under the provisions of the Acts of 1842 and 1858, read together, there is a power to grant an easement in fee simple but such a grant by statutory provisions is only valid subject to certain consents having been given. It is therefore, I think, necessary to look further at the terms of the Acts of 1842 and 1858 to see what it is that is required by way of consent or approval. One goes, first, back to section 1 of the Act of 1842. In the early stages of the extremely long first section of that Act one finds that the grant of the power is expressed to be “... with such consent and under \*279 such restrictions as are hereinafter mentioned,...” One then turns to [section 7](#) , which provides (as amended):

”The execution of any lease, grant, or general deed by the person or corporation,... whose consent is hereby made requisite to the validity of such lease or grant or general deed shall be conclusive evidence that the several matters and things by this Act required to be done and performed previously to the granting or making of such lease, grant, or general deed have been duly done and performed,...”

The provision as to consents is found in [section 20](#) . This provides (as amended):

”Each lease or grant to be granted or made under the provisions of this Act shall be made with the consent of the said Ecclesiastical Commissioners,” (who changed into the Church Commissioners in, I think, 1947) “and also with such further consent as hereinafter mentioned;...”

I need not trouble with the details of further consents, which include a requirement of the consent of the patron, where there is a patron, of the benefice and also, where the land was copyhold, the consent of the lord of the manor. [Section 21](#) of the Act of 1842 (as amended) says:

”The consent of each person, whose consent is hereby required to any deed to be made under the authority of this Act shall be testified by such person being made a party to such deed, and duly executing the same.”

It follows, therefore, that the deed required to make the grant of an easement would be a deed to which the Ecclesiastical Commissioners would have to be parties, otherwise it would not have any validity.

I go on to the Act of 1858, which, as will be remembered, extended the power of leasing given by the Act of 1842 to comprise also a power to sell or otherwise dispose of glebe land. Section 1, in its opening words, prescribes what Parliament has laid down as being the considerations which are to move the Ecclesiastical Commissioners in deciding, if they do so decide, to give their consent to such a grant as that with which we are here concerned. The section (again omitting immaterial words) starts as follows:

”In any case in which it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners for England that all or any part of the lands,... or other property of or belonging to any ecclesiastical corporation, which are by the [Act of 1842] authorised to be leased, might, to the permanent advantage of the estate or endowments belonging to such corporation, be leased in any manner, or be sold, exchanged, or otherwise disposed of, it shall be lawful for any

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ecclesiastical corporation,... from time to time, with such consents as in the [Act of 1842] mentioned, and with the approval of the said commissioners, to be testified by deed under their common seal, to lease..."

**\*280** and so forth. Then later in the section there is, as I have already said, the power to sell, convey or otherwise dispose of the lands or part of them. So the approval of the commissioners (it is now called "approval") is required to be given, and the basis of such approval is that the commissioners are to be satisfied that that which they are asked to approve shall be to the permanent advantage of the estate or endowments belonging to the corporation - in this case, the corporation sole, the incumbent of Appleby Magna.

It is said for the plaintiffs, as their second ground, that, having regard to those statutory provisions, it is not permissible for this court to make the presumption that there has been a valid grant of the easement in question, the right of way: such a valid grant would have required the consent of the Ecclesiastical Commissioners; that consent would have been required to have been given and to have been shown by the Ecclesiastical Commissioners joining as parties in the deed of grant, showing in that deed their consent to the grant which was being made. Why, say the plaintiffs, should the court presume, or on what basis or material can the court presume, that there has been a grant made, and lost, to which the Ecclesiastical Commissioners, carrying out their statutory duty, gave their assent in the form prescribed?

For the defendant it is submitted that that is something which the court properly can assume: all that the court has to do is to see that there is a factual basis which gives rise to the presumption that the incumbent himself made such a grant and that it was on the basis of such a grant that the acts of the defendant's predecessors in title in walking between points "A" and "B" have been allowed to continue. Counsel for the defendant submits that the court is entitled to presume, and ought to presume, at any rate in the absence of some evidence to the contrary, that the rector, in making such a grant, did seek and obtain the necessary consent or approval of the Ecclesiastical Commissioners, and that this grant which has been fictitiously made and lost was a grant which contained, properly, the authorisation of the Ecclesiastical Commissioners as parties thereto.

It seems to me that the defendant's argument on that point cannot succeed. As I understand it, the basis on which the court is entitled to make the presumption of the lost modern grant, in what I may call the normal case where there arises no question of glebe land or complexities such as have arisen in this case, is that the owner of the allegedly servient tenement or a predecessor in title has, with knowledge of acts which would otherwise be acts of trespass, acquiesced in those acts and, therefore, it must be assumed that the owner of the servient tenement or some predecessor in title of his has given his consent in the proper way, namely, by a deed of grant of that easement. Why, however, should the court make that assumption, or how can the court fairly and properly make that assumption, in respect of the Ecclesiastical Commissioners who, by statute, before the deed can be valid, have got to be parties to it? There is no evidence produced of any knowledge on the part of the Ecclesiastical Commissioners of any of the acts in which the incumbent acquiesced. There is, as I see it, **\*281** no basis on which the court could, judicially, make the assumption that they must have known of those acts or that the incumbent for the time being told them that those acts were taking place and of his attitude thereto.

The interest and concern of the Ecclesiastical Commissioners, as appears from what I have read from section 1 of the Act of 1858, is an interest different from and wider than that of the incumbent for the time being. The Ecclesiastical Commissioners are concerned with the interest of the property in question - the benefice, the glebe land - not merely during the time of any particular existing incumbent but for all time. It is their statutory duty to protect that interest, and, unless there be some evidence, or some fair inference, that they knew of and assented to the acquiescence in the acts which would otherwise be trespass, I am unable to see how this court can fairly make such a presumption.

It follows, in my judgment, on this second ground, that the court cannot make the presumption that there has been a valid grant of the easement in question. The most that the court could assume would be a purported grant made by the incumbent himself, which would not be of any benefit to the defendant in relation to the right which he is now claiming. Accordingly, and I confess with some reluctance, on the basis of the second ground put forward on behalf of the plaintiffs I feel bound to hold that the appeal succeeds and that the plaintiffs are entitled to judgment.

ORR L.J.

I entirely agree, and do not wish to add anything.

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GOULDING J.

I also agree, but, as we are differing from the judge below, and in deference to the full arguments that we have heard, I will briefly state my reasons in my own words.

As Megaw L.J. has already said, the action relates to a short length of pathway at Appleby Magna in Leicestershire. The plaintiffs complain of trespasses to their land on which that short pathway lies. The defendant alleges that his entry on the plaintiffs' land is justified by his ownership of a private right of way belonging to part of the defendant's land adjoining the plaintiffs' land.

The judge below found that the defendant and his predecessors in title had actually enjoyed the right of way claimed from 1927, or some earlier date, to 1962, but he found that after 1962 the only user of the pathway had been (as he said) "... of a very minor nature."

The action was commenced only on July 27, 1973. Consistently with the facts which he found, as I have just stated, the judge rejected the defendant's claim to a prescriptive right of way under the [Prescription Act 1832](#) but upheld his claim to such a right by the inference of a lost modern grant. The judge therefore gave judgment for the defendant, and the plaintiffs now appeal. As Megaw L.J. has already said, there are two grounds of appeal, both based on the fact that, so far as the evidence goes, at all times before June 27, 1952, the plaintiffs' land, the alleged servient tenement, was glebe land of the rectory of \*282 Appleby Magna. There was no evidence that the plaintiffs' land and the defendant's land had ever been in common ownership. The two grounds of appeal are set out in the notice of appeal. Both have been argued before us. They are, first, that so long as the plaintiffs' land was land of the rectory the incumbent had no power to grant a right of way thereover, secondly, and alternatively, that the incumbent had power to make such a grant only with the consent of the Church Commissioners, which consent cannot be presumed on the evidence.

The first ground of appeal has led to an interesting excursion into ecclesiastical statute law. My first impression was that the appellants were right, but I am now convinced, having heard argument, that from and after the year 1858 the necessary power for an incumbent to grant an easement over glebe land existed by virtue of the Ecclesiastical Leasing Acts. I can state my conclusion on that point quite shortly. The Ecclesiastical Leasing Act 1842 empowered ecclesiastical corporations, sole and aggregate, with certain consents, to make leases of certain species of ecclesiastical property. The sections in which the leasing powers and the species of property appear are the following (the remaining sections of the Act consisting of procedural and ancillary provisions). Under section 1, the ecclesiastical corporations are empowered to grant leases of lands or houses for the purpose of building or rebuilding. Under [section 3](#) they are authorised to lay out and appropriate land for ways, yards or gardens for buildings comprised in leases under section 1, or

"... for ways, streets, squares, avenues, passages, sewers, or otherwise for the general improvement of the estate, and the accommodation of the lessees, tenants, and occupiers. ..."

Under section 4 the corporations are empowered to grant leases, not exceeding 60 years, of easements of water or of way. Under section 6, finally, they are empowered to grant mining leases, again not exceeding 60 years. Those powers are referred to, and additional powers - powers, namely, of outright alienation - are given, in section 1 of the Ecclesiastical Leasing Act 1858. That Act provides:

"In any case in which it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners for England that all or any part of the lands, houses, mines, minerals, or other property of or belonging to any ecclesiastical corporation, which are by the [Act of 1842] authorised to be leased, might, to the permanent advantage of the estate or endowments belonging to such corporation, be leased in any manner, or be sold, exchanged, or otherwise disposed of, it shall be lawful"

(and I put it shortly) for the corporation, with the consents required by the Act of 1842 and the approval of the Ecclesiastical Commissioners, to lease the land with greater freedom as to the terms of the lease than that provided by the powers of the Act

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of 1842 or absolutely to sell, exchange, partition or otherwise dispose of any of such lands, houses, mines, minerals and other property.

When one places that section of the Act of 1858 alongside the different empowering sections of the Act of 1842, it is, in my judgment, \*283 apparent that the words “other property” in section 1 of the Act of 1858 must include the easements of water and of way specified in section 4 of the Act of 1842. Accordingly, I take the view that from 1858 onwards the incumbent of a parish had power, with the approval of the Ecclesiastical Commissioners and the other consents and formalities required by the Act of 1858, to sell outright an easement over ecclesiastical land.

It was maintained in argument that there are at least two matters outside the Acts which cast doubt on that construction. The first is that a later piece of ecclesiastical legislation, namely, the Church Property (Miscellaneous Provisions) Measure 1960, provided, by section 9 (1) of that Measure, that the incumbent of a benefice should have power, among other things, to grant an easement over any land forming part of the property of the benefice, with a number of consents, and that such grant might be made either without monetary consideration or in consideration of a sum or sums of money. Why, it was suggested, should that section have been necessary if the power of granting an easement existed all the time under the Act of 1858? Secondly, we were referred to a precedent book in which, in one of the precedents, an incumbent was shown as granting an easement to water undertakers not under the Ecclesiastical Leasing Acts but by use of powers given in a special Act by reference to the [Lands Clauses Consolidation Act 1845](#). \* There again, it was suggested, it would on the whole have been more advantageous and convenient to have used the powers under the Ecclesiastical Leasing Acts, if they existed, than be involved in the formalities which attend a sale by a corporation under powers taken by reference to the Act of 1845.

For my part, I am clearly of opinion that the existence or subsequent grant of concurrent powers of carrying out the same transaction cannot cast doubt on the true interpretation of the Ecclesiastical Leasing Acts on their own language. It is not uncommon for corporate bodies and limited owners of all kinds to possess concurrent statutory powers. Moreover, the Measure of 1960 certainly extended pre-existing powers in certain respects. For example, it enables a gratuitous grant of an easement to be made in a proper case, and it extends to classes of ecclesiastical land which were excepted from the operation of the Ecclesiastical Leasing Acts. Further, the provisions in the Lands Clauses Consolidation Act 1845 were not specifically related to ecclesiastical corporations but included a great class of all kinds of owners with restricted powers or under disability.

Accordingly, in my judgment, the most that can be got out of these subsequent or collateral matters referred to in argument is that conveyancers generally were of opinion that it was impossible, or an act of doubtful validity, to grant an easement under the Ecclesiastical Leasing Acts. I confess that that was my own opinion until I came into this court. Having, however, been carefully taken through the language of the Acts, I now think that it is plain that the power did exist. I do not lose sight of the fact that in conveyancing matters a court is slow to \*284 disturb settled views of the law, even though thinking them ill-founded, if the consequence may be to disturb established titles. However, the view now being taken of the Ecclesiastical Leasing Acts cannot, so far as I can see, possibly have that effect; it would rather have the effect of confirming title to easements which may in the past have been taken under those Acts.

I now turn to the second ground of appeal. Under the Ecclesiastical Leasing Acts, for a sale either of corporeal land or of an easement the approval of the Ecclesiastical Commissioners (now replaced by the Church Commissioners) is necessary, and they have to be satisfied of the permanent advantage of the transaction to the benefice. Further, the consent of the patron of the benefice is required. We do not know who was the patron in the present case, and not much has been said about him in argument. A good deal has, however, been said about the position of the commissioners in relation to the doctrine of lost modern grant. Proof that an easement has been actually enjoyed over a sufficient period justifies, in our law, the fictitious inference that it was so enjoyed by virtue of a lost grant by the owner of the servient tenement, unless such a grant is shown to have been impossible. Before the Ecclesiastical Leasing Acts the court would not presume a grant of an easement over glebe land on the part of an incumbent in such a manner as would bind his successors, for he had no power to bind them: see *Barker v. Richardson*, 4 B. & Ald. 579, referred to by Megaw L.J.

On the facts as to enjoyment found by the judge below ought we to presume not only that the incumbent was willing to make, and did make, a grant but also that he had got the consent of the patron and the approval of the commissioners? To answer that question, it appears to me necessary to go back to the first principles on which the doctrine of lost modern grant is justified. I take them from the statement of Fry J. in the opinions of the judges given to the House of Lords in *Dalton v.*

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*Angus & Co., 6 App.Cas. 740*, already referred to. He said, at pp. 773-774:

”But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it \*285 reasonable for the courts to say that he shall not afterwards interfere to stop the act being done.”

Let me consider the third, fourth and fifth of those features of prescription referred to by Fry J. The third was the knowledge of the person affected that the act of trespass is done. In the case of an ordinary owner entitled to possession of the land knowledge is naturally presumed, though there are cases in which such an owner has been able to prove that he had in fact no means of knowledge and, thereby, displace the presumption which would otherwise have arisen against him. In the case of fiduciary or consenting parties, such as trustees, or the commissioners in the present case, it appears to me (no authority has been cited to us on the point) that it is quite impossible for a court to hold, in the absence of positive evidence, that such parties, who may never be near the land, have the means of knowledge, let alone actual knowledge.

The last two, the fourth and fifth, of Fry J.’s requirements require ability on the part of the party affected to interfere and effectively object to the trespass being carried on on the land. So far as has appeared in the argument, and so far as I know, the commissioners had at the relevant times no power whatever to take action against a trespasser on glebe land in the possession of an incumbent. Accordingly, there seem to me to be grave difficulties in saying that the commissioners can be credited with that kind of acquiescence which alone enables the court fairly to presume a fictitious grant. I would add that there are also considerable difficulties in applying a doctrine of acquiescence to persons in a fiduciary position who have an active duty to others to fulfil before they can exercise their powers. The commissioners in the present case in particular were not entitled to let anything go by default: it was their duty only to alienate if satisfied of the permanent benefit of the transaction.

Accordingly, I too take the view that, whatever inference the judge may rightly have drawn as to the operation of prescription under the doctrine of lost modern grant against the incumbent of Appleby Magna, it would be quite wrong to infer the execution by the commissioners, or indeed, the patron, of a deed under the Ecclesiastical Leasing Acts.

I would refer again to what Megaw L.J. has already said: that it is unlikely that the judge below had the benefit of the examination of the law which we have had.

Accordingly, in the circumstances I too would allow the appeal and grant the injunction.

**Representation**

Solicitors: Kingsford Dorman & Co. for Crane & Walton, Ashby-de-la-Zouch ; Fishers, Ashby-de-la-Zouch .

*Appeal allowed. Judgment below set aside. Injunction as asked in notice of appeal. Plaintiffs’ costs of appeal and below on scale 4, order not to be enforced without leave of court. Legal aid taxation of defendant’s costs. (M. G.)*

**Footnotes**

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1                      Encyclopaedia of Forms and  
                                 Precedents. 3rd ed., vol. 9  
                                 (1946), p. 117, precedent 53.

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**In the Consistory Court of the Diocese of Worcester****Archdeaconry of Worcester: Parish of Longdon: Church of St Mary****Faculty petition 10-21 relating to wooden right of way sign****Judgment**

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**Introduction**

1. This petition is for the erection of a small sign to be erected at or near the south-east corner of the churchyard of St Mary's Church, Longdon, indicating that the path across the churchyard is a public footpath. The path in question is shown as a footpath (no 521) on the definitive map of public rights of way, maintained by Worcestershire County Council as surveying authority under section 53 of the Wildlife and Countryside Act 1981 ("the definitive map"). I have not seen an extract of the actual definitive map and list, but I have no reason to doubt that the map included with the petition is a genuine copy of the relevant portion of the definitive map; and that the definitive list accords with it.
2. The justification for the sign is said to be that it is required by law because the path in question is a public footpath, shown as such on the definitive map, and the County Council therefore has a duty under section 27(2) of the Countryside Act 1968 to erect and maintain a signpost at every point where the footpath leaves a metalled road.
3. The cost of the work is trivial; and there have been no objections to the petition.
4. Under section 56(1) of the 1981 Act, the definitive map is conclusive evidence as to the particulars contained therein, namely that there was at the relevant date a footpath

(that is, a highway over which the public have a right of way on foot) as shown on the map. I am not certain as to what was “the relevant date” in this case, but it will be some time between 1949 and the present.

5. The surveying authority is under a duty by virtue of section 53(2) of the 1981 Act, to make an order modifying the definitive map where it discovers evidence to show that there is no public right of way over land as shown on it (see section 53(3)(c)(iii)); and any person may make an application under section 53(5) for such an order. However, until such an application has been made and determined, the effect of section 56(1) is that there is a public right of way as shown on the map.
6. If as a matter of law there is no way in which there could be a public footpath across a churchyard – either across consecrated land in general or across this churchyard in particular – it might arguably be inappropriate to authorise the erection of this sign, as that would serve to perpetuate a misconception. Instead, an application should immediately be made for the modification of the definitive map, as indicated above. If, on the other hand, either there is an undoubted right of way across the land in question, or there might be one, then the effect of section 56(1) would mean that for the time being (and realistically for the foreseeable future) that must simply be accepted, so that section 27 of the 1968 must be complied with and a sign erected – subject only to the details being satisfactory.
7. I have therefore considered briefly whether that is the case, in view of some uncertainty as to the general position in law regarding rights of way across churchyards; and I have taken this opportunity to review a number of the older decisions, as they are sometimes referred to in the more recent cases – although, arguably, there is no need any longer to revisit decisions prior to that of the Court of the Arches in *Bideford*.

## Public rights of way

8. The origin of a public right of way is that the owner of the land is deemed to have dedicated the way for the use of the public – either expressly or, far more often, impliedly, by making no objection to the use of the land by the public. The latter possibility was the subject of the Rights of Way Act 1932, modified by the National Parks and Access to the Countryside Act 1949, and replaced by sections 31 to 33 of the Highways Act 1980.

9. Section 31 of the 1980 Act, as amended, provides (so far as relevant) as follows:

“(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 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.

...

(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.

...

(7) For the purposes of the foregoing provisions of this section “owner”, in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above “the appropriate council” means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the way or land is situated in the City, the Common Council.

[(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.<sup>1</sup>

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.

...”

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<sup>1</sup> Added by Natural Environment and Rural Communities Act 2006, section 69(1).

10. The question thus becomes whether the character of the ownership of ecclesiastical land is such that either section 31(7) applies, so that there is no owner entitled to dispose of the land, or section 31(8), so that the owner could not have had the capacity to dedicate it.<sup>2</sup>

### Rights of way across ecclesiastical land

11. The starting point seems to be the dictum of Lord Herschell in *Phillipps v Halliday*:

“Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. I hardly think that the proposition so stated was assailed by the learned counsel for the appellants.”<sup>3</sup>

That case related to the occupation of pews – but there seems to be no reason in principle why the same approach should not apply equally to the coming into existence of a right of way across a churchyard. In other words, wherever possible, if there exists a strip of land across a churchyard that is used just as though it were a footpath, the right of the public to use it to cross the churchyard should be presumed to have come into existence at some stage as a result of the due process of law.

12. Historically, there was some divergence of opinion as to whether there could be such a right. Thus in *Walter v Mountague and Lamprell*, a case in the Consistory Court of London, Dr Lushington held as follows:

“First, then, as to the church-yard; it is clear that by the common law the rector has the freehold therein, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass if his right be unjustly invaded. The churchwardens by virtue of their office are bound to see that the foot-paths are kept in proper order and the fences in repair.

<sup>2</sup> As with, for example, a registered charity (by virtue of section 36(1) of the Charities Act 1993.

<sup>3</sup> [1891] AC 228, HL, at p 231

Individuals may by prescription have a right of way; and parishioners have the same right for the purpose of attending divine worship, vestries, and other fit occasions. The public may also have a right of way which is not to be infringed upon.

I apprehend that neither the rector nor the churchwardens can make a new path without a faculty from this Court. In strictness that is by law required.”<sup>4</sup>

This made it clear that it was possible for a right of way on foot – either for a particular purpose or for exercise by parishioners – to come into existence by prescription. And by implication the incumbent could dedicate a new right of such a character for the benefit of the public. And each of these would require the authority of a faculty.

13. However, some years later, the same judge, by now in the Court of Arches, made it clear that that approach would not extend to allowing the separation of a portion of a churchyard to be taken into a public road:

“I may therefore at once declare what I believe to be undoubted law, that it is not in the power of any Ecclesiastical Court whatever to allow any portion of consecrated ground to be devoted to secular uses, or to grant a faculty to confirm such an appropriation. From the earliest period that I have been acquainted with these Courts I have heard the law so laid down. ... Applications have several times been made to me sitting in the Consistory Court of London to permit minute portions of churchyards to be appropriated to secular uses; but I have always refused, because if I had allowed small portions of consecrated ground to be so used, I could not have rejected applications extending to the whole. In fact, it would be leaving the matter to the discretion of the judge, which would be contrary to law.”<sup>5</sup>

It may be noted in passing that the court in that case seems to have been resisting the petition not necessarily because it envisaged the grant of a right of way, but because the use of part of a consecrated churchyard as a public road would be a secular use, and thus the court could not authorise it.

14. But the consistory courts were not unanimous in these matters. Thus, in *Re St Mary Abbot, Kensington*, the Local Board (the predecessor to the modern highway authority) wished to acquire a strip of the churchyard so as, in effect, to adopt it as a footway at a busy London road junction – a factual situation that is not particularly uncommon. The Chancellor, Dr Tristram, held:

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<sup>4</sup> (1836) 1 Curteis 253, at p 260.

“... the Court is being asked to sanction a grant of this strip of consecrated ground being made to the Local Board. This neither the Vicar nor the Court has power to do. The freehold of the churchyard is in the Vicar for the use of the parishioners, subject to the jurisdiction of this Court, but the fee is in abeyance. The Court cannot give away what it has not got. It may, however, I think, by Faculty give a leave and licence for this strip of land to be used as a public footway, so long as it may be required for the purpose. If at any time hereafter it should cease to be so required, it will revert to the churchyard.”<sup>6</sup>

15. This reflects the fact that the normal position is that a highway that is maintainable at public expense is owned by the highway authority: see now Highways Act 1980, section 263. That would not be possible in the case of consecrated land, since such land cannot be appropriated for a secular purpose. But it is possible for such land to be used as a public footway “by leave and licence”. However, it is interesting that the Chancellor used the phrase “public footway” to refer to something that was not (on his own analysis) in law a footway in the conventional sense, but something that looked like one, and was doubtless thereafter treated by everyone – the church, the incumbent, the parishioners, the highway authority, and the public – as though it was such a footway.
  
16. Some twenty years later, in *Re St. Botolph Without*, another London case, Dr Tristram authorised the appropriation of a portion of a churchyard for widening a street.<sup>7</sup> The faculty had been opposed by a parishioner in person, and the learned judge delivered a considered judgment, in which he explained that, although it had been contrary to the decisions of the Ecclesiastical Courts to sanction the curtailment of a churchyard used for burials “for the purpose of widening a public thoroughfare,” he had many years before, at the instance of the then Bishop of London and some of the London vestries, reconsidered the matter, with the result that, in order to save the expense of obtaining special Acts of Parliament and to meet the needs of the day, it had become his practice to grant such faculties.

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<sup>5</sup> *Harper v Forbes* 5 Jur (NS) 275.

<sup>6</sup> (1873) Trist 17, at p 19.

<sup>7</sup> [1892] P 161.

17. Dr. Tristram stated his view of the matter thus:

“The principle upon which the Court holds that it has jurisdiction to grant such faculties is that there is a discretionary power vested in it as to making orders relating to churchyards; and that it is the duty of the Court to exercise this discretion reasonably, and, as Sir John Nicholl observes, to vary the exercise of it according to the change of times and circumstances, and that during the last twenty-five years there has been such a change of circumstances, owing to the great increase of traffic in the City and in other frequented parts of the metropolis, as to warrant the Court in granting such faculties for the convenience of those who attend church as well as for that of the general public.”<sup>8</sup>

18. These authorities were considered by Sir Lewis Dibden in the Consistory Court in Rochester in *Re Plumstead Burial Ground*, a case in which it was proposed that part of a closed churchyard should be taken and made part of an adjacent highway. He thus first noted the coming into existence of routes across churchyards equivalent to footways:

“Many churchyards are traversed by public footpaths which neither provide access to the church nor are useful for access to graves, but nevertheless are legal footpaths existing by prescriptive right, and incapable of being interfered with by the Ordinary. How such paths when they are not churchways (that is, ways leading to the church) originated, it is not always possible to say. Sometimes, perhaps, the footpath was there before the churchyard; but however that may be, I take it that all paths of this sort, neither beginning nor ending in the churchyard, but merely crossing it as if it were a field, so far as they have a legal origin, are prescriptive.”<sup>9</sup>

This confirms that public paths that were in existence before the land in question was consecrated do not cease to exist as such upon consecration. However, his comment “sometimes, perhaps, the footpath was there before the churchyard” raises the obvious inference “but sometimes it was not”. And that is borne out by common observation – there are numerous paths across churchyards, but they surely do not all predate the consecration of the land in question.

19. However, the Chancellor in *Plumstead* continued:

“I am not aware of any authority except certain modern dicta for the grant of a faculty for such a footpath; and it seems to me that unless the footpath is needed in connection with the use of the church or churchyard for their proper ecclesiastical purposes, it

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<sup>8</sup> [1892] P 161.

<sup>9</sup> [1895] P 225, at p 235.

would be an application of part of the churchyard to a secular, and therefore an unauthorized, purpose.

The same observation applies with even greater force to a proposal to throw a strip of the churchyard into a high road so as to widen it, and with that object to alter the boundaries of the churchyard. It is a direct application of consecrated ground to a secular purpose, and, as it seems to me, equally so whether the freehold is purported to be given up, or only the right of user of the land as part of a highway. I do not think an attempt to retain on paper, as it were, the Ordinary's jurisdiction over the land after it has been turned into the highway can affect the substance of the transaction, which is the user of the land for a secular purpose."

He was there holding that, although a footpath across a churchyard that already exists may be taken to have come into existence by virtue of a prescriptive right (or, perhaps more accurately, presumed dedication), a faculty could not now be given for the creation of a new path, nor for the throwing into the highway of part of a churchyard – because that would be to sanction the use of consecrated land for secular purposes. And he explicitly declined to follow Dr Tristram's decision in *St Botolph*.

20. Shortly after the decision in *Plumstead*, the same chancellor, this time in the Consistory Court of Exeter, considered another petition to add a piece of a closed churchyard into the neighbouring highway, in *Re Bideford*. Not surprisingly, he took the same line as he had in *Plumstead*, and held that – however desirable such a proposal might be, the court had no jurisdiction to authorise it. However, this time he expressed his conclusion somewhat diffidently, noting that a different approach had been taken in various cases in the consistory courts in London and elsewhere (including in Worcester). The case therefore proceeded to the Court of Arches, where Sir Arthur Charles noted the divergence of views between the various consistory courts, and held as follows:

"Now, in the present case the faculty is asked for in respect of ground which can no longer be lawfully used for burials. It remains nevertheless under the jurisdiction of the Ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. ... It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter v. Mountague*; and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial; but I see no reason why the jurisdiction should not



remain although the ecclesiastical purpose can no longer be carried out. And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.

In the result, therefore, I am of opinion that this appeal must be allowed. I think that the discretion which the learned judge of the Court below was asked to exercise was within the limits of the Court's jurisdiction; and if it be matter of discretion, there is no dispute that the faculty is one which ought to be granted. ... The faculty must be subject to a proviso that the remains to be removed shall be re-interred in another portion of the burial ground to be selected by the rector and churchwardens."

21. As far as I am aware, the decision in *Bideford* has not been doubted subsequently. The position is therefore now clear. Once land has been consecrated, it may not be put to secular purposes. However, the incumbent may grant a private right of way across it, or may by dedication create a public right of way across it, subject in either case to being authorised to do so by the grant of a faculty. That may include throwing a strip of the churchyard in with an adjoining highway, provided that a record is made of the measurements of the land thus effectively transferred, and provided that any human remains be appropriately re-interred.
22. That in turn means that there is no impediment under s 31(7) or (8) of the 1980 Act to the coming into existence of a modern footpath, subject to a faculty being granted to authorise the dedication. And there would have been no impediment under those provisions or their predecessors to the coming into existence of a path at some time in the past.
23. The position was thus summarised as follows in the decision of the London Consistory Court in *Re St John, Chelsea*:

"... in *Walter v Mountague and Lamprell*, Dr. Lushington, sitting in this court, thought that a faculty could be issued for making a public footway across an open churchyard, and in *Re Bideford Parish*, the Dean of Arches evidently thought that Dr. Lushington's view was right and that such a faculty would be founded on public convenience. That

suggests a third category, where public convenience can justify a faculty at least for a public footpath. This category appears to have sprung from the first category, that is, from user for ecclesiastical purposes. For in *Corke v Rainger and Higgs*,<sup>10</sup> Sir Lewis Dbdin, in his discussion of ecclesiastical purposes stated, at p. 76: 'A churchyard path is allowable although persons may pass along it who are not going to church,' and in *Re Bideford Parish*, Sir Arthur Charles said that he could not distinguish between a path across a churchyard and one alongside it. These passages no doubt justify the practice that is now, I believe, followed in all dioceses, of allowing, in proper cases, small strips of a churchyard, open or closed alike, to be thrown into the public highway for the convenience of the public at large. But the practice has extended beyond public ways into the category of wayleaves generally. For instance, drains are often allowed to be laid under a churchyard, or an electrical transformer to stand on it, and I think (though I do not remember a case where I have been asked to allow it myself) that there would be no difficulty in a proper case in allowing water or gas pipes to be laid under a churchyard or electric or telephone wires to pass over it."<sup>11</sup>

### The need for a faculty

24. It is clear from the foregoing that a right of way on foot – either private or public – across a churchyard can only be created with the authority of a faculty. If therefore it is alleged that such a right has come into existence at some time in the past, it is perfectly proper to look for a faculty having been granted to authorise it.
  
25. Clearly there will be no problem if there can be produced a copy of an actual faculty. Nor will there necessarily be a problem if evidence (such as correspondence with the diocesan registry, or a resolution in the PCC minutes) is available that a specific faculty was actually granted, even though no copy of it has remained extant – the difficulty would merely be an evidential one.
  
26. It may incidentally be noted that, although the faculty jurisdiction has existed since the middle ages, it has not always been exercised with great vigour. Thus, Newsom (in *Faculty Jurisdiction of the Church of England*) comments :

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<sup>10</sup> [1912] P 69.

<sup>11</sup> [1962] 1 WLR 706, per Newsom Dep Ch at p 712.

"... it seems that in the nineteenth century the ecclesiastical courts did not insist very strongly on the need for a faculty whenever any "material alteration" was made to a church or its contents. Thus it appears from the Appendix to the Charge of George Moberly, Bishop of Salisbury, issued in 1882, that since his visitation of 1879, only 18 faculties had been granted in the diocese, seven of them in Wiltshire, and 11 in Dorset. Indeed, in the years 1880 and 1882, none at all were granted in Wiltshire. On the other hand, he listed 20 churches "and probably others" which had been "restored or enlarged" in those years, only five of which were in parishes named as having had faculties. ... There is no reason to suppose that, around 1880, the administration of the diocese of Salisbury was unusually slack. But a great deal of works, including "restoration" of many churches, must have been done without the chancellor being concerned: the words "and probably others" are significant."<sup>12</sup>

Nor is there any reason to suppose that changes in the churchyard were dealt with any differently from those to church buildings.

27. The fact that an incumbent may appear to have failed to obtain a faculty for a particular item (including the grant of a private right across a churchyard or the dedication of a public right) may thus not be particularly noteworthy. But what is the situation in law if the diocesan and parish records have been scoured, and there is no suggestion of a faculty having been granted?
28. That was the situation confronting Chancellor Coningsby in *Re St Martin le Grand, York*. In that case, the chancellor found as a fact that a pedestrian way, both with and without trolleys, had been exercised over the churchyard in question for at least the previous 100 years. He held:

"I further find that it has been exercised as of right, that is to say nec vi, nec clam, nec precario [not by force, secrecy or permission]. ... I find that the use was of a kind and quality capable of giving rise to a right by way of prescription. ... Because of the legal principles to which I have already referred as to the right to grant a right of way being in the ordinary (that is, the bishop acting by the chancellor) and not in the incumbent ..., I conclude that the appropriate form of prescription in relation to the present case is that under the doctrine of lost modern grant (including a presumed faculty) rather than by use from time immemorial."<sup>13</sup>

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<sup>12</sup> Second edition, p 7.

<sup>13</sup> [1990] P 63 (PP, authority 11), at p 77E.

29. He then considered the authorities already referred to above (including *St Mary Abbot*) and concluded that:

“In these circumstances, the lost faculty that is to be presumed because of the use as of right to which I have already referred must be deemed to be a faculty for a licence and not an easement.”<sup>14</sup>

This seems slightly surprising, since the rights granted in the older cases – particularly those relating to road widening – were more in the nature of easements than licences. Alternatively, it may be that the true position is that the right being granted in those cases was by way of a quasi-easement.

30. In *St Martin Le Grand*, the right of way that was found by the court to have come into existence by prescription was a right of way on foot, with or without trolleys, for a defined group of persons – that is, essentially a private right – with a lost faculty deemed to have been granted accordingly. But I see no reason why a public right could not equally be held to have come into existence by dedication – subject again to the presumed existence of an appropriate faculty.
31. I therefore consider that, if the evidence in a particular case supports the proposition that a right of way across a churchyard – whether on foot, with or without a trolley, or on horse – has been (or may be deemed to have been) dedicated at some stage in the past, there is no reason of principle why it cannot be presumed that a faculty was granted – as with *St Martin le Grand*. I emphasise that this is of course a legal fiction – but that is no worse than the position that would otherwise arise in respect of all of those works carried out to churches all over Wiltshire and Dorset (and no doubt elsewhere) throughout the 1880s, which would otherwise be unauthorised.
32. Of course that is not an indefeasible presumption. If it can be shown when the apparent right can into existence (that is, the date prior to which there was undoubtedly no public use of the alleged right – perhaps because, for example, there

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<sup>14</sup> at p 82H.

was a wall blocking the route), and if it can be further shown that no faculty was granted then or has been granted at any time thereafter, then it will be possible for anyone who wishes to demonstrate that the doctrine of lost faculty could not apply, and to make an application for the removal of the route from the definitive map. Alternatively it would presumably be possible for a confirmatory faculty to be sought to regularise the apparent right – and such a petition might or might not be granted, according to the merits of the case.

### **Conclusion**

33. It follows from the foregoing analysis that there is no reason in principle why there should not be a public right of way on foot across a churchyard, notwithstanding the effect of consecration. Such a right could have come into existence prior to the land in question being consecrated – either by specific grant or by presumed dedication at common law. Alternatively, it could have come into existence following the consecration, again either by virtue of an actual dedication or by presumed dedication, authorised in either case by the authority of a faculty – even though, in the latter case, that is almost certain to be a legal fiction.
34. Where the definitive map shows a footpath across a churchyard, therefore, there is no reason why that should be incorrect, so as to negate the statutory presumption that it is conclusive evidence that there does indeed exist a public right of way on foot. As I have noted above, that does not mean that such an indication on the map is always correct; and the definitive map may therefore in some cases require rectification in due course by means of the appropriate procedure. However, it does mean that there is no reason to suppose automatically that there can never be such a right.
35. I thus conclude that there is no reason to suppose that the extract from the definitive map in the present instance is incorrect; and therefore, until such time as it is

amended, it is conclusive proof that a public footpath exists as shown on it across the churchyard at Longdon.

36. In the absence of any objection to the details of the proposed sign, a faculty should therefore issue to permit its erection, subject to a condition that no works be carried out until they have been notified to the County Archaeological Officer or another archaeologist approved by the court.

A handwritten signature in black ink, appearing to read 'Dr Charles Mynors', with a small arrow pointing downwards and to the right below the signature.

**DR CHARLES MYNORS**  
Chancellor

4 November 2010

St John's, Chelsea, Re, [1962] 1 W.L.R. 706 (1962)

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## \*706 In re St. John's, Chelsea



Positive/Neutral Judicial Consideration

### Court

Consistory Court (London)

### Judgment Date

26 March 1962

### Report Citation

[1962] 1 W.L.R. 706



London Consistory Court

Newsom , Deputy Ch.

1962 March 6, 7, 26

*Ecclesiastical Law—Faculty—Secular purpose—Use of consecrated land—Jurisdiction of consistory court.*

The vicar and churchwardens of a church sought a faculty to enable the land on which the parish church formerly stood to be used for a commercial purpose, namely, a car park. The petition was opposed, the parties opponent contending that the land ought to be used as a children's playground:—

*Held*, (1) that the status of consecrated ground was indelible save by the authority of Parliament.

Dictum of Farwell L.J. in *Sutton v. Bowden* [1913] 1 Ch. 518; 29 T.L.R. 262 applied .

(2) That faculties could be granted, either in respect of a church site or a churchyard, for ecclesiastical user, for throwing small parts of a churchyard (whether still available for burials or not) into a highway or for granting other rights of user in the nature of wayleaves, and for secular user where the original purpose of consecration could no longer lawfully be carried out, but that there was no jurisdiction to grant any other relevant class of faculty; that the petitioners had failed to establish, on the evidence, that the purpose for which the ground was originally consecrated could no longer lawfully be carried out; and that, therefore, the petition failed and must be dismissed.

*Corke v. Rainger and Higgs* [1912] P. 69; 28 T.L.R. 130 ; *In re Bideford Parish, Ex parte Rector, etc., of Bideford* [1900]

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*P. 314; 16 T.L.R. 540 ; and In re St. Mark's Church, Lincoln [1956] P. 336; [1956] 3 W.L.R. 147; [1956] 2 All E.R. 579 followed .*

**\*707**

*Per curiam* . The distinction between “profane” and “sordid” user is not part of the English ecclesiastical law.

The use of land as a children's playground is not an ecclesiastical user.

The following cases, in addition to those referred to in the judgment, were cited in argument:

*Steeven and Hollah v. Rector, etc., of St. Martin Orgars*<sup>1</sup> ; *Wood v. Headingley-cum-Burley Burial Ground*<sup>2</sup> ; *In re St. Nicholas Cole Abbey*<sup>3</sup> ; *Rector, etc., of St. Gabriel, Fenchurch Street v. City of London Real Property Co.*<sup>4</sup> ; *Williams v. Briton Ferry Burial Board*<sup>5</sup> ; *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White.*<sup>6</sup>

PETITION for faculty.

The vicar and churchwardens of St. John's Church, Chelsea, petitioned for a faculty authorising them to let the land upon which the church formerly stood to National Car Parks Ltd., for use as a car park for the sum of £250 a year. Adjoining that land was the land on which the vicarage of St. John's formerly stood, both pieces of land forming one triangular site bounded by Ashburnham Road, Damer Terrace and Tadema Road, in Chelsea. The church had stood at the south-eastern end of the site, at the base of the triangle. The church and vicarage were used as such from 1876 until 1940, when both were demolished by enemy action. Subsequently, the site was cleared and levelled and had remained unoccupied. Arrangements had been made to let the land on which the vicarage formerly stood, which was not consecrated land, to National Car Parks Ltd. for use as a petrol filling station. The planning authority had given permission for the whole site to be used in the way proposed. The petition was opposed by a parishioner and by a ratepayer who carried on business at a garage nearby.

Representation

E. Garth Moore Q.C. and John Worsley for the petitioners.

John Ellison for the parties opponent.

G. H. NEWSOM Q.C.

Deputy Ch., stated the facts and continued: I need hardly say that if the faculty is granted, the payment of £250 a year will not enure for the personal benefit of the vicar, but will be used for religious purposes in the parish under arrangements which will be made with the court's approval. It is conceded by the petitioners that, if I hold that they are entitled in principle to succeed, the case will have to be considered further by the court so that the detailed arrangements may be settled by the court. I am thus concerned at the present **\*708** stage solely with the questions of principle, namely, whether the court has any jurisdiction to allow the commercial user of the land on which the church formerly stood and, if so, whether in the circumstances it should exercise its jurisdiction in the way proposed.

I turn at once to the question of jurisdiction. The parties opponent submit that I have none. I am much indebted to counsel on both sides for their able submissions on this preliminary and very important point. Many reported cases were read; reference was to some extent made to some unreported cases in the personal experience of counsel, and a brief memorandum of some other unreported cases was prepared at my request by the registrar for the assistance of the court and the parties. The files of the respective registries in respect of many of the last mentioned cases were supplied to me.



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The church site itself was consecrated; its curtilage was not. But both sides agreed that I must deal with the whole of the land in question as if it were the consecrated site of a church, as distinct from a churchyard, if such a distinction is material.

A church is consecrated by the bishop of the diocese, usually with some solemnity, since the consecration is a great occasion; but the essential legal act is the signature by the bishop of the sentence of consecration, by which he separates and sets apart the building from all profane and common uses whatsoever, dedicates the same to the service of Almighty God for the performance therein of divine offices, and consecrates the same for the celebration of such offices. The sentence further pronounces, decrees and declares the building to be so separated, dedicated and consecrated and that it ought to remain so for ever. I take the form from *The Encyclopedia of Forms and Precedents*, 3rd ed., Vol. 3 (1946), p. 535; it is susceptible of minor variations, but these are the typical and essential provisions. The sentence, as Mr. Ellison observed, is definitive and operates in rem. In consequence of the sentence, the building, and with it the land on which it stands, becomes consecrated land, held to sacred uses, and subject to the jurisdiction of this court. The sentence in respect of a churchyard refers to the interment of the remains of the dead instead of to the performance of divine offices; but its other material wording is the same and its legal effect is equally to set the land apart as land held on sacred uses and to subject it to the court's jurisdiction.

In each case, the sacred uses are perpetual and can never be divested from the consecrated land, save by or under the authority of an Act or Measure. Equally, the court's jurisdiction over the land cannot be destroyed save by or under the authority of an Act or Measure. But, that being granted, what are the relevant powers of this court?

I shall start the inquiry with a quotation from the judgment of Farwell L.J. (sitting as an additional judge of the *Chancery Division*) in *Sutton v. Bowden*.<sup>7</sup> He said<sup>8</sup>:

“It has been decided by Dr. Lushington in *Campbell v. Paddington (Parishioners)*,<sup>9</sup> and approved by Cockburn C.J. in *Reg. v. Twiss*,<sup>10</sup> that ‘When ground is once consecrated,’ and dedicated to sacred purposes, ‘no judge has power to grant a faculty to sanction the use of such ground for secular purposes’; and the Lord Chief Justice adds that ‘nothing short of an Act of Parliament can divest consecrated ground of its sacred character.’ This proposition of Dr. Lushington is probably too broadly stated, as Sir Arthur Charles in the Arches Court of Canterbury in *In re Bideford Parish, Ex parte Rector, etc., Bideford*,<sup>11</sup> and Sir Lewis Dibdin in the same court, in *Corke v. Rainger and Higgs*,<sup>12</sup> have affirmed the jurisdiction of the Ecclesiastical Courts to grant faculties, in their discretion, for the erection of buildings and the like in consecrated ground under certain circumstances.”

It is the quoted statement of Dr. Lushington and not the addendum of Lord Cockburn C.J. which Farwell L.J. said was too wide. Thus this passage brings out the point that the status of consecrated land is indelible save by the authority of Parliament. Nowadays, of course, such authority is exercised not only directly by Act, but also by Measure or by delegated legislation.

This special status has been a striking privilege and protection of the Church of England. It is no part of the duty of this court to seek to whittle it away, and even if the faculty here sought is granted, the land will continue to be consecrated land subject to the jurisdiction of this court.

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What then are the circumstances in which the court has power “to grant faculties for the erection of buildings and the like on consecrated ground”? The reported decisions first disclose that the court can do so where the proposal is to erect a building for an ecclesiastical, as distinct from a secular, purpose. In *Corke v. Rainger and Higgs* ,<sup>13</sup> Sir Lewis Dibdin, Dean of Arches, granted a faculty on this principle. He said<sup>14</sup> :

“The test of what is a sufficient ecclesiastical use for the purpose in hand I take to be this. The ecclesiastical purpose must be a substantial and not an incidental part of the whole scheme. Thus a church vestry is allowable on consecrated ground although secular business may sometimes be transacted within its walls. A churchyard path is allowable although persons may pass along it who are not going to church. On the other hand a workhouse or a prison is not rendered ecclesiastical by the fact that somewhere in the building a room is set apart as a chapel.”

Applying that test, he allowed a church school to be built on land, adjacent to a church, which had been consecrated at the same time as the church but not specifically for burials, and which \*710 had not in fact been used for burials. In *Corke v. Rainger and Higgs*<sup>15</sup> the Court of Arches was therefore concerned with a church site, as I am in this case.

In *Campbell v. Paddington (Parishioners)* ,<sup>16</sup> Dr. Lushington, sitting in this court, similarly granted a faculty for the erection of a vestry-room on a piece of consecrated ground, originally intended for an additional burial ground, but in which there had been no interments. He said that a vestry-room is employed for ecclesiastical as well as secular uses. The test is evidently fairly generous towards allowing what is sought; for the report makes it clear that the building was wanted for “vestry or other parochial meetings,” at a date when a vestry was an active organ of local government. It also seems clear that there is no distinction in this class of case between church sites and churchyards. The premises concerned in *Corke v. Rainger and Higgs*<sup>17</sup> were a church site, and those in the *Paddington* case<sup>18</sup> were a churchyard.

Though the test of what is an ecclesiastical purpose is fairly generous, there must be a real and not a fanciful ecclesiastical element. Thus, in the *Paddington* case,<sup>19</sup> Dr. Lushington referred with approval to an earlier case, *The Rector of St. George's, Hanover Square v. Steuart* ,<sup>20</sup> which he regarded as a decision that a faculty ought not to be issued for erecting a charity school on a churchyard. For, he said,<sup>21</sup> “a charity school is purely secular.” I am not sure, looking at the very brief report, that that was what the Court of King's Bench decided in the *Hanover Square* case.<sup>22</sup> The court, at the suit of the rector and parishioners, granted prohibition in respect of proceedings instituted against them in this court seeking a faculty for the charity school. The only reason given is “for the ecclesiastical court has nothing to do with this, and cannot compel them without their consent.” Nevertheless, the view expressed by Dr. Lushington in the *Paddington* case<sup>23</sup> is material on the question what is an ecclesiastical user, and I can leave it at that. Another case of the same class is *In re Bettison* .<sup>24</sup> This was a decision of Sir Robert Phillimore, in the Court of Arches, allowing a church school to be erected on an unused part of a burial ground.

On these authorities, I am of the opinion that it is well established that this court can allow the erection of a building for an ecclesiastical purpose, defined as indicated by Sir Lewis Dibdin, either on a church site or on a churchyard. In the latter case, however, the *Disused Burial Grounds Act, 1884, s. 3* , restricts the right to allow the erection of buildings on disused burial grounds. I see no reason why this part of the jurisdiction should be confined to the erection of buildings; it would equally \*711 cover user of existing buildings. It is, I think, the justification for some of the unreported decisions which have been brought to my attention. For instance, in 1951, in this court, Ashworth Ch. granted a faculty for the formation of a parish room in a transept of St. Luke's Church, Hampstead, on condition that, unless otherwise ordered by this court, the room should be used only for Sunday schools, bible classes, church meetings and religious gatherings.

But none of these reported decisions is of any assistance to the petitioners, for the proposed user as a car park ancillary to a petrol filling station cannot by any test be called an ecclesiastical user. Nor can any of these cases assist the parties opponent in respect of their contention that the land ought to be used as a children's playground. For that would no more

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be an ecclesiastical user than the charity school.

The next group of cases deals with churchyards in which burials have been prohibited by or under the authority of an enactment. I refer to such churchyards as closed churchyards, to draw the distinction between them and churchyards that are merely disused de facto. There had been a good deal of confusion about this class of case at the end of the nineteenth century, some chancellors granting, and others refusing, faculties for secular user of closed churchyards. But the confusion was ended by the decision of Sir Arthur Charles, Dean of Arches, in *In re Bideford Parish, Ex parte Rector, etc., of Bideford*.<sup>25</sup> A faculty was granted authorising a strip of a closed churchyard to be thrown into the adjacent public street. In the crucial passage in the judgment,<sup>26</sup> the dean pointed out that the faculty was asked for in respect of ground which could no longer lawfully be used for burials, but was still subject to the jurisdiction of the Ordinary.

“It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter v. Mountague and Lamprell*<sup>27</sup>; and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty for a path across a churchyard and for a path along one side of it... in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorising the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way.”

This is, therefore, a decision based on the fact that the former ecclesiastical user was no longer lawfully possible. It was so treated by Sir Lewis Dibdin in *Corke v. Rainger and Higgs*,<sup>28</sup> where he said<sup>29</sup>:

“Land once consecrated cannot be used for secular \*712 purposes, subject to this exception, namely, that having regard to the case of *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>30</sup> decided in this court by my learned predecessor Sir Arthur Charles, it must be taken that the Ordinary has jurisdiction by faculty to allow a disused churchyard, which has been closed for burials, to be used for a secular purpose... But the question here is not whether this land, which although consecrated and unused is neither a disused churchyard nor a churchyard at all, can be used for a secular purpose, but whether the purpose to which it is proposed to be put is secular or ecclesiastical. If the former, the petition must be refused because I have no jurisdiction to grant it; but if the latter, then there is undoubted jurisdiction to decree the faculty asked for.”

And he went on to hold that the church school was an ecclesiastical purpose.

This passage seems, however, to make too clean-cut a distinction between cases of closed churchyards, which can be allowed to be used for secular purposes, and any other cases of consecrated land, which can be allowed to be used only for ecclesiastical purposes. For in *Walter v. Mountague and Lamprell*<sup>31</sup> Dr. Lushington, sitting in this court, thought that a faculty could be issued for making a public footway across an open churchyard, and in *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>32</sup> the Dean of Arches evidently thought that Dr. Lushington's view was right and that such a faculty would be founded on public convenience. That suggests a third category, where public convenience can justify a faculty at least for a public footpath. This category appears to have sprung from the first category, that is, from user for ecclesiastical purposes. For in *Corke v. Rainger and Higgs*<sup>33</sup> Sir Lewis Dibdin, in his discussion of ecclesiastical purposes, stated<sup>34</sup>: “A churchyard path is allowable although persons may pass along it who are not going to church,” and in *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>35</sup> Sir Arthur Charles said that he could not distinguish between a path across a churchyard and one alongside it. These passages no doubt justify the practice that is now, I believe, followed in all dioceses, of allowing, in proper cases, small strips of a churchyard, open or closed alike, to be thrown into the public highway for the convenience of the public at large. But the practice has extended beyond public ways into the category of wayleaves generally. For instance, drains are often allowed to be laid under a churchyard, or an electrical transformer to stand on it, and I think (though I do not remember a case where I have been asked to allow it myself) that there would be no difficulty in a proper case in allowing water or gas pipes to be laid under a churchyard or electric or telephone wires to pass over it. Some of these arrangements could not conflict with burials at all (as with wires in the air); \*713 some are at

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times justified as affording a facility to the adjacent church (for example, the electrical transformers); and the drains and other pipes would normally be laid under a verge or in a part of the churchyard never likely to be wanted for burials. Whatever the justification of these practices, the element that they have in common is that the matter authorised is in the nature of a wayleave, either conferring no legal possession at all, or minimal possession. I think that there may well have been unreported cases in which faculties have been granted in supposed reliance on this line of authority, but going beyond the narrow class of case that I have indicated. A liberal interpretation of the scope of this category of jurisdiction is not, in my opinion, justified by any reported authority. This part of the jurisdiction ought, therefore, to be exercised sparingly, bearing in mind throughout that its legal justification seems to stem only from *Walter v. Montague and Lamprell*<sup>36</sup> and the passages from *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>37</sup> and *Corke v. Rainger and Higgs*<sup>38</sup> which I have just cited.

In the present case it is not a wayleave, but exclusive possession of the whole site by National Car Parks Ltd. that is sought by the petition. Accordingly, these cases cannot assist the petitioners. Nor, in my opinion, can they assist the parties opponent with their proposed playground, since someone would have to be put into possession of it in order to manage it.

Under the categories so far defined, all the reported cases that were cited to me can, I think, be subsumed. *In re Plumstead Burial Ground*<sup>39</sup> and *St. Nicholas, Leicester (Vicar) v. Langton*<sup>40</sup> are examples of the conflicting decisions before *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>41</sup> to which I have already referred.

*In re St. Benet, Sherhog and In re St. Nicholas, Acons*<sup>42</sup> were cases in which an electricity supply company was authorised to put tunnels under the churchyards to facilitate access to some of its apparatus. It seemed to me, reading the report, and both counsel agreed, that these two churchyards must have been closed. *St. John the Baptist, Cardiff (Vicar of) v. Parishioners of Same*<sup>43</sup> was a case of a public footway across a closed churchyard. There remains *In re St. Mark's Church, Lincoln*<sup>44</sup> decided by Macmorran Ch., and on appeal by the present Dean of Arches. There the petitioners had a burial ground, one corner of which they had allowed to be used as a rubbish dump, the churchyard had been closed for burials, so, on the authority of *Corke v. Rainger and Higgs*,<sup>45</sup> the court had jurisdiction to authorise its user for a secular purpose. The petitioners sought to throw the \*714 site of the rubbish dump into the local omnibus station. The proposition could have presented no difficulty in itself and a faculty was granted for it. But the petitioners sought also to put a canopy over the place, so that people waiting for an omnibus could stand there in shelter from the rain. It was held that this structure was a building within the Disused Burial Grounds Act, 1884, s. 3, the erection of which was therefore prohibited by that Act. This part of the decision turns on a statute that has no bearing on the present case. The decision is, however, of interest in that the Dean of Arches referred to *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>46</sup> and said<sup>47</sup>:

“This case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorised though the ownership of the land remains unaffected.”

I respectfully and gratefully adopt this short and precise statement of the effect of the *Bideford* case,<sup>48</sup> and I note that the Dean did not differentiate in this matter between church sites and churchyards. The question to be asked is: Can the purpose for which the ground was originally consecrated no longer be lawfully carried out? If so, a faculty may issue for a secular user. If not, we are thrown back on *Corke v. Rainger and Higgs*<sup>49</sup> and the need to prove that the proposed user is ecclesiastical, unless the case is of a wayleave, where the faculty may be justified by *Walter v. Moutague and Lamprell*.<sup>50</sup>

To sum up on this part of the matter: 1. Faculties can be granted, either in respect of a church site or a churchyard, for ecclesiastical user. One example is a church school, as in *Corke v. Rainger*,<sup>51</sup> but the principle is not, in my opinion, confined to buildings.

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2. Faculties can be granted for throwing small parts of a churchyard (whether still available for burials or not) into a highway, or for granting other rights of user in the nature of wayleaves. These faculties are justified by *Walter v. Mountague and Lamprell*,<sup>52</sup> as approved in the *Bideford* case.<sup>53</sup> But those decisions have been somewhat stretched in practice. This part of the jurisdiction must be sparingly exercised and should not be extended.

Faculties may be granted for secular user where the original purpose of consecration can no longer lawfully be carried out. (See the *Bideford* case<sup>54</sup> and the *Lincoln* case.<sup>55</sup>

I can find no jurisdiction in the reported authorities for any relevant class of faculty except these three. The result is, in my judgment, that a faculty for secular user cannot be granted unless the user falls in the restricted category of wayleaves, or if the \*715 purpose for which the ground was originally consecrated can no longer lawfully be carried out.

With these authorities and propositions in mind, I can refer briefly to the various unreported cases that have been brought to my attention. Most of them can be accounted for by one or other of the three propositions, if one bears in mind (a) that in the case of a closed churchyard a secular user can be authorised and (b) that the jurisdiction in the wayleave type of case has tended to be stretched — stretched too widely, in my opinion. There is, however, one case in this court in the time of Ashworth Ch. that fits no category. It was not opposed or argued, so that it is to be received with caution as an authority. It was this: In 1954 this court allowed the letting, at a rent, of the basement of a church to a business firm for storage purposes. The chancellor made a note that the course he was taking was exceptional. I was also informed that a faculty was recently granted by the deputy chancellor in the Diocese of Southwark in circumstances indistinguishable from those of the present case. This was also an unopposed case and one that was not heard in open court. These two decisions, in my opinion, are out of line with the authorities, must have been given per incuriam, and cannot be supported. To find, in connection with a subject upon which there are no recent reported authorities, that orders out of line with those authorities have been made in unopposed cases is hardly surprising. Nor is it without recent precedent: see *Chapman v. Chapman*.<sup>56</sup>

The third of the propositions set out above is that secular user may be authorised where “the user for which the ground was originally consecrated can no longer be lawfully carried out.” That is to say, to put it another way, that such purpose is frustrated by a change in the law, of which an Order in Council forbidding burials is one example.

There remains the question whether, since frustration can found the jurisdiction, frustration in fact will do so as much as frustration by law. Mr. Ellison has stated in argument that he was prepared to admit that jurisdiction could arise in such circumstances, though none of the reported authorities expressly so decides. The point was therefore not argued before me and it would, therefore, be wrong for me to decide it unless I must. It is not necessary so to do; for in my judgment and for reasons which I shall set out later, the facts here proved fall far short of establishing the requisite impossibility. I therefore leave open this point for future decision.

Mr. Garth Moore submitted first that the law was summed up in the two *Lincoln* judgments,<sup>57</sup> especially that of the Dean of Arches. I agree, and have set out the effect of those judgments above. He further submitted that the dividing line between \*716 inability in law to grant a faculty and the cases where the court has a discretion is in twilight, and that there is no hard-and-fast line as to the jurisdiction. For the reasons stated above, I do not agree. He suggested that the court has a comparatively free hand to grant faculties for the use of consecrated land for purposes that are seemly. For this purpose he adopted a distinction taken by the Roman Catholic Canon Law (canon 1187 in the Codex of 1918) which allows a church, of which it can be predicated that “nullo modo ad cultum divinum adhiberi possit,” and that “omnes aditus interclusi sunt ad eam reficiendam” to be turned over by the ordinary “in usum profanum non sordidum.” This canon has its origin at the Council of Trent, and it is therefore not part of the medieval canon law which was retained in this country at the Reformation; see the observations of Lord Westbury in *Bishop of Exeter v. Marshall*.<sup>58</sup>

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The cases which I have recited do not show that there is, in our law, any such distinction as is suggested between “profane” and “sordid” user, and I decline to introduce it. In passing, I note that in the present case I am not in the least satisfied that the second prerequisite of the canon law is fulfilled; it is not established that every approach to the restoration of this church is cut off.

Mr. Garth Moore further submitted that consecrated land is to be likened to the corpus of a charitable trust fund, that where property held on charitable trusts can no longer be used for its original purpose, the court may allow it to be used for another, and that the purposes of consecration would be sufficiently respected if the proceeds derived from the changed user are secured for a godly purpose. I do not accept this analogy. Property is devoted to charitable trusts in order to provide wealth by which a charitable purpose is served; the form taken by the wealth, the fund, is normally immaterial. Land is consecrated in order that it, the physical land and the buildings on it, may be devoted for ever to sacred uses as church or churchyard. This branch of the law is concerned with the user of the thing itself. It may be that there are good grounds for wishing that the law of consecrated land was assimilated to the law of charitable trusts, though I express no such opinion. Be that as it may, there is no warrant in the reported cases for the submission, and I reject it. I have to apply the law, not to reform it.

Mr. Garth Moore further submitted that the church site had been derelict for 22 years, and that it was now “scheduled,” so that it would soon have to be used for the secular purpose of schools that are not church schools. The petitioners pray in aid on this point the statement in the planning permission that

“The site forms part of a site defined on the development plan for educational purposes and is programmed for the period \*717 1960–1972.”

From these premises they derive the submission that the user proposed in the petition is

“a very temporary user for at most seven years until the scheduling operates, and then, short-circuiting this jurisdiction, the site will be used for another purpose.”

Of course, it is true that under [section 28 of the Town and Country Planning Act, 1944](#) , various public authorities have power compulsorily to purchase consecrated land, and the land so purchased becomes freed from consecration under the statute. If it were established that this site was in fact about to be purchased compulsorily or even that it had been designated as being subject to compulsory acquisition under section 5 (2) (b) of the Town and Country Planning Act, 1947 , I should feel no difficulty in holding that it would shortly come about that the purposes for which the ground was originally consecrated could no longer lawfully be carried out, that the jurisdiction would then arise under the *Bideford* case, <sup>59</sup> and that in the short interim it would be futile to insist upon the sacred uses and that a secular and lucrative user could be authorised. But nothing of the sort has occurred, or is about to occur, here. Words like “scheduled” and “programmed” serve merely to darken counsel, and it is needful to examine the situation that in fact exists under the Town and Country Planning Acts and their subordinate legislation. On this point useful memoranda were, at my request, submitted to me by Mr. Ellison and Mr. Worsley, after the hearing, to supplement the oral arguments which were not as full as I desired. These memoranda almost entirely agree, except in their conclusions.

Until 1940, this site was occupied by a church. In 1940, the church suffered war damage. When the Town and Country Planning Act, 1947 , came into effect, on July 1, 1948, the site was vacant and unoccupied. Under section 12 (1) of the Act of 1947 it is necessary to obtain permission (usually called “planning permission”) for any development of land carried out after that date, subject however to the provisions of the section. By section 12 (1), development is defined as including in effect the execution of any building operations or any change of user. But by section 12 (5) (c) , no planning permission is required

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“in the case of land which on the appointed day is unoccupied, in respect of the use of the land for the purpose for which it was last used.”

Thus this site can be used for a church without planning permission. In the Act “use” does not, in relation to land, include the carrying out of any building operations thereon; see section 119 (1) . So far, then, it is still necessary to obtain planning permission to rebuild the church. But, since this is a war-damaged site, such permission is given by delegated legislation. For, in the case of war damaged land, permission to rebuild buildings which have sustained war damage is given by the Town and Country Planning General Development (S.I. 1950, No. 728), Article 3 and Schedule 1, Part 1, Class XI , subject only to the conditions that the cubic content must not be increased and that the external appearance must not be materially altered without permission. There is thus no statutory impediment in the Town and Country Planning legislation to the immediate rebuilding of this church, and no such impediment by other legislation was suggested. The Minister could, of course, take action in a contrary sense under [section 26](#) of the Act, or article 4 of the General Development Order might be applied. But there was no suggestion that any such action is in the present contemplation of the Minister or of the London County Council.

I must now consider the law and evidence about the so-called “scheduling” or “programming.” Under section 5 of the Act of 1947, every planning authority has to draw up for its area a “development plan” showing “the manner in which they propose that land in that area should be used,” and by section 6 this plan has to be revised at least every five years. These plans have to go to the Minister for approval.

The material parts of the London County Council’s development plan were not put in evidence by the petitioners; but the parties opponent produced what appears to be a “town map” made under section 5. This exhibit shows the site as being situated about on the boundary between quite a large area indicated as being for a secondary school and a small area described as a “new open space link or parkway.” Churches are not shown as such; for instance, Chelsea Old Church is left uncoloured, and is thus shown as “residential.” Presumably, however, it is on this map that the petitioners rely for the proposition that the site is “scheduled” for a school. A development plan may designate areas as subject to compulsory acquisition by the local authority, in which case the plan operates as a warning to a purchaser of what may be in store for him. Nothing of the kind is proved here. Apart from such designation, and some other things which it is not suggested apply here, all that a development plan does is to indicate how the planning authority (with the Minister’s approval) proposes that the land should be developed; that is to say, it is an indication of what is likely to be the result of an application for planning permission. But to re-erect St. John’s Church no planning permission is required, so this consideration is immaterial. Besides, the development plan is quite fluid, being subject to review at least every five years, and I am not prepared to assume that, if the site is again used for its proper purpose, the planning authority will seek to interfere.

It was faintly suggested that if a church were put up on this site and the area were later taken compulsorily for a school, no compensation would be payable. In his memorandum, Mr. Worsley rests this proposition on the [Land Compensation Act, 1961, s. 5 \(5\)](#) , which is as follows:

“Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.”

I cannot see how this provision assists. For if there were a church on this site, and if it were to be demolished after a compulsory purchase order, the parish would still need a parish church elsewhere, and reinstatement elsewhere in the parish would be, in all good faith, intended.

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There is, therefore, nothing in the planning law to prevent the church being re-erected, nothing to establish that if it were erected it would soon be taken compulsorily and demolished, and nothing to suggest that if it were so taken it would not be compensated for fully. No other type of statutory impediment was suggested. In my judgment, therefore, the petitioners fail to establish that the purpose for which the ground was originally consecrated can no longer be lawfully carried out.

Finally, it was suggested in effect that it is impracticable for the church ever to be re-erected on this site. But the evidence did not make this point good. Mr. Barber, the incumbent, who is working valiantly in a difficult parish, and with the slenderest resources in money, told me that he thought that this site was not in a good position from which to minister to the people, because at some future date he thought that no one would be living in the parish west of Ashburnham Road. He had written that his intention is eventually to build a new church on the site of the present temporary one near World's End, that is, at the extreme north-eastern corner of the parish. He told Mr. Ellison that that site, too, has some pastoral inconvenience. I think that his ideas on this matter have largely been coloured by speculation as to how the area may eventually be developed, if effect is eventually given to the London County Council's present town map. But all this is surmise. He has also been influenced by considering the site not as a piece of consecrated land, and so the natural site for his church, but as a "parish asset" to be turned to account. Mr. Underhill, the vicar's warden, was also looking at the problem as one of "canalising" the money that a commercial user of the site would make available. Mr. Ling, deputy secretary of the London Diocesan Fund, was asked whether the diocese has any intention of re-erecting the church or the vicarage on the site of the former church and vicarage. His answer was: "Not at the present time." He was then asked for his reason, to which he replied:

"The reason dates back to the re-organisation consideration and discussions shortly after the war, when from all the available evidence it did not seem that the likely numbers of people who would \*720 eventually come to live in that part of Chelsea justified a rebuilding of the church and vicarage on that site."

As he also said that the present population of the parish is about 8,000, that being the figure also given by the incumbent, I was not convinced that there is no justification for rebuilding the church on this site, which lies in the very middle of it. I was not told where the diocesan authorities think that the church ought to be. Mr. Ling said that no diocesan authority had any objection to the proposals in the petition; but that is purely negative. He was also asked whether he knew what was likely to happen to the parish in the future, and whether it would be amalgamated with, or split between, neighbouring parishes. His answer was: "The final decision has not yet been taken."

In the meantime, of course, the parish exists and the incumbent has 8,000 parishioners to whom he seeks to minister. Many of them live in the crowded streets west of Ashburnham Road. No resolutions of any of the statutory and other diocesan bodies that might have powers and responsibilities in regard to this matter were put in evidence. The evidence called for the petitioners on this part of the case was indeed conspicuous by its scantiness. Mr. Ellison, not unnaturally, found it unnecessary to ask the deputy secretary of the London Diocesan Fund any questions at all in cross-examination. In my judgment, therefore, the petitioners fail to establish that it is impracticable to re-erect the church on this site in due course. Moreover, I am not satisfied that it would be unwise so to do. Of course the money is not forthcoming at the moment; but it emerges clearly from the petitioners' evidence that hitherto no one has been trying to raise money for this purpose.

I have considered whether, despite all these circumstances, I should be justified in holding that, since there is no immediate prospect of the church being rebuilt, the site can and should be turned to account for an interim period of, say, five years, while plans are being thought out more fully. That would mean granting the petition either as a whole, or perhaps to the extent only of permitting vehicles approaching the petrol filling station to pass across the consecrated land. In my judgment, however, I should not be justified in so exercising my discretion, even if I were satisfied as to my jurisdiction. So to decide would tend to postpone the day when the officers of the parish and diocese face the problems of either rebuilding the church on this site, or causing this site to be freed from consecration under some Act or Measure. Moreover,



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to do so would establish a commercial user of the consecrated land, albeit temporarily at first. The company would tend to remain as long as possible in order to recoup its initial expenses, which are likely to be £15,000, and the incumbent and churchwardens would naturally tend to let it do so in order to use the income for their work. The court, once having granted the faculty, would be in a difficulty in \*721 refusing an application for an extension of time. Further, the authorities of the parish and the diocese would have greater difficulty in defending land actually used for commerce against attempts at compulsory purchase than they would have in so defending an empty consecrated site awaiting the restoration of the church.

I have some sympathy with the petitioners, who are working in circumstances of difficulty, and who feel that the extra income for a few years would be of great value to them in their work. But the court must apply established legal principles, and I regret that I can find no justification in the reported authorities for the concept that a consecrated site is a "parish asset" in the sense of an income-producing asset. Nor can I find in these authorities justification for the petitioners' proposal or anything really comparable with it. The petition will, therefore, be dismissed.

The cross-petition is not before me in the sense that the parties opponent did not, at the hearing, seek any relief on it. They felt that they could not do so because no citation had been issued upon it. But all the allegations of the cross-petition were before me as a matter of defence against the petition, and a number of witnesses were called by the parties opponent. They consisted, apart from the parties opponent themselves, of a young man who had collected several score of signatures to sheets of paper stating that the signatories object to the site of the church being used as a petrol-filling station and supporting the application to use the said site as a children's playground. No one suggests that the church site should be used as a petrol-filling station. That is the vicarage site, which is not within the jurisdiction of this court. In any case, I did not find this witness helpful. Then there were six witnesses, resident near the site, who said that they thought it should be a playground for children. I have visited the streets near the site, and I accept that they are mainly of houses with no gardens. I also accept that these witnesses genuinely felt that a children's playground would be a very desirable thing to have near by. But I am not convinced that a playground alongside Ashburnham Road (which several witnesses stated is one that is constantly full of very heavy traffic) is a suitable or safe place for such a playground.

The first party opponent, Reilly, also gave evidence. I accept him as sincerely believing that the church site as land would be better used in the public interest as a children's playground than as a car park, and I noted that he said that he would contribute quite a lot of money towards its equipment and maintenance as a playground. The other party opponent, Bevis, owns and conducts a garage near the site. He thinks that the proposed arrangements would injure his trade, and for this reason opposes the petition. This is, of course, a legitimate point of view, but one not entitled to much weight in the present context. He thought it proper to assert in his examination-in-chief that he \*722 thought "it is a bad thing to use consecrated ground at all for a business." In cross-examination, he stated that he felt "a concern for the use of consecrated land" and that he "really meant that." In further cross-examination he admitted that in 1958 he had himself tried to buy the consecrated land for the purposes of his own business. He claimed that he did not then know it was consecrated. In my judgment, his concern in this matter is purely with his own financial advantage.

Quite apart from the particular criticisms applying to Bevis, I thought that the evidence called for the parties opponent was misconceived. These witnesses seem to think that the court was conducting a planning inquiry. But the issue is what is the right use of a piece of consecrated land, consecrated as a church site and now derelict, but still held for sacred uses.

The petitioners do not think that the church site ought to be used as a children's playground, and have not offered it for that purpose. They think that they ought to be allowed to let it so that the resultant money can be applied for ecclesiastical and religious purposes. But a children's playground is not such a purpose. If I had found that I was entitled to grant a faculty I should, without hesitation, have preferred the petitioners' scheme to that of the parties opponent. The latter were entitled to

**St John's, Chelsea, Re, [1962] 1 W.L.R. 706 (1962)**

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come to the court, and they have succeeded, by legal argument, in destroying the petitioners' case. But I should not have exercised my discretion in favour of their positive case. In this sense they, too, have failed.

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

**Representation**

Solicitors: Milles, Day & Co.; S. Kalman.

*Petition dismissed. Cross-petition dismissed by consent. Petitioners to pay one-third of the costs of the parties opponent.*

**Footnotes**

- 1 (1842) 2 *Add.Eccl.Rep.* 255 .
- 2 [1892] 1 *Q.B.* 713 ; 8 *T.L.R.* 217, *D.C.*
- 3 [1893] *P.* 58 .
- 4 [1896] *P.* 95 .
- 5 [1905] 2 *K.B.* 565, *D.C.*
- 6 [1947] *K.B.* 263 ; 62 *T.L.R.* 706 ; [1946] 2 *All E.R.* 604 ; [1948] 1 *K.B.* 195 ; 63 *T.L.R.* 523 ; [1947] 2 *All E.R.* 170, *C.A.*
- 7 [1913] 1 *Ch.* 518 ; 29 *T.L.R.* 262 .
- 8 *Ibid.* 518, 551.
- 9 (1852) 2 *Rob.Eccl.* 558 . 559.
- 10 (1869) *L.R.* 4 *Q.B.* 407 , 412.
- 11 [1900] *P.* 314 ; 16 *T.L.R.* 540 .
- 12 [1912] *P.* 69 ; 28 *T.L.R.* 130 .
- 13 [1912] *P.* 69 .
- 14 *Ibid.* 76.
- 15 [1912] *P.* 69 .
- 16 (1852) 2 *Rob.Eccl.* 558 .
- 17 [1912] *P.* 69 .
- 18 (1852) 2 *Rob.Eccl.* 558 .
- 19 *Ibid.*
- 20 (1740) 2 *Stra.* 1126 .
- 21 (1852) 2 *Rob.Eccl.* 558 , 560.
- 22 2 *Stra.* 1126 .

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23	<i>2 Rob.Eccl. 558 .</i>
24	<i>(1874) L.R. 4 A. &amp; E. 294.</i>
25	<i>[1900] P. 314 ; 16 T.L.R. 540 .</i>
26	<i>[1900] P. 314 , 326.</i>
27	<i>(1836) 1 Curt. 253 .</i>
28	<i>[1912] P. 69 .</i>
29	<i>Ibid. 74 .</i>
30	<i>[1900] P. 314 .</i>
31	<i>(1836) 1 Curt. 253 .</i>
32	<i>[1900] P. 314 .</i>
33	<i>[1912] P. 69 .</i>
34	<i>Ibid. 76 .</i>
35	<i>[1900] P. 314 , 326.</i>
36	<i>(1836) 1 Curt. 253 .</i>
37	<i>[1900] P. 314 .</i>
38	<i>[1912] P. 69 .</i>
39	<i>[1895] P. 225 .</i>
40	<i>[1899] P. 19 .</i>
41	<i>[1900] P. 314 .</i>
42	<i>[1893] P. 66 n.</i>
43	<i>[1898] P. 155 .</i>
44	<i>[1956] P. 166 ; [1955] 3 W.L.R. 844 ; [1955] 3 All E.R. 699 ; [1956] P. 336 ; [1956] 3 W.L.R. 147 ; [1956] 2 All E.R. 579 .</i>
45	<i>[1912] P. 69 .</i>
46	<i>[1900] P. 314 .</i>
47	<i>[1956] P. 336 , 341.</i>
48	<i>[1900] P. 314 .</i>
49	<i>[1912] P. 69 .</i>
50	<i>1 Curt. 253 .</i>
51	<i>[1912] P. 69 .</i>
52	<i>1 Curt. 253 .</i>
53	<i>[1900] P. 314 .</i>
54	<i>Ibid.</i>

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- 55 *[1956] P. 166 .*
- 56 *[1954] A.C. 429 ; [1954] 2  
W.L.R. 723 ; [1954] 1 All E.R.  
798, H.L.*
- 57 *[1956] P. 166 , 336.*
- 58 *(1868) L.R. 3 H.L. 17, 55, H.L.*
- 59 *[1900] P. 314 .*

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St Mark's Church, Lincoln, Re, [1956] P. 336 (1956)

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## \*336 In Re St. Mark's Church, Lincoln.



Positive/Neutral Judicial Consideration

### Court

Arches Court

### Judgment Date

15 May 1956

### Report Citation

[1956] 3 W.L.R. 147  
[1956] P. 336



Arches Court

Willink, Dean of Arches

1956 March 27; May 15.

*Ecclesiastical Law—Faculty—Burial ground—Disused churchyard—Proposed user of part as footpath and omnibus shelter—Whether omnibus shelter a “building” within meaning of section 3 of Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72).*

*Cemetery. “Building.”*

A faculty was sought to adapt part of a disused churchyard as a footpath and to suspend a covering over the footpath to protect persons using the same from the weather:-

Held:

(1) that the court had no jurisdiction to grant the faculty since the proposal involved the erection of a structure which was \*337 a “building” within the meaning of section 3 of the Disused Burial Grounds Act, 1884 , <sup>1</sup> and which was therefore prohibited by that Act. *St. Nicholas Acons v. London County Council [1928] A.C. 469; 44 T.L.R. 656* applied.

(2) That a faculty would be granted authorizing the petitioners to adapt and use part of the churchyard as a footpath, but not to erect or suspend any covering over that part of the churchyard.

*In Re Bideford Parish [1900] P. 314; 16 T.L.R. 540* applied.

### St Mark's Church, Lincoln, Re, [1956] P. 336 (1956)

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*Decision of Macmorran Ch.*, ante 166; [1955] 3 All E.R. 699 affirmed.

APPEAL from Macmorran Ch., delivered on November 21, 1955, at Lincoln, refusing the grant of a faculty to the Reverend Prebendary Arthur Oswald Jones, vicar, and two churchwardens of St. Mark's Church, Lincoln, and the Lincolnshire Road Car Co. Ltd., who sought authorization to adapt part of the disused churchyard appurtenant to St. Mark's Church, so that it might form part of a footpath which the company proposed to construct, and so that a covering might be suspended over it to protect persons using the same from the weather. The petition was supported by unanimous resolutions passed by the Parochial Church Council of St. Mark's Church, and was unopposed.

The facts appear fully in the judgment.

*Cur. adv. vult.*

*W. S. Wigglesworth* for the petitioners. The petition raises two questions: (1) can a faculty issue authorizing consecrated land to be used as a footpath for secular purposes, and (2) if so, does the structure which it is proposed to erect over the footpath come within the meaning of a "building" prohibited by section 3 of the Disused Burial Grounds Act, 1884? As to the first question, a faculty can so issue in respect of a private right of way (*St. Gabriel, Fenchurch Street (Rector, etc.) v. City of London Real Property Co. Ltd.*<sup>2</sup>), and as to a public right of way (*In Re Bideford Parish*<sup>3</sup>). This is supported by *Corke v. Rainger*,<sup>4</sup> which suggests no limit to secularization; there is no need to limit secularization to cases where the approaches to a church or churchyard are concerned, as suggested in *St. Nicholas Acons v. London County Council*.<sup>5</sup> The petitioners seek a right of way for their servants and passengers, and this is a private right, for although the passengers form part of the general public, they are only that part of the travelling public which uses the services provided by the company.

As to the second question, while it is clear that section 3 of the Disused Burial Grounds Act, 1884, applies to this burial ground, the section does not prohibit what the petitioners now seek to do. In *St. Botolph, Aldersgate Without*<sup>6</sup> an arcade built to protect frescoes on a churchyard wall was held not to be a "building" within the meaning of the section, but in *St. John's, Hampstead*<sup>7</sup> a columbarium was held to be such a building. Subsequently the proposals in that case were amended so as to be outside the section and were approved in chambers. In *Paddington Borough Council v. Attorney-General*<sup>8</sup> Lord Halsbury L.C. considered that the object of the Disused Burial Grounds Act, 1884, was to prevent disused burial grounds from becoming building ground and to keep them free as places of exercise, ventilation and recreation. In *Bermondsey Borough Council v. Mortimer*<sup>9</sup> a urinal was held to be a "building" within the meaning of the Act, and in *St. Nicholas Acons v. London County Council*<sup>10</sup> an electricity transformer chamber which would have been built below the surface of the churchyard was also held to be a "building." This latter case overruled *In Re St. Nicholas Cole Abbey*,<sup>11</sup> *In Re St. Benet Fink Churchyard*<sup>12</sup> and *In Re St. Benet Sherehog*,<sup>13</sup> where faculties for similar transformer chambers had been granted.

The covering which the petitioners now seek to erect is analogous to that in *St. Botolph, Aldersgate Without*<sup>14</sup> and is therefore not a "building" for the purpose of the Act, and its presence will not make the land building ground. The land will remain free for exercise. Further, the building (if such it is) will not be erected upon a disused burial ground, since it will be so constructed that there is no contact between it and the burial ground. In all other cases the building has been erected upon ground, and this case is thus clearly distinguishable.

*John Ellison* as amicus curiae. The petitioner company is a commercial undertaking and there is no direct authority for the grant of a faculty to such a body; the court has no jurisdiction \*339 to grant the right sought, since the true nature of what the petitioners seek is a licence or a lease and not an easement. (For all practical purposes they seek absolute possession.) In *Reilly v. Booth*<sup>15</sup> it was held that if the general effect of a contract is to pass the right to the exclusive possession of land, even though subject to restrictions of user, it is a lease and not an easement. This view is supported in *Copeland v. Greenhalf*,<sup>16</sup> where the right in fact exercised and claimed by prescription amounted virtually to a claim to the whole beneficial user of the servient tenement, and was held to be too extensive to constitute an easement in law. In *In Re Ellenborough Park*<sup>17</sup> this jus spatiandi was further considered.

The Disused Burial Grounds Act, 1884, must be read in conjunction with the Open Spaces Act, 1887, and the words "land" or "burial ground" must be taken to be governed by the common law rule that land includes the air space above it. See Coke on this subject, which was fully analysed and discussed by Hahn J. in *Swetland v. Curtiss Airports Corporation*,<sup>18</sup> who was upheld on appeal.<sup>19</sup> It follows, therefore, that any building occupying air space over a disused burial ground is a building

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upon a disused burial ground, and therefore the erection proposed by the petitioners is forbidden by the Act. Neither “on” nor “upon” is an operative word, and they are not defined in the appropriate definition sections. They are merely a nexus between two operative defined words, “building” and “burial ground.” “On” in the same context is synonymous with “in” or “within.” For example, “a memorial stone *on* a grave *in* a burial ground.”

May 15. WILLINK, Dean of Arches,

read the following judgment: This is an appeal by the vicar and churchwardens of the parish of St. Mark, Lincoln, and the Lincolnshire Road Car Co. Ltd. from a decision of the learned Chancellor of the Diocese of Lincoln, the matter arising upon a petition dated September 16, 1955. On the hearing of the appeal Mr. Wigglesworth of counsel appeared for the appellants company. By the courtesy of the Dean of Westminster and with the consent of the appellants’ counsel I sat to hear the appeal in the Deanery of Westminster. In view of the fact that the petition, though unopposed, raised questions of importance I invited Mr. John Ellison of \*340 counsel to attend the court as amicus curiae. I am greatly indebted to Mr. Ellison for the assistance he gave to the court.

By their petition the petitioners sought authority for the use of a small part of a closed churchyard as part of a projected omnibus station. Included in the use prayed for was a proposal to roof the area in question in order that those using the station should be protected from the weather. The learned chancellor took the view that apart from the proposed roof the petition could and should be allowed, but that the proposed roof constituted such a structure as is prohibited by the combined operation of the [Disused Burial Grounds Act, 1884, s. 3](#) , and the [Open Spaces Act, 1887, s. 4](#) ,<sup>20</sup> and the definition of “burial ground” in the [Open Spaces Act, 1906, s. 20](#) .<sup>21</sup>

The facts of the case are not in dispute, and I have not thought it necessary to require affidavits to add to the evidence, including plans, given in the consistory court by Mr. A. A. Briggs, an architect employed by the British Transport Commission.

The land in question is a small oblong projection, 26 feet by 6 feet, at the southern end of the western boundary of the churchyard. The churchyard was closed for burials by an Order in Council dated February 8, 1855. There are no human remains in the area in question. The whole western wall of the churchyard is dilapidated, and if the company is permitted to carry out its plan it is prepared to undertake to rebuild its whole length together with a further length on the north side of the churchyard at a cost of about £1,000 and to a design to be approved by the parochial church council. The small piece of land has no amenity value, and the vicar and churchwardens, in supporting the petition, are acting with the unanimous authority of the parochial church council.

The city of Lincoln has found a need to establish a comprehensive omnibus station to accommodate the large number of \*341 services that run between the city and the surrounding countryside, and the land to the west of the churchyard is designated for this purpose in the town map prepared under the Town and Country Planning Act, 1947 . The land is owned by the appellants company who plan to lay it out with island platforms, but with a continuous pavement 8 feet in width along the eastern boundary. The oblong projection of the churchyard constitutes an obstacle.

For the comfort and convenience of their customers and staff the company wishes to cover the station and proposes that the oblong projection shall be covered in a particular manner to which I shall refer later.

Although the company’s project is a unified scheme in that they would be unlikely to leave part of the station uncovered, the issue before me appears to me, as it appeared to the learned chancellor, to fall into two parts. Can, and if so, should this area of consecrated ground be used as part of an omnibus station? If so, is the proposed roofing permissible?

As to the first of these issues I see no reason to differ from the learned chancellor. Until the decision of this court in [In Re the Parish of Bideford](#)<sup>22</sup> there was considerable doubt and some apparent conflict of authority whether it could be permitted that land once consecrated to a sacred use should be used for a secular purpose. This case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorized though the ownership of the land remains unaffected.

The [Bideford](#) case<sup>23</sup> was one in which the wall of a churchyard was moved, part of the area of the churchyard being thrown

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into the highway. But the earlier case of *St. Gabriel, Fenchurch Street (Rector, etc.) v. City of London Real Property Co. Ltd.*<sup>24</sup> shows that the principle is not limited to the widening of a highway: the Court of Arches in that case protected and treated as valid a faculty permitting the construction and fencing of a private pathway to be used only by a commercial concern in common with the rector and churchwardens.

Mr. Ellison suggested that the use asked for was of a character inconsistent with the established concept of an easement in the nature of a right of way. It is not necessary, in my view, so to particularize. In the *St. Gabriel's* case<sup>25</sup> Lord Penzance found it unnecessary to define the exact nature of the right of user which may be authorized, and in my judgment the \*342 principle is fully stated by Sir Lewis Dibdin as Dean of the Arches in *Corke v. Rainger*<sup>26</sup> when he said: "having regard to the case of *In Re the Parish of Bideford*,<sup>27</sup> decided in this court by my learned predecessor, Sir Arthur Charles, it must be taken that the Ordinary has jurisdiction by faculty to allow a disused churchyard, which has been closed for burials, to be used for a secular purpose."

In a later case, that of *St. Nicholas Acons v. London County Council*,<sup>28</sup> the same judge, referring to the *Bideford* case,<sup>29</sup> suggested that "it is perhaps worthy of consideration whether it is applicable to cases where questions of convenience of access to the church or churchyard are not involved." In my judgment there is no such limitation to be added as a rider to the principle as stated in *Corke v. Rainger*.<sup>30</sup> I cannot see that any question of convenience of access to a church or churchyard arose in the *St. Gabriel's* case,<sup>31</sup> and consider that the matter is one for judicial discretion once it is established that the land is land which may be used for some secular purpose. The question is whether permission to rebuild the churchyard wall in the new position and to use the land outside the wall as part of an omnibus station is, on the terms proposed, in the interest of the public, including the parishioners. I find, as the learned chancellor found, that the petitioners successfully establish this part of their case, including their proposal that the land should be included in the area occupied by the 8-foot-wide pavement. Such a pavement would usually, if not invariably, be incidental to the extension of a highway over part of a disused churchyard and has never, so far as I am aware, been questioned in such a case.

By the statute of 1884, to which I have already referred, it is provided that "It shall not be lawful to erect any buildings upon any disused burial ground" except for purposes irrelevant to this case. It is conceded by the petitioners that the land in question is part of a disused burial ground. The statute is closely linked with others providing for the maintenance of open spaces for the benefit of the public and I have been referred, in particular, to the speech of Lord Halsbury L.C. in *Paddington Borough Council v. Attorney-General*<sup>32</sup> - a case where a disused burial ground was being administered by the local authority as an open space.

\*343

It is, however, to the language of section 3 of the Act of 1884 that I am bound to pay particular regard, together with the reported cases in some of which a proposed structure has been held to be within the prohibition and in others of which it has been permitted. In the *St. Nicholas Acons* case<sup>33</sup> the Privy Council held without hesitation that the building of a subterranean transformer chamber was prohibited; in *Bermondsey Borough Council v. Mortimer*<sup>34</sup> Chancellor Hansell took the same view as to the building of urinals. On the other hand, in *St. Botolph, Aldersgate Without*,<sup>35</sup> Chancellor Tristram authorized the construction of an arcade or covered way on the inner side of a churchyard wall, and the House of Lords in the *Paddington* case<sup>36</sup> held that a screen erected to prevent the acquisition of rights of light over a churchyard was not a building.

No case cited to me is, in my judgment, at all closely analogous to that now before me, and in my judgment it is necessary to specify with precision what is proposed and then to ask whether, if carried out, a building will have been erected on or upon the land in question.

The company's scheme for roofing their proposed station is for a structure covering a considerable area. Taken as a whole I have no doubt that it is a building. It is clear, however, that in designing the building the architect had in mind the prohibition expressed in the Act of 1884. By the use of modern engineering methods he has so designed such part of the roof as would cover the land now in question that it is supported entirely from the company's own land. At its eastern extremity it is proposed to hang a vertical glazed panel in approximately the same plane as the new churchyard wall, but nowhere in contact with it nor with the ground.

It was urged for the petitioners that by this somewhat ingenious design they had found a means of avoiding the difficulties placed in their way by the statute: and that the *St. Botolph's* case<sup>37</sup> in particular was authority for the contention that the



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roofing over of space does not necessarily constitute building upon it. I cannot, however, regard the *St. Botolph's* case,<sup>38</sup> in which the arcade remained within the churchyard and was ancillary to an embellishment of the churchyard wall, as affording any guidance for the decision of the present appeal.

**\*344**

It is with regret that I find myself unable to allow what is sought by the petitioners.

It would be artificial to rely on the fact that the words “on” and “upon” usually imply contact: the clear intention of the Act of 1884 is to prohibit all building in churchyards other than such building as is expressly permitted. Moreover, I agree with the learned chancellor that it is not possible or in accord with common sense to isolate one portion of the roof on the western side of the proposed building. The proposed building would appear to be and would in fact be a building erected partly upon the company's land and partly upon consecrated land, and it is clear to me that there is no jurisdiction in this court to permit the use of a disused burial ground for the accommodation of such a building.

For these reasons I find myself in agreement with the learned chancellor and obliged to dismiss the appeal with costs.

#### Representation

Solicitor: M. H. B. Gilmour.

*Appeal dismissed. Cause to be retained in Court of Arches. Faculty limited to adaptation and use of part of churchyard as a footpath, but not extending to the erection or suspension of any covering over that part. ([Reported by M. B. KELLY, Esq., Barrister-at-Law.] )*

#### Footnotes

- 1 [Disused Burial Grounds Act, 1884, S. 3](#) : “It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other place of worship.”
- 2 [\[1896\] P. 95](#) .
- 3 [\[1900\] P. 314; 16 T.L.R. 540](#) .
- 4 [\[1912\] P. 69](#) , 74.
- 5 [\[1928\] P. 102](#) , 112.
- 6 [\[1900\] P. 69](#) .
- 7 [\[1939\] P. 281](#) .
- 8 [\[1906\] A.C. 1](#) , 3.
- 9 [\[1926\] P. 87](#) .
- 10 [\[1928\] A.C. 469; 44 T.L.R. 656](#) .
- 11 [\[1893\] P. 58](#) , 66n.; Tristram's Judgments 274.

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- 12 *[1893] P. 58 , 66n.; Tristram's Judgments 274.*
- 13 *[1893] P. 58 , 66n.; Tristram's Judgments 274.*
- 14 *[1900] P. 69 .*
- 15 *(1890) 44 Ch.D. 12 .*
- 16 *[1952] Ch. 448; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809 .*
- 17 *[1956] Ch. 131; [1955] 3 All E.R. 667 .*
- 18 1930 U.S.AV.R. 21, 29.
- 19 1932 U.S.AV.R. 1.
- 20 **Open Spaces Act, 1887, S. 4 :**  
**"In the Disused Burial Grounds Act, 1884 , ... the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881 , As amended by this act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or order in council, and the expression 'building' shall include any temporary or movable building."**
- 21 **Open Spaces Act, 1906, S. 20 (Part): "the Expression 'Burial Ground' Includes Any Churchyard, Cemetery or other Ground, Whether Consecrated or Not, Which Has Been at Any Time Set Apart for the Purpose of Interment."**
- 22 *[1900] P. 314; 16 T.L.R. 540 .*
- 23 *[1900] P. 314; 16 T.L.R. 540 .*
- 24 *[1896] P. 95 .*
- 25 *[1896] P. 95 .*
- 26 *[1912] P. 69, 74; 28 T.L.R. 130 .*
- 27 *[1900] P. 314 .*
- 28 *[1928] P. 102 , 113; [1928] A.C. 469; 44 T.L.R. 656 .*
- 29 *[1900] P. 314 .*

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30	<i>[1912] P. 69 .</i>
31	<i>[1896] P. 95 .</i>
32	<i>[1906] A.C. 1, 3; 22 T.L.R. 55</i> <i>.</i>
33	<i>[1928] A.C. 469 .</i>
34	<i>[1926] P. 87 .</i>
35	<i>[1900] P. 69 .</i>
36	<i>[1906] A.C. 1 .</i>
37	<i>[1900] P. 69 .</i>
38	<i>[1900] P. 69 .</i>

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## \*63 In Re St. Martin Le Grand, York



No Substantial Judicial Treatment

York Consistory Court

Coningsby Q.C. , Ch.

1988 Feb. 15, 16, 17; 29

**Court**  
Consistory Court (York)

**Judgment Date**  
29 February 1988

**Report Citation**  
[1989] 3 W.L.R. 1207  
[1990] Fam. 63

*Ecclesiastical Law—Ecclesiastical property—Churchyard—Right of way over churchyard to adjacent printing works—Whether consistory court having jurisdiction to determine existence and scope—Whether easement or licence—Whether licence of indefinite duration terminable— Ecclesiastical Jurisdiction Measure 1963 (No. 1), s. 6(1) (e)*

<sup>1</sup> The petitioners were the owners and occupiers of a printing works adjacent to the churchyard of a parish church over which they had rights to pass for purposes of access to the works, the churchyard having been closed for burials for many years. The petitioners sought, inter alia, rulings as to the extent of those rights and, where necessary, a faculty to ensure their future use and to extend them to cover use by their licensees and other visitors to their premises. The petition was opposed by the incumbent, the parochial church council, the feoffees of the parish and a number of individual objectors, on the ground that the churchyard should be maintained as a peaceful place, not open to the public at large, and under the control of the church. At the hearing it was agreed that, subject to the court's approval, the petitioners should have vehicular access to the churchyard in case of emergency for a period of not more than 30 months, by which time it was expected that the petitioners' printing business would have moved to a new site.

### \*64

On the petition: -

Held:

(1) that, as, in practical terms, it was no longer possible to carry out the purpose for which the churchyard had been consecrated, namely, for burials, it was open to the court to allow a limited secular use of the churchyard; and that, given the very limited and short term use of the vehicular access proposed, a faculty for a licence in the agreed terms would be granted (post, pp. 71D-F, 72A).

*In re St. Benet Sherehog; In re St. Nicholas Acons* [1893] P. 66n.; *In re Bideford Parish* [1900] P. 314 and dictum of Newsom Q.C., Ch. in *In re St. John's, Chelsea* [1962] 1 W.L.R. 706, 714 applied.

(2) That the court did not have jurisdiction under section 6(1)(e) of the Ecclesiastical Jurisdiction Measure 1963 to determine the questions relating to the existence, legal status and scope of the pedestrian right of way over the churchyard, since the rights concerned were not even substantially of an ecclesiastical nature; but that there was a long-standing practice whereby the ecclesiastical court determined matters of a temporal nature which were incidental to the exercise of the ecclesiastical jurisdiction; that, since the right to deal with the fee in the churchyard was vested in the ordinary on whose behalf the court might act, the court had jurisdiction to grant a faculty for a more extensive pedestrian access over the churchyard than that to which the church bodies were willing to agree; and that, accordingly, since the issues as to the existence and scope of the pedestrian right of way were genuinely ancillary to the question of whether such faculty should be granted, the court had jurisdiction to decide them (post, pp. 73F-H, 74C, G-H, 76B-D).



*St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95 ; *In re St. Paul's, Covent Garden* [1974] Fam. 1 and *In re St. Andrew's, North Weald Bassett* [1987] 1 W.L.R. 1503 followed.

(3) That, on the evidence, a pedestrian right of way across the churchyard had been exercised as of right by the occupiers of the buildings around the churchyard for at least the last hundred years and had been exercised by the petitioners throughout, not only by themselves and their servants, but also by and for their licensees having a legitimate business interest in coming to their premises; that it was to be presumed that such right had been conferred by way of lost faculty; that, as a matter of law, the churchyard being consecrated land, that faculty could not have conferred an easement, but did confer a licence of indefinite duration; and that that licence could be terminated only by faculty if the ordinary was put on notice that it was being abused and the consistory court determined that it should be terminated (post, pp. 77C-D, G-H, 81B, 82C-D, G-H).

*Baxendale v. North Lambeth Liberal and Radical Club Ltd.* [1902] 2 Ch. 427 applied.

The following cases are referred to in the judgment:

*Baxendale v. North Lambeth Liberal and Radical Club Ltd.* [1902] 2 Ch. 427

*Bideford Parish, In re* [1900] P. 314

*Butt v. Jones* (1829) 2 Hagg. Ecc. 417

*Hammond v. Prentice Brothers Ltd.* [1920] 1 Ch. 201

*Hilcoat v. Archbishops of Canterbury and York* (1850) 10 C.B. 327 \*65

*Keith v. Twentieth Century Club Ltd.* (1904) 73 L.J.Ch. 545

*Liddell v. Rainsford* (1868) 38 L.J. Eccl. 15

*Linnell and Walker v. Gunn* (1867) L.R. 1 A. & E. 363

*Proud v. Price* (1893) 63 L.J.Q.B. 61, C.A. .

*St. Andrew's, North Weald Bassett, In re* [1987] 1 W.L.R. 1503

*St. Benet Sherehog, In re; In re St. Nicholas Acons* [1893] P. 66n .

*St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95

*St. John's, Chelsea, In re* [1962] 1 W.L.R. 706; [1962] 2 All E.R. 850

*St. Mary Abbots, Kensington (Vicar and Churchwardens) v. St. Mary Abbots, Kensington (Inhabitants)* (1873)

Trist. 17

*St. Mary of Charity, Faversham, In re* [1986] Fam. 143; [1985] 3 W.L.R. 924; [1986] 1 All E.R. 1

*St. Mary the Virgin, Woodkirk, In re* [1969] 1 W.L.R. 1867; [1969] 3 All E.R. 952

*St. Paul's, Covent Garden, In re* [1974] Fam. 1; [1973] 1 W.L.R. 464

*St. Peter's, Bushey Heath, In re* [1971] 1 W.L.R. 357; [1971] 2 All E.R. 704

*Thornton v. Little* (1907) 97 L.T. 24

*Walter v. Mountague and Lamprell* (1836) 1 Curt. 253

*Wood v. Saunders* (1875) L.R. 10 Ch.App. 582

*Woodhouse & Co. Ltd. v. Kirkland (Derby) Ltd.* [1970] 1 W.L.R. 1185; [1970] 2 All E.R. 587

The following additional cases, supplied by the courtesy of the chancellor, were cited in argument:

*Anon.* (1575) Jenk. 142

*Attorney-General v. Dean and Chapter of Ripon Cathedral* [1945] Ch. 239; [1945] 1 All E.R. 479

*Philipps v. Halliday* [1891] A.C. 228, H.L.(E.) .

*St. Mark's Church, Lincoln, In re* [1956] P. 166; [1955] 3 W.L.R. 844; [1955] 3 All E.R. 699

*St. Mary's, Aldermary, In re* [1985] Fam. 101; [1985] 3 W.L.R. 396; [1985] 2 All E.R. 445

*Stileman-Gibbard v. Wilkinson* [1897] 1 Q.B. 749

## PETITION

By petition dated 13 November 1986, the petitioners, Westminster Press Ltd., sought a faculty (1) confirming a presumed grant of a right of way on foot or with laden or unladen trolleys across the churchyard of St. Martin Le Grand, York, alternatively, granting a licence conferring such rights, alternatively, validating an agreement made in October 1967 in so far as it related to pedestrian access with trolleys; (2) confirming the grant of a similar right of way with motor vehicles; and (3) to remove a barrier at the entrance to the churchyard. The petition was opposed by the incumbent, Canon John Armstrong, the parochial church council, the feoffees of St. Helen's and St. Martin's and 22 individual objectors.

The facts are set out in the judgment.

## Representation



Michael Douglas for the petitioners.  
John Bullimore for the parties opponent.

*Cur. adv. vult.*

29 February. The following judgment was handed down (by post).

\*66

CONINGSBY Q.C., CH.

These are proceedings under the Faculty Jurisdiction Measure 1964 in relation to the churchyard of the Church of St. Martin le Grand in Coney Street, which is part of the central area of the City of York. The petitioners, Westminster Press Ltd., own and occupy a printing works which lies partly between the church and the River Ouse and partly alongside the churchyard with a frontage onto Coney Street. The petitioners' premises are basically in the shape of an L with the longer side fronting onto the River Ouse. The churchyard consists of the area between the church and the printing works and extends round to the rear or west end of the church. The entrances from the printing works onto the churchyard are mainly in that part of the yard.

The petitioners' case is that they have had certain rights to pass over the churchyard for many years and in the proceedings they seek rulings as to the extent of those rights and, where necessary, they seek a faculty to ensure the future use of those rights, to ensure that a gate erected by the parochial church council of St. Martin's across the Coney Street entrance to the yard should be of such construction as not to interfere with their use of the yard, and, again so far as necessary, to extend their use of the yard to cover use by their licensees and other visitors coming to and from their premises for purposes connected with their business or their staff.

The basic position of the parties opponent is that they are concerned to maintain the churchyard as a peaceful place to which the public at large do not have general access and over which the church retains control. Prior to the erection of the gate in late 1985 or early 1986 the parochial church council and team vicar having responsibility for St. Martin's had become much concerned over the parking of cars and other vehicles in the churchyard which had occurred when a previous "gate" in the form of a chain and movable post had fallen into disuse. The parties opponent opposed any vehicular use of the churchyard by the petitioners, notwithstanding an agreement in 1967 between the then incumbent and the petitioners for a very limited vehicular use of the churchyard in cases of emergency and for the moving of machinery; they did not admit the existence of any right of way over the churchyard, even a pedestrian way, and, though it was accepted that by a temporary arrangement with the petitioners there was de facto pedestrian access for the petitioners and their employees, it was disputed that the petitioners exercised this use as of right and the parochial church council asserted their own right to maintain a gate across the Coney Street entrance so as to prevent all access to the churchyard other than by permission of the parochial church council or clergy.

The pleadings in the case consist of a number of documents. The petition for faculty is dated 13 November 1986. The schedule of works contained in that petition was subsequently amended by insertion of an additional paragraph 1A. It asks in paragraph 1 for confirmation of a presumed grant of a right of way on foot with laden or unladen trolleys for the benefit of the petitioners and their successors. In the alternative it asks for the grant of a licence conferring such rights. In the alternative (by the new paragraph 1A) the petitioners in effect ask for a \*67 confirmatory faculty to validate the agreement made in October 1967 in so far as it related to pedestrian access with laden or unladen trolleys. By paragraph 2 of the amended schedule the petitioners seek "confirmation" of the grant of a similar right of way with motor vehicles subject to the conditions set out in the 1967 agreement. Again I construe this as a prayer for a confirmatory faculty. Paragraph 2 pleads that the vehicular right exists by virtue either of presumed grant by reason of long user as of right or by purported grant by the court of a licence. That is presumably a reference to the doctrine of prescription by lost modern grant. Finally the amended schedule asks for "the removal of the barrier erected at the entrance to the said churchyard (and completed on 3 February 1986)." I read this as an application for a faculty to remove the barrier and it was conceded by both counsel at the hearing that once the barrier had been erected, whether lawfully or not, a faculty would be required for its subsequent removal. The petition was accompanied by a letter dated 13 November 1986 from Messrs. Lee Bolton & Lee, acting for the petitioners, to the registrar of the court. This letter became part of the evidence at the hearing and it contains a material admission to the effect that the 1967 deed was not by itself effective to confer new rights of a permanent nature in the absence of a faculty, it being further conceded that no such faculty was asked for or obtained. The letter also gives further information about the petitioners' claim to pedestrian and trolley access having arisen by prescription.

The case of the individual objectors is set out in a large number of letters received at the registry from these persons following citation of the petition. Subsequently all these individual objectors (except Mrs. Robinson)



agreed to be represented by Messrs. Harland & Co., who by that time were also representing the incumbent, the team vicar and the parochial church council, and also the feoffees of St. Helen's and St. Martin's, being the trustees inter alia of certain lands or their proceeds of sale, and probably certain other assets, previously connected with the Church of St. Martin's. On 19 November 1987 Messrs. Harland & Co. wrote a letter to the registrar setting out in detail the objections of the individual objectors. On the same date they wrote another letter to the registrar setting out the detailed objections of the feoffees. These letters have also been taken for the purpose of the proceedings as setting out any objections of the parochial church council, churchwardens and clergy of the team ministry. Messrs. Lee Bolton & Lee supplied an answer dated 11 December 1987 to the two letters of objection. As far as directions are concerned I gave directions on 20 January 1987 and 5 March 1987 and some further directions were given by consent at a directions' appointment which was held before the registrar on 13 November 1987, when a formal order for directions was drawn up.

In the event the issues which arose at the hearing were somewhat different from those raised in the pleadings. To some extent this was due to certain concessions made on either side and to certain agreements between the parties as to some of the issues. In particular the parties had virtually reached an agreement, prior to the opening of the case, as to the limited extent of any vehicular access to the churchyard in future, subject to my being satisfied that a faculty should issue to implement \*68 such agreement. Also and by the same stage the parties opponent had come to accept the petitioners' case that they had in fact been using the churchyard for access on foot and by trolley for themselves and their servants, so that broadly-speaking the main issues relating to pedestrian access were (a) whether a right of pedestrian way was limited to the petitioners and their servants, or extended to licensees such as suppliers and customers and (b) whether such right amounted to an easement or merely to a licence. The parties opponent were no longer opposing all use by the petitioners of the yard, but were conceding pedestrian access as above and were also prepared to grant a limited amount of vehicular access (in case of emergency only) for a period of not more than 30 months. That period was put forward as reasonable on the basis of the petitioners' statement that their printing and newspaper business which they carried on from their premises would be coming to an end within such period of time. The question of the future form of the gate, and who should have a key to it, would fall to be decided in the light of the other issues.

In the background there was a problem about the future development of the petitioners' site and the implications which would arise as to future use of the yard by pedestrians and vehicles in relation to the site as developed. It became clear that the attitudes of both sides in relation to the existing position were coloured by their wishes and fears in relation to the position as it would be after redevelopment. Although it appeared to me after the opening of the case that some of the issues which I was being asked to decide were not fully pleaded by the petitioners and that as a result I might make decisions in certain areas where the amended schedule to the petition did not indicate that this would occur, I nevertheless decided that it was not necessary to adjourn the proceedings for the purposes of amendment of the schedule or for recitation of the amended petition. That was because I was not asked to do this by either counsel and it seemed to me that all the possible parties opponent who might have an interest in the new issues were either before the court or had received a sufficient general notification as to the scope of the issues likely to be decided at the hearing.

[The chancellor described the church and its history; noted that no regular church services were held but that the church was used extensively during the week for retreats and counselling work; described the petitioners' premises and business operations; and continued:]

As far as the parties opponent are concerned I have already made reference to the feoffees of St. Helen's and St. Martin's. There was originally a separate parish of St. Martin but by an Order in Council dated 13 October 1910 the benefice of St. Martin was united with the benefice of the nearby Church of St. Helen, Stonegate, and by a further Order in Council dated 19 October 1954 the parish of St. Martin and the parish of St. Helen were united to form one parish. Finally in 1975, when the then incumbent of St. Helen's and St. Martin's, Canon Porter, retired, a team ministry was formed, known as the York Central Team Ministry, whereby the ministries of St. Helen and St. Martin and a further church, All Saints, Pavement, were brought together in a team ministry. The team rector and incumbent of the three churches was (and \*69 is) Canon John Armstrong. There are two team vicars, one for each of the other churches and the team vicar of St. Martin's is the Reverend Peter Dodson. He is the clergyman responsible for the day-to-day administration of St. Martin's and one of his main ministries is the running of retreats at St. Martin's. The freehold of St. Martin's is therefore legally vested in Canon Armstrong during his incumbency.

[The chancellor enumerated the witnesses called for the parties opponent, referred to his visit to St. Martins and the petitioners' printing works and to the witnesses called on behalf of the petitioners, including their service managers past and present, and to the evidence of the Ven. Leslie Stanbridge, the Archdeacon of York, who gave him the views of the Diocesan Advisory Committee as to the current use of the yard and its future use and



continued:] I formed the view that all the witnesses, on both sides, who gave evidence as to the extent and nature of the use of the yard over the years were reliable witnesses. This is not a case where I have to decide a conflict of evidence as to the facts, but on the basis of all the evidence given I have to decide on the basis of those facts what inferences I should draw as to the existence, legal status, and scope of any rights to the use of the yard.

### Vehicular access

Prior to the opening of the case substantial agreement had been reached between the parties as to (a) the extent of any vehicular use up to the date of the hearing and (b) what vehicular use should be allowed subsequently. There had been no agreement at the time of the pleadings. What emerged from the evidence was that no vehicular access was possible prior to 1965 when the small walls and railings at the Coney Street end were removed for the purposes of building work on the church. It was common ground between witnesses on each side that during the course of the building works vehicles were able to come into the yard and were in fact brought in. Some of the vehicles related to the building works, some to the petitioners' business and some may even have belonged to members of the public taking advantage of the position. As the building works were nearing a conclusion both sides desired to regularise the position with regard to future use of the yard and eventually, after much discussion in meetings and in correspondence, an agreement (by deed) was entered into on 4 October 1967. In relation to vehicular access there was an agreement (in clause 3) that the petitioners should be entitled from time to time to pass with motor vehicles of a laden weight not exceeding 15 tons over the churchyard to and from their premises for the purpose of bringing into or taking out of the premises any equipment apparatus or machinery. By clause 4 there was an agreement that they should be permitted, on first obtaining on each and every occasion the written consent of the incumbent which consent should not be unreasonably refused, in case of emergency, to pass with motor vehicles over the churchyard for the purpose of collecting newspapers for delivery, and it was agreed that an emergency should be deemed to include a situation in which, by virtue of abnormal congestion of traffic in Coney Street, the collection of newspapers for delivery from the petitioners' normal collection point should be prevented or affected to a substantial degree. By clause 5 it was provided that the \*70 resurfacing of St. Martin's churchyard - which was about to take place - should be carried out in such a way as to bear the weight of vehicles of up to 15 tons. The petitioners agreed to pay a sum of £300 towards the resurfacing of the churchyard and by a separate agreement (in correspondence) they agreed to pay a further £1,500 to York Civic Trust, a charitable body concerned in the restoration of St. Martin's. The clauses relating to vehicular traffic clearly gave the petitioners additional rights in the yard but in law such rights without a faculty could not amount to more than a licence granted by the incumbent for the duration only of his own incumbency, and could not be binding on his successors in title to the freehold. That was conceded on behalf of the petitioners at the hearing, a faculty for any more extensive rights not having been sought at the time.

[The chancellor set out the evidence as to subsequent vehicular use of the churchyard and the installation of the present gate early in 1986, and continued:] During the opening counsel were able to announce that there was agreement between the parties to vehicular access rights being conferred for a maximum period of 30 months should the petitioners not have moved during that time, but for a period of time up to the completion of their move should they move within 30 months. The only difference between the parties was that the petitioners asked for liberty to apply for an extension of time beyond 30 months whereas the parties opponent did not wish any extension. Eventually, however, during closing speeches a formula was agreed whereby there should be liberty to apply to me for an extension of time, but on the basis that a good case would have to be made out for an extension of time and that it was accepted that I might not grant it. In relation to vehicular access the only matter which remains to be considered is whether the court has legal jurisdiction to grant a limited vehicular access of this kind, for a limited period of time, over land which is consecrated, but which has clearly not been used for burials for at least 100 years.

Any faculty will be for a licence for a fixed period of time and no question arises of granting an easement, quasi-easement or licence of indefinite duration. There have been a number of faculty cases where a licence has been granted for a private right of way over consecrated land. In *In re St. Benet Sherehog*; *In re St. Nicholas Acons* [1893] P. 66n. Tristram Q.C., Ch. granted faculties to the City of London Electric Lighting Company to construct flights of steps in portions of two disused churchyards for the purposes of their employees gaining access to electricity sub-stations underneath public streets adjoining the churchyards. He said, at p. 66:

"The court has undoubtedly jurisdiction to grant by faculty the user of a way across a churchyard for public convenience or to an individual for private convenience, provided no detriment will thereby accrue to the parishioners."





He granted licences for 21 years in each case. In *St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95 Tristram Ch. confirmed a previous grant by him (a year or so earlier) of a right of passage on foot across a consecrated churchyard, closed for burials by \*71 Order in Council, for the benefit of the occupiers of an adjoining property and this was done by a licence for 80 years. He declined to grant a faculty for a similar right of way in favour of the occupiers of another adjoining property, which right of way would have interfered with the one which he had previously sanctioned. Tristram Ch.'s decision was approved on appeal by Lord Penzance, Dean of the Arches [1896] P. 95, 106. In *In re Bideford Parish* [1900] P. 314 a faculty was granted for a portion of a disused consecrated burial ground to be thrown into the adjoining public highway. It was argued that the ecclesiastical court had no authority to allow consecrated ground to be applied to secular uses, but Sir Arthur Charles, Dean of the Arches, said, at pp. 326-327, that in the case of a churchyard closed for burials an ecclesiastical court had the discretionary power to make an order of the kind asked for. It is clear that the purpose of the faculty was that the piece of land to be transferred to the mayor, aldermen and burgesses of the town of Bideford should be used for the passage of vehicular traffic.

In *In re St. John's, Chelsea* [1962] 1 W.L.R. 706 Newsom Q.C., Deputy Ch. reviewed some of the earlier cases and said, at p. 714, that, in deciding whether or not to allow consecrated land to be used for secular purposes, the central question was: "Can the purpose for which the ground was originally consecrated no longer be lawfully carried out?" If so a faculty may issue for a secular use. If not the faculty may only issue for an ecclesiastical use, except in the limited case of a wayleave. Seeking to apply that dictum to the present case I have reached the conclusion that in practical terms it is no longer possible to carry out the purpose for which the churchyard was consecrated, namely for burials, and that it is in fact closed for burials. That was the effect of the evidence given to me by the parties opponent and a visual examination of the site shows that in practice it would be impossible to bury people there. I consider that it is therefore open to me in my discretion to allow a limited secular use of the churchyard to the extent proposed, particularly having regard to the time limit of 30 months, the fact that the licence will not allow vehicles to remain parked in the yard, and that it will allow vehicles into the yard only on rare occasions and on permission first being obtained from the incumbent, the team vicar or his deputy.

This conclusion is further supported by *In re St. Mary the Virgin, Woodkirk* [1969] 1 W.L.R. 1867 where the deputy auditor, Owen Stable Q.C., granted a faculty for a strip of graveyard measuring 260 yards by some 12 yards to be transferred to the borough council for the purpose of road widening, thereby allowing secular use of consecrated land, and this was done notwithstanding the opposition of the vicar, churchwardens and parochial church council concerned. Parts of the graveyard were still in use for burials. The deputy auditor granted the faculty because he was satisfied that it was in the public interest to do so. The land was required to widen an existing road into a dual carriageway, this being part of a very substantial road-widening scheme stretching over many miles. The case can be distinguished from the present one in relation to the public interest factor but it illustrates the proposition that the \*72 principle whereby consecrated land should be protected from secular use is not an absolute one.

Having considered these authorities, I have reached the conclusion that I should exercise my discretion in favour of granting a faculty for the very limited and short term vehicular use of St. Martin's churchyard which is proposed by the petitioners and agreed to by the parties opponent. The faculty and the licence will be in the terms of clauses 3 and 4 of the 1967 agreement but limited as to time in the manner agreed between the parties and with the words "incumbent or team vicar having responsibility for St. Martin's" in substitution for the word "incumbent" in clause 4. Further, the licence will be subject to a condition similar to clause 5 of that agreement, that is to say, the petitioners are to make good all damage caused by them to St. Martin's churchyard or to the Church of St. Martin by reason of the exercise of their rights of vehicular access above referred to.

### Bicycles and motorcycles

The evidence before me was that employees of the petitioners have over the years been allowed by the parties opponent to park a limited number of bicycles and motorcycles in the area between the west wall of St. Martin's Church and the printing works. The 1967 agreement referred to this and identified the area in which these vehicles should be parked. At the hearing it was indicated to me by both counsel that there was agreement that this practice should continue. For the sake of good order I will include in the faculty a licence for the identified area to be used for the parking of bicycles and motorcycles used by staff of the petitioners, but this licence will be for the limited period of time already provided for in relation to the vehicular access. The requirement as to the making good of damage will apply to the licence relating to bicycles and motorcycles as well as the licence for vehicular access.

### Pedestrian access



In discussing this matter it can be taken that the phrase "pedestrian access" includes that form of access in conjunction with the use of trolleys. It was common ground between the parties at the hearing that the use of trolleys had gone on over the years as an adjunct to pedestrian access. The petitioners claim a right of way for pedestrians, with or without trolleys, arising from longstanding user as of right. They claim this either by prescription at common law or by prescription under the doctrine of lost modern grant. They contend that the existence of a faculty should be presumed. They ask me to find that such a right exists and that it exists as an easement. Failing that they ask me to say that it is a quasi-easement, and failing that they ask me to say that it is a licence intended to be of permanent duration, such that it cannot be terminated without a further order of the court (which would be in effect a faculty to terminate the existing right). The parties opponent agree that the petitioners have exercised a right of pedestrian access for very many years and they do not dispute evidence that the right was being exercised in 1935.

The petitioners then asked me to determine the scope of the right, and they contend that it extends to the petitioners' licensees, such as its \*73 business suppliers, its customers, for example, people wanting printing work carried out, representatives of companies seeking to do business with it, and other persons having reason to come to the premises such as relatives and friends of staff of the petitioners coming to leave messages or to meet members of staff at lunch break and the like. The parties opponent contended from the start that any right of pedestrian access should not extend to licensees or visitors, but only to the petitioners themselves and their staff, and the parties opponent maintained that position throughout the hearing and asked me to find that the pedestrian access is limited to the petitioners and their servants.

The first question which I have to decide in relation to pedestrian access is whether I have jurisdiction in the consistory court to decide the questions relating to the existence, legal status and scope of a right of way. Basically the nature of the right of way claimed is similar to any other right of way and the principles applicable to the decision which I have to make are not affected by the fact that the right of way happens to be over ecclesiastical property. The law which I have to apply in reaching a conclusion is the ordinary secular law rather than any specifically ecclesiastical law. It was conceded by counsel for the petitioners that the relief which he sought in relation to the pedestrian access could equally well have been sought in the secular court, but he contended that it was convenient for me to deal with it in the ecclesiastical court and he maintained that I had jurisdiction. Clearly it is necessary to ensure that the ecclesiastical court does not trespass on the secular court's jurisdiction and there have been numerous cases, particularly in the last century, where the writ of prohibition has been used in the secular court to prevent the ecclesiastical court determining issues which ought to have been raised in the secular court.

I have considered whether I might have jurisdiction under section 6(1)(e) of the Ecclesiastical Jurisdiction Measure 1963 which includes in the original jurisdiction of the consistory court of the diocese

"any proceedings . . . which, immediately before the passing of this Measure, it had power to hear and determine, not being proceedings jurisdiction to hear and determine which is expressly abolished by this Measure."

This residual jurisdiction is referred to in *Halsbury's Laws of England*, 4th ed., vol. 14 (1975), p. 758, para. 1344. A footnote says that the third edition of *Halsbury*, in which the law stated was in general that in force on 1 October 1955, contained a statement to the effect that in some cases civil rights in connection with ecclesiastical property or with the recovery of money applicable to ecclesiastical purposes could be tried and decided in the ecclesiastical courts though such proceedings were uncommon. Reference was made to *Butt v. Jones* (1829) 2 Hagg. Ecc. 417; *Linnell and Walker v. Gunn* (1867) L.R. 1 A. & E. 363; *Liddell v. Rainsford* (1868) 38 L.J. Eccl. 15 and *Proud v. Price* (1893) 63 L.J.Q.B. 61, 64-66. Having looked at these cases I am satisfied that it would not be right for me to attempt to deal with the questions which arise in relation to the right of way in the present case by seeking to rely on the residual jurisdiction provision of the Measure of 1963. Some of the cases \*74 cited in the third edition of *Halsbury's Laws*, vol. 13 (1955), p. 491 are faculty applications in which a preliminary issue arose to be decided, and these are therefore in the category of cases to which I will refer in due course. There are only one or two examples of decisions involving civil rights or the recovery of moneys not connected with the faculty jurisdiction. *Liddell v. Rainsford*, 38 L.J. Eccl. 15 related to a dispute as to which of two clergymen should be entitled to retain and use communion alms for distribution to the poor of the parish. The right to administer communion alms was clearly a matter of ecclesiastical law, not appropriate to be litigated in a secular court. *Proud v. Price*, 63 L.J.Q.B. 61 related to a dispute over whether pews could be altered by the incumbent and



churchwardens without the concurrence of a member of the congregation who claimed to be entitled to the exclusive use of the pews.

Neither counsel has invited me to decide the issues about the right of way as a matter within my residual jurisdiction under the Measure of 1963, and it is my independent view that I should not do so because the rights with which I am concerned are not exclusively or even substantially of an ecclesiastical nature but are rights existing wholly in the secular field. For the purpose of determining whether the rights are of an ecclesiastical nature so that they could be determined under the residual jurisdiction I consider that it is purely incidental that in the present case the rights are claimed in respect of ecclesiastical property, i.e. the churchyard of St. Martin's. The issues as to the existence and scope of the rights would be the same whether the rights were claimed in respect of ecclesiastical property or secular property. The issue as to the legal status of the right requires some consideration of the law relating to the effects of consecration on land such as a churchyard but it is an area of law which can be considered as well in a secular court as in an ecclesiastical court. The fact that in relation to this one aspect of the case the secular court would have to take into account the law relating to consecration and the existence of the faculty procedure is in my view insufficient to justify me in regarding the issues as a whole which I have to decide as being issues relating to ecclesiastical rather than secular rights.

I am urged, however, to decide these issues on the basis that they are ancillary to the petitioners' application for a faculty. If the petitioners do not have an existing pedestrian right of way, with or without trolleys, they ask for a faculty granting them such right of way. If they have a right of way which does not extend to licensees they ask for a faculty granting such extension. It is argued that in order for me to decide whether faculties are required for these purposes I must first decide what the petitioners' existing rights are, so that the jurisdiction in deciding these issues is genuinely incidental to the faculty jurisdiction. The parties opponent do not argue against those submissions. I accept that there is a long-standing practice whereby the ecclesiastical court will determine matters of a temporal nature which are incidental to the main ecclesiastical jurisdiction being exercised. In Phillimore's Ecclesiastical Law, 2nd ed. (1895), vol. 2, p. 1115, the following view is expressed: <sup>75</sup>

"In case the principal matter belong to the cognizance of the spiritual court, all matters incidental (though otherwise of a temporal nature) are also cognizable there; and no prohibition will lie, provided they proceed in the trial of such temporal incident, according to the rules of the temporal law . . ."

In relation to the latter part of this quotation I can confirm that the law which has been argued before me and which I shall apply in relation to the rights claimed by the petitioners is the temporal law.

In deciding whether to treat these issues as incidental to the faculty jurisdiction I take the view that I must first be satisfied that this is a case in which I could, if satisfied on the merits, grant the faculty sought. Relevant to that is the question of whether the court has power to grant a faculty for a right of way, or an extension to a right of way, in circumstances where the incumbent, churchwardens and parochial church council do not concur. Such non-concurrence will obviously be a matter of importance in relation to the merits, but does it remove the court's jurisdiction? The petitioners referred me to [In re St. Andrew's, North Weald Bassett \[1987\] 1 W.L.R. 1503](#) a decision of Cameron Q.C., Ch. There a secular parish council petitioned for a faculty for a licence to pass and repass over a churchyard for the purpose of access to a proposed cemetery. The petition was opposed by the incumbent, churchwardens and parochial church council. Cameron Ch. discussed, at p. 1506, the implications of the opposition by these persons and bodies. She referred to [Walter v. Mountague and Lamprell \(1836\) 1 Curt. 253](#) where Lushington Ch. said, at p. 260:

"I think the consent of the rector is necessary by reason of his common law right; but I do not say whether or not, if the rector be called upon to show cause, and he obstinately opposes the faculty, the court may grant it. That point I consider it is not necessary to decide."

Cameron Ch. concluded that Lushington Ch. had left the point open. She then referred to [St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd. \[1896\] P. 95](#) where the question of overriding the opposition of the rector did not arise but Tristram Q.C., Ch. made some general observations about churchyards and the position of the incumbent. He said, at pp. 101-102:



"churchyards are by the law placed under the protection and control of the ecclesiastical courts and the freehold of the churchyard is in the rector, the fee being in abeyance; but the freehold is vested in him for the use (in so far as may be required) of the parishioners. Subject to that use, he is entitled to receive the profits arising from the churchyard; but he cannot by law make any appropriation of the soil of the churchyard. Such appropriation can only be made for limited purposes by a faculty issued from the ecclesiastical court."

Tristram Ch.'s judgment was upheld on appeal to the Court of Arches where Lord Penzance, Dean of the Arches, in no way demurred from anything that the chancellor had said. Cameron Ch. then referred to *In re St. Paul's, Covent Garden* [1974] Fam. 1, 4 where Newsom Q.C., Ch. \*76 referred to the above-quoted passage from *St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95 and said that as churchyards were under the protection and control of the consistory court he took the view that he had jurisdiction to grant a faculty which would override the views of an incumbent should it be right to do so. He said, at p. 5:

"No doubt if the company were to petition me without the incumbent or parochial church council approving, I might very well refuse the faculty. I should not do so because I had no power to grant it but upon the merits."

I am prepared to follow the reasoning in the three cases to which I have referred and I consider that I have jurisdiction, if I consider it right to do so on the merits, to grant a faculty for a more extensive pedestrian access than that to which the church bodies are willing to agree. This arises from the fact that, as a result of consecration of the churchyard, the fee is in abeyance and the right to deal with the fee, including the right to grant a right of way, is vested in the ordinary on whose behalf the consistory court may act. Having concluded that I do have jurisdiction in an appropriate case to grant a faculty, I am able also to conclude that if some issue is genuinely ancillary to the question whether or not such faculty should be granted I have jurisdiction to decide such issue.

A further example of the consistory court deciding issues as ancillary to the faculty jurisdiction is *In re St. Mary of Charity, Faversham* [1986] Fam. 143, a decision of Judge Newey Q.C., Com. Gen. There the petition was for the sale of a flagon so that the proceeds could be used to carry out urgent repairs to the church. Appearance was entered by several bodies some of which contended that the parish did not own the flagon and also that the commissary court had no jurisdiction to determine their ownership. The Commissary General held that an ecclesiastical court does have jurisdiction to determine ownership of chattels when it is essential to do so in order to decide whether to grant a faculty in respect of the chattels. As already indicated, I conclude that I have jurisdiction on the basis that these issues are ancillary to my faculty jurisdiction.

Mr. Douglas on behalf of the petitioners urged on me, as a further basis for my taking jurisdiction over these issues, the fact that the petitioners' case, that they are entitled to pedestrian access with or without trolleys and for the benefit of licensees, is based, inter alia, on the doctrine of prescription by lost modern grant and that it is inherent in that doctrine, when applied to a way over a churchyard, that the grant of a faculty at some time in the past must be presumed. He then said that it would be necessary for the court to construe that faculty, even though no document exists and the doctrine assumes that it has been lost, and he argued that this exercise of construction is one for the ecclesiastical court and not the secular court. He referred to the *St. Gabriel, Fenchurch Street* case [1896] P. 95 as an example of a chancellor taking jurisdiction to construe a previous faculty (in that case one granted by himself). As I have decided to accept jurisdiction on a different basis, it is not necessary for me to decide whether I would have \*77 jurisdiction to decide issues as to existing rights of way and their scope because of the presumed existence of a faculty, and I therefore leave that question open.

In relation to the existence, nature and scope of any existing right of pedestrian way I have to decide three questions. (a) Is user as of right proved by the evidence, so as to establish a prescribed right either at common law or under the doctrine of lost modern grant? (b) What is the scope of the right and in particular does it extend to use of the way by licensees, for example, customers, suppliers, representatives of companies wishing to do business with the petitioners, other persons having business dealings with the petitioners and friends or relatives of members of the petitioners' staff wishing to speak to members of staff or to leave items for them as a matter of convenience? (c) Does any such right amount in law to an easement or to a licence, and if it is a licence is it determinable by any of the church bodies concerned either at will or on any particular grounds, or is it



determinable only by the consistory court? This third question is largely a question of law whereas the first two questions are largely questions of fact and depend on the evidence given at the hearing and contained in documents and correspondence placed before me. [The chancellor reviewed the evidence and concluded:] A pedestrian way, both with and without trolleys, has been exercised over this churchyard for very many years. It has been exercised since well before 1935 and I conclude for at least the last 100 years. The age of each of the buildings known to have stood around the churchyard was not established but some of them have been there for at least 100 years and it seems to me undeniable that the occupiers of the buildings around the churchyard have had a pedestrian access to Coney Street. I find that it has not been restricted to any particular route across the churchyard. I further find that it has been exercised as of right, that is to say *nec vi, nec clam, nec precario*. In particular correspondence in 1949 seems to establish user as of right. I think that the user has been for the benefit of the petitioners and their predecessors in title as fee simple owners of the printing works buildings and I am satisfied that the use was never furtive or secret but was entirely open. I find that the use was of a kind and quality capable of giving rise to a right by way of prescription. The period of user as of right required under the [Prescription Act 1832 \(2 & 3 Will. 4, c. 71\), section 2](#), is 20 years next before the commencement of the proceedings and I am satisfied that such use has taken place for a considerably longer period than 20 years prior to the commencement of the faculty proceedings. Because of the legal principles to which I have already referred as to the right to grant a right of way being in the ordinary and not in the incumbent (as freeholder for the time being) or any other body or person, I conclude that the appropriate form of prescription in relation to the present case is that under the doctrine of lost modern grant (including a presumed faculty) rather than by use from time immemorial. I am therefore satisfied that a right of way on foot, both with and without trolleys, over the whole of the churchyard from Coney Street at one end to the printing works at the other has been established. *\*78 How extensive is the right?*

Does it extend only to the petitioners and their servants or does it also extend to licensees? There is substantial evidence that the right of way was exercised by and for licensees as well as servants of the company. The 1949 correspondence does not indicate that, in the view of the feoffees, the right of way was not available to licensees. The inherent probabilities point to the right of way being for licensees as well as the company and its servants. It would be very difficult to operate a business from these printing works without being able to receive calls there from customers, suppliers and other persons having a business interest since geographically there is no realistic access to the premises otherwise than through the churchyard. The large sign "Herald Printers" which was clearly visible from the street would in my view indicate to customers and suppliers that they could cross the yard to reach those premises. When an almshouse building on the east side of the churchyard was conveyed to the petitioners in 1950 the feoffees included a right of way from the entrance to the almshouses across the churchyard to the street and I think it is plain that such right of way must have included a right in the occupiers in the almshouses to receive visits from licensees including such people as their friends, relatives, tradespeople and the doctor. It was conceded by Mr. Bullimore on behalf of the parties opponent that the pedestrian right of way for the almshouses must have included, and did include, a right in respect of licensees. If that is the case in relation to the almshouses it is difficult to see why it should not be the case also in relation to the commercial premises since there are powerful practical reasons in both cases for the right being required for licensees although the classes of people requiring to come to the premises would clearly vary as between residential property and commercial property. Thus far there would appear to be substantial evidence to support the petitioners' case on this point.

However, it is necessary to consider with some care the wording and inferences to be drawn from the 1967 deed between Canon Porter and the petitioners. Mr. Bullimore, on behalf of the parties opponent, argued that this deed evidences a more limited right of way, not extending to licensees, and he said that the petitioners could not go behind what they agreed to in 1967. The deed is dated 4 October 1967 and it is clear from the correspondence that it resulted from a great deal of prior discussion. The original draft had to be considered and amended before its terms were agreeable on both sides. Mr. Bullimore points to clause 2 of the recital which says that one of the purposes of the agreement is to "remove any doubts or uncertainties which may exist as to the rights of the company over St. Martin's churchyard." I agree with him that it follows that the intention of the agreement was to record accurately the extent of the existing right. This is dealt with in clause 2 of the main part of the agreement which reads:

"The parties desire to record that for many years past the company and its servants have enjoyed and shall continue at all times hereafter to enjoy a right of way on foot and with laden or unladen trolleys over St. Martin's churchyard to and from Coney Street to and from the company's printing works shown coloured red on the plan."



\*79 The parties opponent say that clause 2 defines the right of pedestrian access as being for "the company and its servants" only. It is argued that if it had been understood that the right was also for the benefit of licensees this would have been stated because of the degree of care which was being used in drawing up the wording of this document as a record of the existing position. [The chancellor referred to correspondence leading up to the 1967 deed, and continued:] The essential contention of Mr. Douglas was that the word "company" should be construed as meaning the enterprise or business of the petitioners, so that it would include all pedestrian use of the churchyard connected with that enterprise or business. He supported this interpretation by referring to the word "enjoyed" and argued that the phrase "for many years past the company has enjoyed and shall continue at all times hereafter to enjoy" indicates that the company was to benefit from the right of way and it is to be inferred that such benefit included a right for its licensees to visit its premises. This seems to me to be a powerful argument.

Mr. Douglas referred me to a passage in *Gale on Easements*, 15th ed. (1986), p. 292, where it is said, "the maxim that a grant must be construed most strongly against a grantor must be applied," and there is reference to *Wood v. Saunders (1875) 10 Ch.App. 582*. While that is a passage relating to a grant rather than, as in the present case, the recital of an existing situation, it seems to me that the same principles of construction apply. The passage in *Gale* continues:

"In particular, in construing a grant the court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used."

These references seem to me to support the petitioners' case.

Mr. Douglas then drew my attention to clause 3 of the deed which confers the right for vehicles of a laden weight not exceeding 15 tons to be brought onto the churchyard for the purpose of bringing in or taking out of the petitioners' premises any equipment apparatus or machinery. He argued that it must in common sense have been envisaged that on occasions such vehicles would belong not to the petitioners themselves but to some other company or individual who agreed to take away machinery no longer required at the premises or who was supplying new machinery. It is highly improbable that all new equipment apparatus and machinery would be transported on the company's own vehicles. On that basis it is significant that the express wording of this clause, if narrowly construed, would limit the company in such a way that the vehicles of any other company or person could not come onto the churchyard. That points towards a wide interpretation of the word "company," similar to that for which Mr. Douglas contended in relation to the preceding clause, that is to say that the word "company" means the enterprise or business activity of the petitioners. Perhaps an alternative way of arriving at the same result is to say that if permission is given to a company to exercise a right over a churchyard this will be construed as including licensees unless the contrary is stated. Here there was clearly an opportunity to \*80 say that the company's rights did not include its visitors but that was not stated.

I find the petitioners' arguments compelling and I think that there is some judicial authority in support of them. In *Gale on Easements*, 15 ed., p. 307, reference is made to *Hammond v. Prentice Brothers Ltd. [1920] 1 Ch. 201*, 216, where Eve J. said:

"After all the grant is appurtenant to the dominant tenement, and in my opinion in the absence of special circumstances ought to be so construed as to secure to the grantee all that is necessary for the reasonable enjoyment of the dominant tenement . . ."

*Gale* continues, at p. 307: "Words in a grant mentioning certain persons as entitled to use, e.g. tenants, visitors, and the like, are generally to be regarded as illustrative, and not as restrictive." Both counsel referred me to *Baxendale v. North Lambeth Liberal and Radical Club Ltd. [1902] 2 Ch. 427* where it was held that the grant, contained in a lease, of full right "for the lessee, his executors, administrators, and assigns, undertenants and servants" at all times and for all purposes connected with the use and enjoyment of the premises, to use a way, extended to members and honorary members of, and all other persons going lawfully to and from, a workmen's club afterwards established on the premises. Swinfen Eady J. said, at p. 429, that it could not be doubted that, in the ordinary case of a grant of a right of way to a house and premises which could only be used as a private



dwelling house, the right would extend not only to the grantee, but to members of his family, his servants, visitors, guests and tradespeople, even though none of those persons was expressly mentioned in the grant; and that the necessary or reasonable user of the club premises as a club required that there should be liberty of passing over the way in question for the persons and vehicles shown to have used it. It seems to me that in effect Swinfen Eady J. was construing the word "lessee" as including the lessee's family, visitors, guests and tradespeople going lawfully to his premises. The petitioners in the present case asked me to construe the word "company" in a similar way.

There are two cases referred to in *Gale on Easements*, at pp. 307-308, where the court was more reluctant to put a wide interpretation on documents creating rights of way. In *Thornton v. Little (1907) 97 L.T. 24* a right of way was granted so as to be annexed to premises then used as a school to the grantee, her administrators and assigns, and her and their "tenants, visitors, and servants." Kekewich J. seemed inclined to regard the enumeration of permitted persons as exhaustive but he did hold that he could interpret the words in the light of the circumstances and therefore the word "visitors" included pupils. In *Keith v. Twentieth Century Club Ltd. (1904) 73 L.J.Ch. 545* the right to use a London square garden was held not to apply to the residents of a club when the house for the benefit of which the right had been granted was converted into a residential club. Buckley J. declined to extend the words of grant, "heirs executors administrators and assigns and his and their lessees and sub-lessees or tenants (being occupiers for the time being [of the house]), and for his and their families and friends," to residents of the \*81 club. It seems to me that this case turned to a considerable degree on the fact that the dwelling house was no longer being used in the way envisaged at the time of the grant and that the language of the grant, particularly the part about use by families and friends, was no longer apt to deal with the new situation of a residential club. This is an illustration of the words of the deed being construed in the light of the circumstances.

Applying that principle in the present case, and particularly having regard to *Baxendale v. North Lambeth Liberal and Radical Club Ltd. [1902] 2 Ch. 427*, I consider that the decided cases support the petitioners' contention that I should construe the word "company" widely so as to cover the company's licensees having a lawful business interest in coming to the premises. I therefore reach the conclusion that the right of pedestrian way was in fact exercised by the petitioners throughout the period not only by themselves and their servants but also by and for their licensees having a legitimate business interest in coming to their premises.

### Easement or licence

The remaining question is what is the legal status of the pedestrian right. Mr. Douglas has argued that it is an easement but Mr. Bullimore says that it is a licence. I have already made some reference to the effects of consecration and the putting into abeyance of the fee. In Halsbury's Laws of England, 4th ed., vol. 14, p. 571, para. 1073, there appears the statement:

"When consecrated a church or churchyard ceases to be the property of the donor, who, by dedicating his property to God, voluntarily sacrifices it for the attainment of sacred objects. Thereafter, in strictness only the authority of an Act of Parliament or Measure of the Church Assembly or General Synod can divest it of its sacred character, and a faculty should not be granted for applying it to secular purposes. Deviations from the strict rule are, however, frequently allowed . . ."

The authority cited is *Hilcoat v. Archbishops of Canterbury and York (1850) 10 C.B. 327*, 347. Halsbury says, at p. 573, para. 1074:

"It is not possible to alienate consecrated land or buildings completely from sacred uses and to appropriate them permanently for secular uses without the authority of an Act of Parliament or a Measure of the Church Assembly or General Synod. . . . Except in the pursuance of [such powers], it is not lawful to sell, lease or otherwise dispose of any church (or part of it) or the site (or part of it) of any church or any consecrated land belonging or annexed to a church . . ."

There are a few exceptions to this principle, for example in the road widening cases to which I have already referred. In *St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd. [1896] P. 95* a pedestrian right of



way was granted in the form of a licence for 80 years and it was assumed by all parties and by the chancellor that it was not appropriate to grant an easement.

In *In re St. Peter's, Bushey Heath* [1971] 1 W.L.R. 357 the petitioners, the incumbent and churchwardens, petitioned for a faculty to authorise them to enter into an agreement for the granting of a right of way across <sup>\*82</sup> part of the unconsecrated curtilage of the parish church. Newsom Q.C., Ch. granted a faculty authorising the user, subject to conditions, for 99 years. Originally the petitioners had asked for a more extensive right, not limited to 99 years. The chancellor said, at pp. 359-360:

"[Counsel for the petitioners] also conceded, and in my judgment correctly, that it is impossible to create a legal estate in consecrated land, save under the authority of an Act of Parliament or a Measure . . ."

He referred to *St. Mary Abbots, Kensington (Vicar and Churchwardens) v. St. Mary Abbots, Kensington (Inhabitants)* (1873) Trist. 17. Newsom Ch. in granting a faculty for a licence directed that the legal estate in the land should remain in the incumbent. My conclusion is that a full legal easement of way could not have been acquired in the present case. I have previously indicated my view that the case falls to be considered under the doctrine of prescription by lost modern grant, there being a presumption of the grant of a faculty at some time. I consider that as a matter of law such a faculty could not have conferred an easement, but it could have conferred a licence of indefinite duration. Mr. Douglas did not concede this but he agreed that in practical terms an indefinite licence would have the same effect as an easement and he was disposed to refer to such a licence as a "quasi-easement" for that reason. He did refer me to the [Prescription Act 1832, section 2](#), in support of his primary contention that there can be an easement of way over consecrated land and I must refer to that section. The relevant parts read:

"no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement . . . to be enjoyed or derived upon, over, or from any land or water of our said Lord the King . . . or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of 20 years . . ."

It is argued that, since this section speaks of "any way or other easement . . . over . . . the property of any ecclesiastical . . . person," it must be implying that an easement of way can exist over ecclesiastical property. I do not believe that is a necessary interpretation of this section because I think that the reference to ecclesiastical property is clearly wide enough to include land which is not consecrated and in respect of which an easement can therefore be acquired. I do not read the section as intending to alter the rule of law about consecrated land which clearly existed in and prior to 1832 whereby an easement over consecrated land cannot be created. In those circumstances the lost faculty which is to be presumed because of the user as of right to which I have already referred must be deemed to be a faculty for a licence and not an easement. <sup>\*83</sup> *Terms of the licence*

Mr. Bullimore agreed that the licence for a pedestrian way was of indefinite duration and was not terminable by the parties opponent. I agree with that concession. However, just as the acquisition of the licence is deemed to have been by faculty, the fee and control of the land being in the ordinary, so the licence can be terminated by faculty if the ordinary, acting through the consistory court, is put on notice that the licence is being abused and if the consistory court considers that the licence should be terminated. The procedure would involve an application for a further faculty to terminate the existing licence. I find therefore that the licence which is in existence is one which is terminable only by a further faculty application. It extends to persons having a lawful business interest in attending the petitioners' premises and it also extends to such people as friends and relatives of members of staff who may be allowed by the petitioners to come to the premises from time to time to bring messages and the like.

In relation to the question whether the quality of the petitioners' use of the right of way, in so far as it related to licensees, was "as of right" Mr. Bullimore urged me to take the view that the use by licensees had been secret. He said that it would not have been possible for anyone on behalf of the church authorities to know whether a particular person walking across the churchyard was a member of the petitioner company or one of its servants, or contrariwise was a licensee. That may be so in practice, though I think that the church authorities could have





called for a list of employees and members of the company so as to be able to identify them and distinguish them from licensees if they had wished to do so, and that clearly did not occur. But be that as it may I do not think the test of "secrecy" is whether the church authorities could in practice distinguish between servants and other people, but it is a question of whether there was any lack of openness or concealment being practised by or on behalf of the petitioners. I am satisfied that there was not and that the petitioners allowed their customers, suppliers and other visitors to come to them openly across the churchyard. The presence of the large sign facing towards the road seems to me to make that clear because, if there had been any intention of secrecy, it would have been most unwise to display that sign in such an obvious manner and over such a long period of time. I have reached the conclusion that the 1967 agreement should be construed on the basis that the word "company" is wide enough to include licensees. Mr. Bullimore did suggest to me at the end of his submissions that the agreement might amount to an estoppel by deed. That argument cannot arise in the light of my construction of the relevant clause.

Having reached a conclusion that the right of way is to be used by persons having a legitimate business interest to come to the premises, I conclude also that if there are circumstances in which the petitioners genuinely appoint an agent for the purposes of carrying out some part of their business, so that that person needs to come to the premises on foot, he becomes a licensee within the class of persons who has a business interest to come to the premises. To that extent therefore agents are within \*84 the class of person covered by the right of way. An agent not connected with the petitioners' business would in my view be outside the class.

Having reached these conclusions in relation to the existing right of pedestrian way it clearly becomes unnecessary for me to consider the petitioners' application that, in the absence of such a right, I should grant a faculty to provide it. [The chancellor dealt with the necessary modifications to the gate, consequent on his findings as to access; directed that, in view of the proposal to develop the site occupied by the petitioners, the present proceedings should be kept alive by the faculties and orders granted being made until further order; referred to the possibility of a major retail development on the site, and continued:]

### Future of the site

My reason for declining to deal with future aspects at this stage is not any procedural problem in relation to the petition and citation, but is a question of jurisdiction. I do not consider that I have jurisdiction to make rulings about the scope of rights of way of a basically secular nature unless to do so is necessarily ancillary to an application for a faculty of a kind which it would be possible for me to grant. In relation to the development proposals it is possible that when the proposals are clear a faculty application could be made asking the court to grant a faculty for an extension of the existing right of way so that it covers the extended class of licensees (both in quality and quantity) which the petitioners will say should be allowed to use the churchyard. I think it might well be a matter necessarily ancillary to such an application for me to decide at that stage whether this increased class of visitors is or is not within the existing pedestrian right of way. I am satisfied however that at the present time any adjudication as to whether the existing right of way extends to a large number of customers visiting a retail outlet, and members of the public window-shopping, could not be necessarily ancillary to any faculty application which I could at present consider. I could not consider a faculty application relating either to a development for retail business or a development for the division of the existing premises into a number of light industrial businesses until particulars of the proposals are clear. I cannot consider matters ancillary to such a faculty application until the faculty application itself is properly constituted.

It is clear that if a stage is reached where those issues have to be decided there will be a great deal more information which will be needed by the court. There will need to be evidence as to the number of customers and members of the public likely to be wanting to use the churchyard and this will depend to a substantial extent on what other access there may be to the proposed redeveloped premises. If there is no other main access to those premises one could envisage a situation where the present 50 or 60 pedestrians using this yard to get to the printing works might increase to many hundreds per day. The question would then arise whether such use could or could not fall within the existing right. As far as non-employees are concerned the existing right has related to a relatively small number of customers, suppliers and others having a business interest to come to the premises. The vast increase in numbers of customers might be outside the existing use. Also there might well be a change in the quality of the use as well as a change in the quantity of it, because the \*85 people coming into the churchyard would not only be customers but would also be people who simply wanted to walk round looking in shop windows, or perhaps entering the shops without intending to buy, and they would thereby be more in the category of ordinary members of the public than the category of customers. It would be a use considerably wider than the existing one where all the licensees are persons having a business interest in going to the petitioners'



premises and are not going to those premises as tourists or window-shoppers or for some other non-business purpose.

It would also be necessary to have information as to the extent of any nuisance caused in other retail areas of the City of York by noise from shops, bad behaviour by the public and/or people such as buskers and street vendors. It has to be borne in mind that this site is in an extremely busy area in the centre of York and in the summer months in particular vast numbers of people visit the city. The situation in the Coppergate Centre, though no doubt different in detail, might provide some indication of how the public would use a new retail outlet on the printing works site. It would then be necessary for considerable thought to be given to the question of safeguards for the church and as to how the use of the churchyard could be controlled and monitored. It would have to be borne in mind that the churchwardens and the parochial church council both have legal responsibilities in respect of the churchyard. The question of making good any damage in the churchyard caused by customers or members of the public would have to be considered. Again there would be a question of who should maintain insurance against the risk of people using the churchyard being injured.

The question of whether as a matter of law the existing right for customers to use the churchyard could extend to a very much larger number of customers as a result of the development may well turn out to be complex. Prior to my informing Mr. Douglas that I felt unable to proceed into this area (and his agreement that I should not do so) he referred me to certain authorities and Mr. Bullimore also did so. For the record it may be of value to list some of these. I was referred to *Jackson on Easements* (1978), pp. 148 and 149, in relation to whether an increase in user if very great can of itself amount to excessive user. It is possible that a change in quantity might be so vast as to amount to a change in quality: see *Woodhouse & Co. Ltd. v. Kirkland (Derby) Ltd.* [1970] 1 W.L.R. 1185. I was also referred in this context to *Keith v. Twentieth Century Club Ltd.*, 73 L.J. Ch. 545 where the right to use the garden in the square was held not to apply to the residents of a club following the conversion of the house. Plainly these are difficult questions and I have indicated the way in which they might come within my jurisdiction if the issue raised by them is necessarily ancillary to a faculty application which I would in turn have jurisdiction to grant. [The chancellor concluded by directing that the petitioners should pay the court costs and two-thirds of the costs of the parties opponent.]

## Representation

Solicitors: Lee Bolton & Lee ; Harland & Co., York .

*Orders accordingly. (C. N.)*

## Footnotes

<sup>1</sup> Ecclesiastical Jurisdiction Measure 1963, s. 6(1) : see post, p. 73E-F.



## **Appendix 21**

### **Schedule 14 appeal documents**

**STATEMENT OF CASE OF COUNCIL OF THE CITY OF  
YORK**

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



3A Eagle Wing  
Temple Quay House  
2 The Square  
Bristol, BS1 6PN

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Mr S Harrison (Chairman)  
Bishopthorpe Parish Council

Your Ref:

Our Ref: FPS/C2741/14A/3

Date: 05 October 2021

---

Dear Sir

WILDLIFE AND COUNTRYSIDE ACT 1981

City of York Council

Appeal against refusal to add a Footpath between Chanty Lane and Ferry Lane, Bishopthorpe (extending to Acaster Malbis)

I refer to your letter of 31 July 2021 appealing against your authority's decision not to make an order under section 53(2) of the above Act modifying their definitive map and statement.

Following an examination of the papers supplied by you and your authority, it has become apparent that the appeal is flawed and cannot proceed for the following reasons.

- The right of appeal only applies when an authority has made a decision not to make an Order following an investigation into the application. There is no right of appeal if the authority rejects the application as invalid (not properly made) or the authority decides to make an Order that differs from the application.
- In this case it appears that the City of York Council in the report dated 26 July 2019 decided to make an Order to add the route applied for but not including the section between Chanty Lane and Ferry Lane so there is no automatic right of appeal in this case.
- It has been noted that the Order has been made by the City of York Council and Bishopthorpe Parish Council has objected to the on the grounds that it does not include the above route. In due course the Council will need to submit the Order to the Secretary of State for determination.

No further action will be taken regarding your appeal. This letter has been copied to the Council for their information..

Yours faithfully

*Clive Richards*  
(Rights of Way Section)



## GENERAL SYNOD

### LEGAL ADVISORY COMMISSION

#### Public rights of way over land forming part of a churchyard

1. The Commission has been asked whether it is possible for a public right of way across a churchyard to be created. The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated as a highway under section 31 of the Highways Act 1980, but that this will not always be the case.
2. **The first part of this opinion (paragraphs [4] to [36]) sets out how, as a matter of law, a highway may come into existence.** It is necessarily of a technical nature and is intended primarily for legal practitioners and others who are familiar with legal concepts.
3. **The second part (paragraphs [37] to [44]) is concerned with the practical steps that may be available to an incumbent and parochial church council should they wish to prevent a public right of way arising.**

#### PART 1: THE LEGAL BASIS FOR A HIGHWAY

##### Dedication as a highway at common law

4. As a matter of law, a highway is a way over which there exists a public right of passage. A public footpath is a highway, as is a bridleway or a way for vehicles.
5. At common law, a highway can arise in either of two ways:
  - (i) express dedication by the owner of the land in question as a highway, or
  - (ii) inferred dedication based on the fact of public user over a period of time (which need not be of any particular length) coupled with conduct on the part of the landowner such as to indicate that his intention was to dedicate the land in question as a highway.
6. At common law, only a fee simple owner (a person who owns land outright) can dedicate land as a highway because dedication is by nature dedication in *perpetuity*; a person with only a limited interest cannot act so as to bind land in perpetuity. So, at common law, a tenant for life could not expressly dedicate land as a highway; nor could it be inferred that he had done so.
7. Benefice and church property – including any churchyard – is vested in the incumbent in his corporate capacity. In that sense the incumbent is the ‘owner’ of the churchyard. But the incumbent is not an outright owner. An incumbent’s interest is less than that of a fee simple owner; the fee in respect of benefice and church property is permanently in abeyance.<sup>1</sup> An incumbent’s position is equivalent to that of a tenant for life.<sup>2</sup> An incumbent, therefore, does not have the legal capacity necessary to dedicate as a highway land forming part of a churchyard and it cannot be inferred that he has done so.

8. The position at common law, therefore, is that a right of way cannot be created over a churchyard. In a 2013 Inspector's decision letter concerning a proposed addition to the Definitive Map of a footpath over a churchyard, a claim of inferred dedication at common law was rejected.<sup>3</sup> See, too, section 68(2) of the Mission and Pastoral Measure 2011 which provides (subject to exceptions that are not material here), "it shall not be lawful to sell, lease or otherwise dispose of ... any consecrated land belonging to or annexed to a church ...".
9. It is, however, possible for a faculty to authorise the use by a highway authority of part of a churchyard as if it were a highway (or part of a highway). This, it is suggested, was the rationale for the Consistory Court of London holding in *Vicar and One of the Churchwardens of St Botolph without Aldgate v Parishioners of the Same* [1892] P 161 that that the Court had jurisdiction to authorize by faculty the appropriation of a portion of the churchyard required for a proposed widening of the adjacent street.<sup>4</sup> The power of the consistory court to grant a faculty "authorising a suitable use" of land belonging to or annexed to a church is expressly preserved by section 68(15) of the Mission and Pastoral Measure 2011.

### **Presumed dedication under the Highways Act 1980**

10. Section 31 of the Highways Act 1980 provides for dedication of land as a highway to be presumed in certain circumstances. A copy of section 31 is annexed to this Opinion.
11. The facts that have to be made out in order to establish the presumption are that "a way over any land ... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years". "As of right" has its usual legal meaning – namely that the use in question has not been by force, has not been clandestine, and has not been with the permission of the owner (*nec vi, nec clam, nec precario*).<sup>5</sup>
12. Under section 31(1), provided the requisite facts are made out, "the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period of 20 years to dedicate it."
13. There is therefore no need to infer a dedication by an owner: the way becomes a highway by operation of law. As Scott LJ said in *Jones v Bates* [1938] 2 All ER 237 at 246, "The change of the law brought about by statute is that, upon proof of such user for the requisite period, the conclusion of dedication follows as a presumption *juris et de jure*, instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway."
14. Dedication arises by virtue of the operation of the subsection: there is no requirement that the person in possession of the land in question has *power* to dedicate it. That this is the correct construction appears to be supported by a number of considerations.

*Legislative history of section 31*

15. First there is the legislative history of what is now section 31 of the 1980 Act. Its legislative predecessor, section 1 of the Rights of Way Act 1932, set out two bases upon which a statutory presumption of dedication would arise. The first required 20 years' uninterrupted user, with the proviso that the presumption would be defeated if "*during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such a way.*" It is therefore clear that under the 1932 Act, a mere 20 years' uninterrupted user could not have resulted in a highway being established across a churchyard (or indeed over land subject to a strict settlement).
16. However, section 1 of the 1932 Act also provided a second basis whereby dedication would be deemed to have occurred. This required 40 years' uninterrupted user. If such user were made out, then a conclusive presumption of dedication arose irrespective of whether there was a person with capacity to dedicate.
17. A comparison may be made with section 2 of the Prescription Act 1832 and the two periods of user there. It was held in *Re St Martin Le Grand, York* [1990] Fam 63, that the provisions of the 1832 Act would not give rise to an easement over a churchyard. But section 2 of the 1832 Act is readily distinguishable from the relevant provisions in the 1932 and 1980 Acts. Section 2 of the 1832 Act prevents the defeat of a "claim which may be lawfully made at the Common Law etc. to any Way or other Easement" where the requisite period of user can be shown. The restriction to a "claim which may be lawfully made at the Common Law" would exclude an easement of way over a churchyard, as no such easement could be granted at common law. But the relevant provisions of neither the 1932 nor the 1980 Acts are restricted in this way to claims that can be made at common law. The decision in *St Martin Le Grand* is therefore not applicable to the present question.
18. Taking the legislative history of section 1 of the Highways Act 1980 further, its predecessor, section 1 of the Rights of Way Act 1932, was amended by the National Parks and Countryside Act 1949. The second of the two bases giving rise to a presumption of dedication (i.e. 40 years' user) was entirely repealed. The first basis (20 years' user) was amended so as to remove the proviso that a way would not be deemed to have been dedicated if "*during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such a way*".
19. This followed a recommendation from the Hobson Report that the statutory machinery for establishing rights of way should be simplified. The relevant part of the report stated,
 

*"We recommend that after 20 years' use of a way by the public 'as of right and without interruption', that way shall be deemed in all cases to have been dedicated as a highway. This will cover entailed estates and would do away with the existing requirement that in such cases proof of 40 years' public use must be adduced."* (Cmnd 7208, para. 56).

Introducing the 1949 Act, the Minister said,

*“...in future there is a presumption of dedication of a right of way after 20 years user in all cases”* (Hansard HC Deb, vol 463, ser 5, col 1485).

20. The result of the amendments made to section 1 of the 1932 Act was that 20 years' public user as a highway was of itself enough to give rise to the statutory presumption of dedication, irrespective of whether a fee simple owner had been in possession of the land throughout that period.
21. Section 31(1) of the Highways Act 1980 is essentially a re-enactment of section 1 of the 1932 Act as so amended. That being so, one would expect its effect to be the same as its predecessor: namely that 20 year's uninterrupted user (absent positive evidence of there being no intention to dedicate) will give rise to a statutory presumption of dedication in all cases, irrespective of the legal capacity of the person in possession.

*Provision for land in possession of tenant for life*

22. Secondly, the specific provision made in section 33 of the 1980 Act in relation to land in the possession of a tenant for life casts light on the statutory intention behind section 31(1). It gives those with interests in remainder or reversion a statutory right to bring claims in trespass to prevent the acquisition of a public right of way over land as if they were in possession. Were it the case that the statutory presumption of dedication in section 31(1) only applied where there was a person with legal capacity to dedicate at common law (which a tenant for life generally lacks), then there would have been no need for section 33 (Protection of rights of reversioners).
23. The position therefore is that the (non)existence of a fee simple owner has no bearing on the question of whether section 31(1) is capable of applying. If that is so, then section 31(1) is in principle capable of applying in the case of land forming part of a churchyard vested in an incumbent (even though, at common law, he would not have the capacity to dedicate such land as a highway). In the 2013 Inspector's decision letter referred to in para 3 above, this was accepted to be the position.<sup>6</sup>
24. If that is so, one needs to consider whether any of the other provisions of section 31 have the effect of excluding land forming part of a churchyard from the statutory presumption of dedication after public use for 20 years.

*Exclusionary provisions*

25. Section 31(1) expressly excludes from its operation “a way of such character that use of it by the public could not give rise at common law to any presumption of dedication”.
26. It is suggested in *Newsom*<sup>7</sup> that a path across land forming part of a churchyard would be excluded from the operation of section 31(1) by these words because, at common law, a presumption of dedication could not arise in respect of the way in question given the lack of legal capacity on the part of the owner of the land and



because dedication would be inconsistent with the sacred uses on which the land was held. But it does not seem that the exclusionary words in section 31(1) do in fact have that effect.

27. In *Attorney- General v Brotherton* [1992] AC 425, the House of Lords held that the equivalent provisions of the 1932 Act are concerned with the *physical* nature of the way in question; so that, for example, the statutory presumption of dedication could not arise in respect of a navigable river. The subsection is not concerned with the legal nature of the way but with whether its physical character is such that use of it by the public could give rise at common law to any presumption of dedication.<sup>8</sup>
28. Turning to subsection (7) of section 31, it is true that it provides a definition of “owner” for the purposes of the foregoing provisions of the section and that “owner” is defined as “the person who is for the time being entitled to dispose of the fee simple in the land”. An incumbent of a benefice would not, therefore, be within the meaning of “owner” for the purposes of the earlier provisions of the section<sup>9</sup>; and the wording of subsection (7) suggests that the parliamentary draftsman did not have in mind the particular position of incumbents.
29. But that does not take one very far. The provision of section 31 which operates so as to turn a way into a highway – subsection (1) – makes no reference to any owner. Where the requisite period of user is established (and unless there is sufficient evidence that there was no intention during the period to dedicate it), the way is simply deemed to have been dedicated as a highway. There does not even need to be a known owner.<sup>10</sup> The definition of “owner” in subsection (7) is not material for the purpose of the operation of subsection (1).
30. Finally, consideration needs to be given to subsection (8):

“Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”

As expressed in the 2013 Inspector’s decision letter referred to above,

*“subsection (8) provides a means whereby a specific class of landowner can defeat a claim for deemed dedication if they can demonstrate that the claimed right of way would be incompatible with the public or statutory purposes for which they hold the land over which it would pass”*.<sup>11</sup>

31. An incumbent in whom a churchyard is vested is a corporation in possession of land. Given that all who are resident in a parish have a right of burial in the churchyard of that parish and, more broadly, all consecrated land is held for sacred purposes and for the benefit of the parishioners at large, there would seem to be a good case of saying that an incumbent is in possession of such land for public purposes.
32. However, even assuming that subsection (8) applies to Church of England churchyards, this will only be relevant *“if the existence of a highway would be*

*incompatible with those public or statutory purposes*". The test is a pragmatic one, to be applied on the facts of the particular case. As explained in the case of a railway undertaking, "...a public highway could not be dedicated if at the relevant time it was reasonably foreseeable that such dedication was incompatible with the object of the statutory undertaker".<sup>12</sup>

33. Where a claimed footpath has been used by the public for more than for more than 20 years, there are likely to be (for both statutory undertakers and churches) evidential problems in proving such incompatibility, whether one looks to what was foreseeable at the start or end of the 20 year period. On the facts of the Inspector's decision letter referred to above, it was "*not convincingly demonstrated to the Inspector that the public walking along the claimed path through Widford churchyard is incompatible with the purposes for which that land is held*", so that the claim of deemed dedication under section 31 of the Highways Act 1980 was upheld.<sup>13</sup>
34. There could, however, be cases where continued use of the path by the public might impede further burials, or the proper functioning of the church and/or the churchyard. Even where the churchyard was closed by Order in Council, so that the public purpose of burial of bodies will have ceased and the existence of the highway could not be said to be inconsistent with future such burials, the footpath might be inconsistent with the future interment of ashes (which is permissible in a closed churchyard). The position in each case will need to be assessed on its own facts.

### *Conclusion*

35. The conclusion therefore is that land forming part of a churchyard can after 20 years use by the public as of right be deemed to have been dedicated as a highway under section 31 of the Highways Act 1980, but that this will not always be the case: it will depend on the facts of the particular case.

### **Ancient paths**

36. Where a public footpath or other highway existed over land before that land was consecrated as a churchyard, that highway will have continued in existence in spite of the fact that the land had become a churchyard. There may be a number of such ancient paths in existence.

## **PART 2: PRACTICAL GUIDANCE TO INCUMBENTS AND PCCs**

### **The definitive map**

37. If a footpath across a churchyard is already shown on the definitive map kept by the local authority under section 53 of the Wildlife and Countryside Act 1981, it is suggested that only in the rarest cases would it be sensible for the incumbent and parochial church council to challenge this. Where it is proposed to seek a modification of the definitive map, the incumbent and PCC should obtain legal advice before proceeding.

### Steps incumbents and PCCs might take to prevent the deemed dedication of highways arising

38. Some parishes may understandably wish to resist the acquisition by the public of a right of passage across the churchyard.<sup>14</sup> Of course if the path has already become a public footpath by use for 20 or more years, there may be nothing that can now be done to safeguard the position, and the taking of steps may positively encourage users to apply for a public path to be registered.
39. There are, however, three steps which parishes should consider taking, each of which should have the effect of preventing a public right of way being acquired.
40. Total prevention of access for a period of time each year should have the effect of preventing a public right of way arising. That is because it would amount to bringing the public's right to use the path 'into question' for the purposes of section 31(2) of the Highways Act 1980. Where there are gates, this can readily be done by the closure of all gates once a year.<sup>15</sup>
41. Putting up clear notices to the effect that use of the path by the public is permitted by the incumbent and PCC, but that such permission may be withdrawn at any time, would probably suffice to make the user permissive, and thus not "*as of right*", the latter being a requirement under subsection (1) of section 31.<sup>16</sup>
42. Putting up of clear notices prohibiting entry (save for access to the church) would also probably negative use "*as of right*" under subsection (1)<sup>17</sup>, although such a prohibitive notice can be expected to annoy users of the path, and could be counter-productive.
43. The effectiveness of putting up permissive or prohibitory notices to protect churchyards has not been tested in the courts.<sup>18</sup>

### Other cases

44. Finally, there will be some parishes where the establishment of a public footpath through a churchyard is not seen as problematic. Indeed benefits may be perceived through securing highway authority funding for the maintenance of such a path.

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<sup>1</sup> Co Lit 341a: "the fee simple is in abeyance, as Littleton saith". See also *Re St Gabriel's, Fenchurch Street* [1896] P 96 per Tristram Ch at 101-102: "churchyards are by the law placed under the protection and control of the Ecclesiastical Courts and the freehold of the churchyard is in the rector, the fee being in abeyance; but the freehold is vested in him for the use (in so far as may be required) of the parishioners. Subject to that use, he is entitled to receive the profits arising from the churchyard; but he cannot by law make any appropriation of the soil of the churchyard. Such appropriation can only be made for limited purposes by a faculty issued from the Ecclesiastical Court." See also *Re St Paul's, Covent Garden* [1974] Fam 1, 4 and *Re Tonbridge School Chapel (No. 2)* [1993] 2 All ER 339, 342.

<sup>2</sup> Co Lit 341a: "... a parson or vicar, for the benefit of the church or his successor, is in some cases esteemed in law to have fee simple qualified; but to do any thing to the prejudice of his successor in many cases, the law adjudgeth him to have in effect but an estate for life". In *Barker v. Richardson* (1821) 4 B & Ald 579 it was held that a presumption of a grant of an easement - in that case, an easement of light - could not be made because the grant, if it had been made, would have been made by a rector who was described as "a mere tenant for life" and who had no power to make such grant. Abbott C.J. said, at p. 582: "Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

The reform of the law relating to real property brought about by the Law of Property Act 1925 has not changed the essential position in that regard. Before the 1925 Act came into force, it was possible for an interest less than a fee simple to exist as a legal estate. Under section 1 of the 1925 Act, that ceased to be the case and all estates, interests and charges in or over land other than an estate in fee simple absolute in possession, or a term of years absolute, took effect as equitable interests. The effect of the 1925 Act was to turn the incumbent's estate into an equitable interest; the Act did not have the effect of enlarging the incumbent's estate so that it became a fee simple. See *Re St Paul's, Covent Garden* [1974] Fam 1 at 4E, per Newsom Ch.

<sup>3</sup> Ref: *FPS/M1900/7/66/M*, 24 May 2013, para 19 (concerning the churchyard of St John the Baptist, Widford, Hertfordshire). In paras 15-18 the Inspector referred to, and purported to limit the application of, dicta contained in *In re St Mary's, Longdon* (2011) 13 Ecc LJ 370, Worcester Consistory Court.

<sup>4</sup> Per Tristram Ch at 169, referring to an earlier decision of his: "I therefore ordered the boundary fence of the churchyard to be placed back, and granted, by faculty, to the local authorities the use of a strip of the churchyard outside the new boundary fence for a public footpath, so long as it might be required for the public use; and in case of its not being so required, I ordered that it should revert to the use of the church.

I found, on inquiry in the registry, that my predecessor had granted one faculty of the kind; and, since the granting of the Kensington faculty, it has been the uniform practice of this Court, upon a proper case being made out by evidence, to grant by faculty to the local authorities the use of strips of the churchyard for enlarging adjoining thoroughfares upon similar terms, and this practice has been followed in several other Diocesan Courts."

For more recent decisions see *In re St. John's, Chelsea* [1962] 1WLR 706; *In re St. Mary the Virgin, Woodkirk* [1969] 1WLR 1867.

<sup>5</sup> *Jones v Bates* at 245.

<sup>6</sup> At para 23.

<sup>7</sup> GH Newsom & GL Newsom, *Faculty Jurisdiction of the Church of England*, London 1993, p. 151-2.

<sup>8</sup> In his speech, Lord Oliver said, "I cannot, for instance, think that any reader of Alfred Lord Tennyson would have regarded the Lady of Shalott, as she floated down to Camelot through the noises of the night, as exercising a right of way over the subjacent soil."

<sup>9</sup> Given the absence of such an "owner", it is not possible to use the procedure for depositing a map under section 31(6) of the Highways Act 1980 in order to negative an intention to create a right of way over a churchyard.

<sup>10</sup> "... the Act has got rid of all the trouble and difficulty inherent in the task of inducing the tribunal of fact to give a solemn finding of an act of dedication at some past date, which was, as a rule, wholly imaginary, and often by an imaginary owner", per Scott LJ in *Jones v Bates* at 246.

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<sup>11</sup> At para 27.

<sup>12</sup> *British Transport Commission v Westmorland County Council* [1958] AC 126, at 152 and 156.

<sup>13</sup> At para 33 and 46.

<sup>14</sup> Sub-sections (3) to (6) of the Highways Act 1980 provide means by which the owner or reversioner may take steps to prevent the accrual of public rights over land. But “owner” bears the meaning given in subsection (7): the person who is entitled to dispose of the fee simple. In the case of a churchyard vested in an incumbent there is no such person, so that sub-sections (3), (5) and (6) have no application; nor is the incumbent’s interest that of “a tenant for a term of years, or from year to year”, nor is he (or anyone else) “a person for the time being entitled in reversion to the land”, so that sub-section (4) similarly has no application (perhaps another indication that the draftsman did not have in mind the position of churches).

<sup>15</sup> “Occasional closure to all comers” was instanced as a way of defeating a claim to use “as of right” by Lord Walker in *R (Beresford) v City of Sunderland* [2003] UKHL 60 ; [2004] 1 AC 889, para 83. The annual closure of gates was specifically mentioned by Lord Hoffmann and Lord Neuberger in *R (Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28; [2008] 1 AC 221 paras 37 and 89.

<sup>16</sup> See the observations of Lord Walker in *Beresford*, above, para 72

<sup>17</sup> See *Winterburn & anor v Bennett & anor* [2016] EWCA Civ 482

<sup>18</sup> There is a counter-argument, to the effect that since sub-sections 31(3) to (5) make express provision for owners and reversioners to post or give notice “that the way is not dedicated as a highway”, such notice cannot be given in other ways. It is considered unlikely, that such a counter-argument would succeed before an Inspector or the courts. As to sub-section (6), it is the “owner” of land who may deposit a map and statement with the appropriate council such as to amount to sufficient evidence to negative an intention to dedicate. That sub-section is incapable of being resorted to in respect of churchyards, and it is unlikely that notice given to the appropriate council other than under sub-section (6) would be regarded as sufficiently drawn to the attention of users to prevent deemed dedication of a public footpath.

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## Highways Act 1980

### 31 Dedication of way as highway presumed after public use for 20 years

(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 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.

(1A) Subsection (1)–

(a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but

(b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.

(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 erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land . . . , and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, . . . declarations in valid form made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time--

(i) within the relevant number of years from the date of the deposit, or

(ii) within the relevant number of years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(6A) Where the land is in England—

(a) a map deposited under subsection (6)(a) and a statement deposited under subsection (6)(b) must be in the prescribed form,

(b) a declaration is in valid form for the purposes of subsection (6) if it is in the prescribed form, and

- 
- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 20 years.
- (6B) Where the land is in Wales—
- (a) a map deposited under subsection (6)(a) must be on a scale of not less than 6 inches to 1 mile,
- (b) a declaration is in valid form for the purposes of subsection (6) if it is a statutory declaration, and
- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 10 years.
- (6C) Where, under subsection (6), an owner of land in England deposits a map and statement or lodges a declaration, the appropriate council must take the prescribed steps in relation to the map and statement or (as the case may be) the declaration and do so in the prescribed manner and within the prescribed period (if any).
- (7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5), (6), (6C) and (13) "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsections (6), (6C) and (13)) is situated or, where the way or land is situated in the City, the Common Council.
- (7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.
- (7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.
- (9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.
- (10) Nothing in this section or section 32 below affects section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement), . . .
- (10A) Nothing in subsection (1A) affects the obligations of the highway authority, or of any other person, as respects the maintenance of a way.
- (11) For the purposes of this section "land" includes land covered with water.
- (12) For the purposes of subsection (1A) "mechanically propelled vehicle" does not include a vehicle falling within section 189(1)(c) of the Road Traffic Act 1988 (electrically assisted pedal cycle).

- 
- (13) The Secretary of State may make regulations for the purposes of the application of subsection (6) to land in England which make provision—
- (a) for a statement or declaration required for the purposes of subsection (6) to be combined with a statement required for the purposes of section 15A of the Commons Act 2006;
  - (b) as to the fees payable in relation to the depositing of a map and statement or the lodging of a declaration (including provision for a fee payable under the regulations to be determined by the appropriate council).
- (14) For the purposes of the application of this section to land in England "prescribed" means prescribed in regulations made by the Secretary of State.
- (15) Regulations under this section made by the Secretary of State may make—
- (a) such transitional or saving provision as the Secretary of State considers appropriate;
  - (b) different provision for different purposes or areas.



## Consecrated Land and Public Rights of Way

First published as Crossing God's Acre in Waymark Winter 2007.

There are many examples of public rights of way passing through churchyards, yet English law is quite clear that a public right of way cannot usually arise at common law across consecrated land. Sue Rumfitt looks at the present law and how some of these routes came to be recorded as rights of way in the past.

### **Alleged Dedication**

The question of an alleged dedication of a public right of way across a churchyard infrequently arises. It remains one of those issues usually debated by rights of way officers at an academic level only. However, since people commonly walk through Church of England churchyards in towns and villages and since public footpaths, and, sometimes, public bridleways or even roads appear to exist through such churchyards it is inevitable that from time to time applications will be made to add rights of way across churchyards to definitive maps. Applicants can quite often point to paths through other churchyards that are recorded on the definitive map as supportive evidence that an unrecorded right can exist over consecrated land and should be recorded – however it is rarely the case that paths through churchyards are or were public rights of way.

To understand why this is so, it is necessary to understand the legal effect of consecration and the implications on the capacity to dedicate land as a public highway.

### **Capacity to Dedicate**

When land is consecrated, or more properly subjected to the Sentence of Consecration, it is declared that the land is separated from other land and set apart from all common and profane (in the sense of “not sacred”) uses and is designated and consecrated for the purposes of a burial ground for ever. At this point the land changes legal character and it is submitted that it ceases to be land over which a right of way could arise at common law.

In an Order Decision dated 5 March 2007 <sup>1</sup> Inspector Mrs Erica Eden had to consider whether or not a bridleway was wrongly recorded on the definitive map and statement by being shown through the grounds of the Old Rectory at Westwell, Oxfordshire and whether it should instead be shown in part through the churchyard. The Parochial Church Council argued (para 11 of the Order Decision) that there was at the material time no owner with capacity to dedicate and the particular circumstances of the case were that the freehold of the churchyard had been vested in the Rector since the creation of the church and churchyard in the 12th century. In all such cases, this ‘vesting’ is not a freehold estate, i.e. an estate in fee simple absolute in possession but rather the fee is held by the incumbent ‘in abeyance’ meaning that the incumbent cannot convey or create any legal estate or interest in the land without the authority of an Act or other legal Measure authorising it. Counsel for the owners of the Old Rectory agreed that the incumbent could not at any time have granted a

freehold or leasehold interest or an easement including a right of way in respect of any part of the churchyard (para 12 of the Order Decision). In the event Mrs Eden concluded (para 110):

“In considering the evidence overall, I think it is necessary to turn first to the submissions concerning whether a bridleway could be dedicated across the churchyard. I have studied the submissions and given much thought to the arguments made. I am convinced that there is no capacity for the dedication of a right of way across consecrated ground unless it has been used for such a long time that dedication might be presumed to have occurred before the consecration of the churchyard.... Dedication, whether express or implied, is integral to the existence of a public right of way.”

It might be argued that section 31 of the Highways Act 1980 could be used to overcome the fact that at the material time there was no owner with the capacity to dedicate a right of way to the public. However, section 31 (1) commences with the words, “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....”. It is submitted that a path through a consecrated churchyard is an example of a way of such character that use of it by the public could not give rise at common law to a presumption of dedication. At common law it has been held that dedication could be presumed, even in circumstances where the ownership of the land is unknown; perhaps the most well-known authority for this occurs in *Mann v Brodie*: “Where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting in the belief that the way had been dedicated and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.”<sup>2</sup> An authoritative highway law text book even commented: “The presumption arising from long uninterrupted user of a way by the public is so strong as to dispense with all inquiry as to the actual intention of the owner of the soil ....”<sup>3</sup> Whilst the common law sought ways to overcome the difficulties presented by the legal fiction that some past landowner had dedicated a right to the public, by inferring dedication from long user and by extending the doctrine to cover land even where the details of landownership were unknown, it could not overcome the position where landownership was known and the owner was constrained from dedicating a right of way; as in the case of consecrated land.

Additionally, section 31(8) states that: “Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes”. Arguably the Church of England is in possession of consecrated land for public and statutory purposes and those purposes are incompatible with the use of the land as a public highway – it would not be possible to bury in a public highway.

### **Rights by Other Means**

So, if it is impossible for a public highway to arise across a churchyard, how come so many definitive maps show rights of way through churchyards? There may be a number of reasons. As Mrs Eden considered, it is possible for the dedication of the right of way to pre-date the forming of the church and churchyard. In such cases the Sentence of Consecration would not apply to the pre-existing highway, even if it runs through the land that became the churchyard. A more likely reason is that the right of way ran alongside the edge of a churchyard, which was then extended by the consecration of land the other side of the right of way. In such cases the right of way would appear

to cross the churchyard but legally would remain separate from it. In future it is intended to extend the churchyard at Biddenham in Bedfordshire and the new churchyard will be separated from the old by a public footpath (already on the definitive map), which would then appear to run through the churchyard, whereas in fact the churchyard will have been extended.

### **Churchways**

There is the possibility of a mistake having been made in the recording of the right of way on the definitive map. Historically many churches and churchyards were accessed by “churchways”, which were (and are) not highways. However it seems quite likely that when the original definitive maps were compiled under the National Parks and Access to the Countryside Act 1949, few people were actively aware of the precise distinction between a highway and a churchway.

Halsbury’s Laws of England <sup>4</sup> defines a churchway as, “A right may exist by custom for parishioners to go to and from their parish church. Such a way is known as a churchway. It is distinguished from a highway in so far as no one but a parishioner can be legally entitled to use a churchway whereas every member of the public has the right to use a highway.” Case law has held that it is no longer possible to dedicate a churchway <sup>5</sup>, and such churchways as there are have existed actually or presumptively since time immemorial.

Confusingly, the 1835 Highway Act Section 5 defined highway to mean “all roads, bridges, (not being county bridges) carriageways, cartways, horseways bridleways, footways, causeways, churchways and pavements...”. Pratt and Mackenzie (page 144 note (K)) helpfully clarified this as meaning that “the common law definition of the term highway must be read into this statutory definition; and, therefore, the word ‘highway’ in this Act comprehends all roads, bridges etc, which are highways. Roads and bridges which are not highways are not affected by the Act; churchways which are common only to the inhabitants of a particular house, village or parish, are not highways at common law.” So it would seem that any particular route to a church, may or may not be a highway and, as ever, the status had to be determined from the facts of any particular case.

Churchways themselves ran only to the churchyard gate and did not extend over the churchyard; any path from the churchyard gate within the churchyard is simply an internal path and not an extension of the churchway. It seems unlikely that, unless the inclusion of a right of way across a churchyard was challenged at the point it was originally included in a definitive map, in depth investigations were made as to the precise status of the route and quite likely that some routes to churches and across churchyards were included in error. (Whether it would not be possible or even desirable to remove such paths from the definitive map is a topic beyond the scope of this article.)

### **Highways**

Which leaves the question of how a path across a churchyard might actually become a highway. It has been suggested that the grant of a faculty <sup>6</sup> could create a right of way across a churchyard <sup>7</sup>. Arguably, a right of way might be presumed to exist if a grant of a faculty could also be presumed to exist. The question of whether or not a faculty for a path had been granted in the past arose at the Westwell inquiry; Mrs Eden concludes that apart from a temporary faculty in 1992 there was no evidence of one having been granted. Interestingly she notes (para 13 of the Order Decision) that, “it was agreed by both Counsels that even if a faculty had been granted for a path it could not have

created a permanent and irrevocable public right of way over consecrated ground. It could only create a path which would be by leave or licence.”. A faculty would not authorise a public right of way across the churchyard or dedicate the land as a highway. Use by the public of a path created by leave or licence would be precario and therefore a public right of way could not arise over it, either at common law or under section 31.

In circumstances where a churchyard is no longer consecrated ground a faculty granting a right of way may be more analogous to an overt act of dedication of the route to the public by the landowner and therefore may create a right of way; but it is not completely clear if the exercise of the faculty is irreversible, as it would need to be for the dedication of a public right of way. This issue does not seem to have arisen in the Courts recently and in general the use of land in churchyards, whether consecrated or otherwise, for the passage on foot by members of the public is allowed and in some cases actively encouraged, provided that the public respect the burial grounds that they pass through and the fabric of memorials and buildings.

### **Conclusion**

This remains a thorny issue and any reader dealing with a claimed right of way through a churchyard, consecrated or not, is advised to seek specialist legal advice on the issues raised – the overlap of highway and ecclesiastical law being complex and almost certainly beyond the experience of most local authority lawyers and rights of way officers.

### **Author’s note**

In preparing this article for publication I am indebted to David Cheetham the Registrar of the Diocese of St Albans for his assistance. Any errors however remain my own.

Sue Rumfitt

November 2007

1. FPS/U3100/7/19 and reported in Byway and Bridleway Extra of 16.5.2007↔
2. Lord Blackburn in Mann v Brodie (1885) 10 App.Cas 378 at 386↔
3. Pratt and Mackenzie’s Law of Highways, fifteenth edition 1905 page 33↔
4. Volume 21 Highways Streets and Bridges fourth edition reissue para 6↔
5. Farquhar V Newbury RDC (1909) 1 Ch 12 CA↔
6. A permission from the Consistory Court of the Diocese↔
7. Churchyards and coffin ways RWLR section 11 pp 17-26 1993 J.D.C. Harte↔

## Postscript

After publication of this article, a Worcestershire Order involving a churchyard was confirmed and elements of the Inspector's decision are contrary to the views above. The Inspector's report can be seen on the Planning Inspectorate website.

## Consecrated Land II

First published as Crossing God's Acre – Again Or, The paths of glory lead but to the grave <sup>1</sup>

In a follow-up piece to her article Consecrated Land/Crossing God's Acre in Waymark 2007, Sue Rumfitt looks at the implications of the decision 'In re St. Martin Le Grand, York <sup>2</sup> on the difficult issue of public rights of way across consecrated land.

The original Crossing God's Acre article Waymark Volume 20 Issue 3 winter 2007 generated the largest 'post-bag' I have ever had and I am very grateful to those who took the trouble to contact me. Several people drew my attention to an Order Decision for a Worcestershire case <sup>3</sup> that had been published after Waymark had gone to press <sup>4</sup>.

In the Worcestershire case Inspector Martin Elliott had to consider whether or not a public footpath had arisen over the graveyard of St Mary's church in Alfrick. The original application for a Definitive Map Modification Order (DMMO) had been refused by Worcestershire County Council and the applicant appealed to the Secretary of State. Inspector Mrs Helen Slade considered the appeal <sup>5</sup> and on her recommendation the Secretary of State directed the Council to make the DMMO. The DMMO was objected to, resulting in an inquiry held on 20 November 2007. The County Council took a neutral stance with the case for the confirmation of the DMMO being presented by the applicant, who was represented by Counsel.

At the inquiry the applicant submitted that consecrated ground was not held for public or statutory purposes but for ecclesiastical purposes, that the Church did not owe a public duty and was not accountable under public law and that the land was not held for public purposes, nor was it in public ownership and as a consequence the provisions of Section 31(8) of the Highways Act 1980<sup>6</sup> did not apply. The applicant further relied upon In re St. Martin Le Grand, York ('Re St Martin') on the question of whether or not a faculty <sup>7</sup> was needed for a right of way to subsist, and if so, whether or not one could be presumed.

Re St Martin was heard before the Consistory Court <sup>8</sup> of the Diocese of York and concerned a private right of way over a churchyard to adjoining printing works, the churchyard having been closed to burials for many years. The petitioners (the owners of the printing works) sought rulings as to the extent of their rights and where necessary a faculty to ensure the future use of the right and to extend the right to the petitioners' licenses and to visitors to their premises. In a very long judgment the Chancellor first considered whether or not the court had jurisdiction to rule on the matter of the right of way (as being essentially a secular rather than an ecclesiastical matter). He concluded that it

did in cases such as this where a ruling on the right of way was necessarily ancillary to the application for a faculty.

Whilst *Re St Martin* concerns a private, rather than a public, right of way the consideration of the principles involved are relevant to public rights of way cases. Initially the Chancellor concluded that:

“...the appropriate form of prescription in relation to the present case is that under the doctrine of lost modern grant (including a presumed faculty) rather than by use from time immemorial. I am therefore satisfied that a right of way on foot, both with and without trolleys, over the whole of the churchyard from Coney Street at one end to the printing works at the other has been established.”

This seems to support the view that a faculty could be presumed and that it would lead to the establishment of an easement. However, the attention of the court was not drawn to the Court of Appeal case of *Oakley and another v Boston*<sup>9</sup> (“*Oakley v Boston*”). This case involved a claimed private right of way over glebe<sup>10</sup> land. The Court of Appeal held:

“Since no evidence had been produced to the court that the Ecclesiastical Commissioners must have known of any acts of user over the pathway in which the incumbent had acquiesced it could not be presumed that the commissioners had given the necessary consent to a grant by the rector which had subsequently been lost. Accordingly a valid grant by the rector could not be presumed...”

Whilst *Oakley v Boston* did not concern consecrated land, the circumstances mirror *Re St Martin* in that the incumbent was not in control of the fee simple absolute and therefore had no capacity to grant an easement without the consent, express or implied, of the Ecclesiastical Commissioners. Since *Oakley v Boston* was not put to the Chancellor in *Re St Martin* we cannot know whether it would have affected his conclusions about the applicability of the doctrine of lost modern grant to the circumstances of a private right of way over consecrated land.

Returning to *Re St Martin*, later in the judgment the Chancellor concluded:

“...that a full legal easement of way could not have been acquired in the present case. I have previously indicated my view that the case falls to be considered under the doctrine of prescription by lost modern grant, there being a presumption of the grant of faculty at some time. I consider that as a matter of law such a faculty could not have conferred an easement, but it could have conferred a licence of indefinite duration.”

Therefore, the private right arising is not an easement, but a licence of indefinite duration, which may be for all practical purposes as good as an easement, but in law does not confer the same rights as an easement. In respect of this the Chancellor notes that:

“...the licence can be terminated by faculty if the ordinary<sup>11</sup>, acting through the consistory court considers that the licence should be terminated.”

It is difficult to conclude that this could amount to an easement in perpetuity.

In the Order Decision dated 5 March 2007<sup>12</sup> Mrs Eden noted that both Counsel at the inquiry before her agreed that a faculty “...could not have created a permanent and irrevocable public right of way over consecrated ground. It could only create a path which would be by leave of licence.” The

conclusion reached by the Chancellor in *Re St Martin* albeit concerning a private right of way seems to support this view.

There would appear to be no modern case law on the direct circumstances of public rights of way arising through user across consecrated land. These two order decisions issued by Inspectors on the face of it seem to conflict. Mrs Eden concluded that she was convinced that there is no capacity for the dedication of a right of way across consecrated land, whereas Mr Elliott confirmed a DMMO to add a public footpath across consecrated land. There is a significant difference between the two cases. Mrs Eden was considering the possibility that a bridleway was wrongly shown on the definitive map as going across the grounds of the Old Rectory at Westwell and that it should instead have been shown through the churchyard, i.e. that a public right of way subsisted over the churchyard prior to the coming into effect of the National Parks and Access to the Countryside Act, 1949. Mr Elliott was considering the matter of deemed dedication under the operation of what is now section 31 of the Highways Act 1980<sup>13</sup>. Arguably the operation of section 31 defeats the proposition that if there was no landowner with the capacity to dedicate during the relevant period then the claim by the public that rights existed automatically failed. This raises the issue of the precise meaning of the wording of section 31(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...”

The cases of *Oakley v Boston* and *Re St Martin* establish that dedication of a right of way over consecrated land cannot be presumed at common law, as the most that could be established would be a revocable licence. As to whether or not section 31 operates to overcome this problem there is some guidance in *Jaques*<sup>14</sup> where it was held that the fact that the twenty-year period included a period of time when the land had been requisitioned (for the war) and, at that time there was no person owning the land with capacity to dedicate, defeated the claim. In the case of consecrated land there is nobody with the capacity to dedicate a right of way in perpetuity.

Inspector Susan Doran in a more recent Order Decision<sup>15</sup> considers the case of *Re St Martin* but in the matter before her she concludes that there is no evidence to show that the footpath (already shown on the definitive map for the area) passing through a graveyard was not already dedicated to the public prior to the consecration of the land in July 1877. Having regard to the judgment in *Trevelyan v Secretary of State for the Environment Transport and the Regions* 2001 EWCA Civ 266 she confirms her decision to confirm the DMMO with modifications – thus the footpath in the graveyard remains on the definitive map.

The position remains far from clear and as previously advised any reader dealing with a claimed right of way through a churchyard, consecrated or not, is advised to seek specialist advice on the issues raised.

Sue Rumfitt

November 2008

## Postscript

An interesting case in Hertfordshire considering the addition of a footpath through a churchyard in Hertfordshire.

[[http://www.planningportal.gov.uk/uploads/pins/row/documents/fps\\_m1900\\_7\\_66\\_interim.pdf](http://www.planningportal.gov.uk/uploads/pins/row/documents/fps_m1900_7_66_interim.pdf) PINS interim decision] (order proposed for modification)

August 2012

1. Elegy Written in a Country Churchyard, Thomas Gray (1716-1771)↔
2. [1990] Fam. 63 (St Martin)↔
3. FPS/E1855/7/15 of 14 December 2007↔
4. In a further “churchyard” case, FPS/C1245/7/7 of 2 April 2008, Inspector Barney Grimshaw refused to confirm a deletion DMMO to delete a footpath through St Peter’s Churchyard at Eype, Dorset.↔
5. Appeal Reference NATROW/E1855/529A/05/35↔
6. S. 31(8): “Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes.”↔
7. A permission from the Consistory Court of the Diocese↔
8. The Consistory Court is a type of ecclesiastical court, in this case within the Church of England. Before the reforms of the mid 1800s it had wide jurisdiction including over matters that we would now see as secular (such as probate and defamation). Today the principal business of the court is the dispensing of faculties, though it may also hear the trial of clergy below the rank of bishop accused of immoral acts or misconduct.↔
9. [1976] QB 270↔
10. Historically glebe was land or property that provided an income to meet the financial needs of Church of England clergy↔
11. The ordinary is the Bishop of the Diocese↔
12. Discussed in detail in the original Crossing God’s Acre article Consecrated Land↔
13. Whilst s.31 HA 80 derives from The Rights of Way Act 1932, that Act was amended by s.58 NPACA 49↔
14. Jaques v SoS for the Environment [1995] JPL 1031 (1994) 15 FW 3,3↔
15. FPS/A4710/7/65M 7 August 2008 reported in Byway and Bridleway 2008/6/71↔



Bideford Parish, Re, [1900] P. 314 (1900)

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## \*314 In Re the Parish of Bideford.



Positive/Neutral Judicial Consideration

### Court

Arches Court

### Judgment Date

2 August 1900

### Report Citation

[1900] P. 314



In the Arches Court of Canterbury.

The Chancellor , Sir Arthur Charles .

1900 Aug. 2.

*Ecclesiastical Law—Jurisdiction—Faculty—Grant of Faculty for use as Public Street of Portion of consecrated Cemetery or Churchyard closed for Burials, and setting back of Cemetery or Churchyard Wall—Retention of Cause.*

The Ordinary has jurisdiction to grant a faculty authorizing a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street. Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening.

The rector and churchwardens of a parish church in the diocese of Exeter, and the corporation of a borough in which a consecrated cemetery forming an addition to the parish churchyard was situate, petitioned the Ordinary for a faculty to authorize a strip of the cemetery being used for widening an adjoining public street, and the boundary wall of the cemetery being set back so as to form the boundary wall between the remaining portion of the cemetery and the widened street. It appeared that the street proposed to be widened was only 16 feet wide, and too narrow for the traffic along it, and that the proposed widening would be not only for the general convenience and safety of the public, but particularly of the rector and his parishioners, to the former of whom and the churchwardens moreover, by way of consideration, a sum of money was intended to be paid by the corporation. It also appeared that the strip of the cemetery proposed to be thrown into the street had been closed for interments under an Order in Council, and that the proposed alteration of the width of the street had been unanimously approved by the parish vestry. The Chancellor of the Diocese of Exeter refused to issue citation, being of opinion that he had no jurisdiction to grant the faculty prayed for. The petitioners appealed to the Arches Court of Canterbury.

The Dean of Arches allowed the appeal, retained the cause, and, the allegations in the petition having been verified by affidavit, decreed a faculty to issue in accordance with the prayer of the petitioners.

**Bideford Parish, Re, [1900] P. 314 (1900)**

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ON October 17, 1899, a petition to lead to the grant of a faculty for the purpose of throwing a portion of the old church cemetery at Bideford, in the county of Devon and diocese of Exeter, into the adjacent public street known as Honestone \*315 Street, and the setting back of the boundary wall of the same cemetery so as to separate the ground proposed to be so thrown into the street from the remaining portion of the cemetery, was lodged in the registry of the Consistory Court of Exeter. <sup>1</sup>

The petition was signed by T. Newton Leeke, the rector, and H. M. Barclay and H. S. Bourne, the churchwardens of the parish of Bideford, and was also signed and sealed on behalf of and by the direction of the town council for the borough of Bideford, and contained averments material to this report to the following effect:—

“That your petitioners, the mayor, aldermen, and burgesses of Bideford (hereinafter referred to as the corporation), are desirous to carry out a much-needed improvement by widening Honestone Street, in the town of Bideford, and for this purpose to take and throw into the street a small portion of the old consecrated cemetery, containing 337 square feet or thereabouts, which adjoins and projects into the said street: a plan shewing the portion of the cemetery proposed to be taken for the improvement being annexed to the petition.

“That your petitioners, the corporation, are prepared to pay to the petitioners, the rector and churchwardens, the sum of 42*l.* as purchase-money for the portion of the cemetery proposed to be taken, and to erect a sufficient boundary wall of the same height as the present wall between Honestone Street and the remainder of the said cemetery.

“That it is proposed that such purchase-money shall be applied in repairing the cemetery walls and putting the cemetery in order under the direction of your petitioners, the rector and churchwardens.

“That the said cemetery has been closed for burials in new graves under an Order in Council. <sup>2</sup>

\*316

“That there are in the portion of the cemetery proposed to be taken, as your petitioners believe, five graves only, the last interment therein having been made in the month of August, 1884, and two head-stones and no more; and these head-stones it is intended to replace in the remaining portion of the cemetery, and to there remove and reinter with the greatest care and decency any human remains which may be found in carrying out the improvement.

“That your petitioners are unable to discover the names of the persons interred in two of the above-mentioned graves, but the representatives of those interred in the three remaining graves are consenting to the said removal (except two persons, and they required each a payment of a sum of money before consenting).

“That the vestry of the parish had unanimously passed a resolution in favour of the proposed improvement, and authorizing the rector and churchwardens to apply for a faculty for sanctioning the same.”

The petition concluded with a prayer for the grant of a faculty for the purposes aforesaid.

1899. March 17. On this day a member of the firm of solicitors for the petitioners, having previously received an intimation from the registrar of the Consistory Court of Exeter that the citation in the suit should be moved for in court, moved before the Chancellor of the Diocese of Exeter (Lewis Tonna Dibdin, Esq.), sitting in court in Lincoln’s Inn (by consent), for citation to issue in the above matter on the petition of the rector and churchwardens and corporation of Bideford for a faculty as therein prayed.

An affidavit verifying the petition on behalf of the petitioners had been lodged in the registry of the Consistory Court of Exeter before the hearing of the motion.

THE CHANCELLOR.

This is a motion for citation on a petition by the rector and churchwardens and corporation of Bideford asking for a faculty to allow a strip of a consecrated burial ground, in which there are several graves and one interment as late as \*317 1884, to be sold for 42*l.* to the corporation, in order that it may be thrown into and form part of a highway. The burial ground was closed some years ago under an Order in Council. Mr. Peard, the solicitor for the petitioners, appearing before me on their behalf,

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has stated that the street which is proposed to be widened is at present only 16 feet wide, and as it forms the main approach from one side of the town of Bideford to the market-place is far too narrow for the traffic which passes along it. I have no doubt that what Mr. Peard tells me is accurate, and subject to the amount of compensation being adequate, as to which there might be something said, and to the consents of those interested in the graves being obtained, which appears to have been done, I should, if I thought I had jurisdiction to grant the faculty, probably do so when the case came on for hearing. At any rate, there could be no doubt that I ought now to issue citation. But, in my opinion, it has long been decided by the Queen's Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses: *Reg. v. Twiss*<sup>3</sup>; *Harper v. Forbes*.<sup>4</sup> I considered the question fully in a case in the diocese of Rochester a few years ago—*In re Plumstead Burial Ground*.<sup>5</sup> Nothing has happened since to change my view. There is, however, a later case, *In re St. Nicholas, Leicester*<sup>6</sup>, in the diocese of Peterborough, where the decision was the other way; and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances, I cannot but feel great diffidence in restating my opinion, and, were it not that the matter concerns my jurisdiction and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point was carried to the Court of Arches, and I hope this will be done in the present case. I have only to add, with reference to the agreement entered into by the corporation, that I cannot see that any power is conferred by the *Public Health Act, 1875 (38 & 39 Vict. c. 55)*, and the Lands Clauses Acts to \*318 enable consecrated land to be devoted to secular purposes. A Provisional Order, which when confirmed would have the effect of an Act of Parliament, would be sufficient; but in my view nothing less than express statutory authority will remove the protection which the law extends to lands once consecrated - a protection which, in the case especially of burial grounds, is surely in accordance with the desire of all of us—that the resting-places of the departed should not lightly, or except for some very great or urgent reason, be disturbed. I must refuse to issue citation in this case.

From the decree entered in pursuance of this judgment the petitioners appealed to the Arches Court of Canterbury.

The inhibition and citation in the appeal issued out of the registry of the Arches Court on June 19 last, and was subsequently duly served at Bideford.

1900. July 25. The appeal was heard before the Dean of Arches (Sir Arthur Charles).

*H. D. Grazebrook*, on behalf of the appellants, petitioners in the Court below. In refusing to issue the citation in this case, the judge of the Court below merely followed his own decision in *In re Plumstead Burial Ground*<sup>7</sup>, where his reasons for declining jurisdiction and dissenting from the views of the Chancellors of the dioceses of London, Chichester, Lincoln, Llandaff, and Peterborough, all of whom have at various times granted faculties similar to that asked for by the petitioners—*The Vicar and Churchwardens of St. Botolph v. The Parishioners of the Same*<sup>8</sup>; *The Vicar and Churchwardens of St. Andrew's, Hove v. Mawn and Others*<sup>9</sup>; 2 Phillimore, Ecclesiastical Law, p. 1415; *The Vicar and Churchwardens of St. John, Cardiff v. The Parishioners of the Same*<sup>10</sup>; *The Vicar and Churchwardens of St. Nicholas, Leicester v. Langton and Others*<sup>11</sup>—will be found set forth at greater \*319 length than in the judgment now appealed from. From this former decision—a decision given by the judge of the Court below when sitting as Chancellor of the Diocese of Rochester—it is clear that he considered himself precluded from exercising the jurisdiction claimed mainly in consequence of the opinion expressed by Dr. Lushington in this Court in *Harper v. Forbes*<sup>12</sup>, and approved of by the judges of the Court of Queen's Bench in *Reg. v. Twiss*<sup>13</sup>, “that when ground is once consecrated and dedicated to sacred purposes no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character.” These propositions were not required for the decision of either of these cases, and are merely dicta. *Harper v. Forbes*<sup>14</sup> was a criminal suit in which the jurisdiction of the Court in cases of faculty did not really come in question; and in *Reg. v. Twiss*<sup>15</sup> - a case of prohibition, where the jurisdiction sought to be prohibited was the jurisdiction to grant a faculty for the erection of buildings for secular purposes on a churchyard—the prohibition was refused on the narrow ground that it was applied for at the instance of a stranger, whilst at the time of the application the Ecclesiastical Court had not exceeded its jurisdiction, and there was no reason for assuming that it would do so. There are two other cases which are relied on by the judge of the Court below as shewing that the jurisdiction of the Ecclesiastical Courts to grant faculties does not extend to cases like the present: *The Rector of St. George's, Hanover Square v. Stewart*<sup>16</sup> and *The Rector and Churchwardens of St. John, Walbrook v. The Parishioners of the Same*.<sup>17</sup> Of these cases, the first amounts to no more than a decision that, for some reason unexplained in the only short report of the case known, the faculty there applied for could not be granted in the absence of consent by the rector and parishioners; and the latter of the two cases, even if it was not decided on the point that the particular application for the faculty there prayed for ought to have been made to the Bishop of London \*320 and not to

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the Consistory Court of London, is at least inconsistent both with the decision of Dr. Lushington in the very same year in *Campbell v. The Parishioners of Paddington*<sup>18</sup>, where a faculty was granted for the erection of a vestry room on a portion of a consecrated churchyard without confining the use of the vestry room to be so erected to religious purposes, and with a similar decision by Sir Robert Phillimore in this Court in *In re Bettison*.<sup>19</sup> There is in fact no direct authority binding the Court either in favour of or against the jurisdiction in this case, and, having especial regard to the circumstances that the cemetery here is closed for burials, so that it is now illegal to bury there, it is submitted that the view taken by the Chancellor of the Diocese of London and the other Chancellors who agree with him is the correct view, and that the judge of the Court below possessed jurisdiction in his discretion to grant the faculty prayed for in this case.

If the Court should decide in favour of the jurisdiction, this is clearly a case where that jurisdiction should be exercised, and the petitioners ask that the Court should follow the precedent in *In re Bettison*<sup>20</sup>, retain the cause, and decree the faculty to issue as prayed. [He also referred to *The Rector and Churchwardens of St. Gabriel, Fenchurch Street v. The City of London Real Property Co.*<sup>21</sup>; *The Rector and Churchwardens of St. Ann, Soho v. The Parishioners of Soho*<sup>22</sup>; The *Cemeteries Clauses Act, 1847*(10 & 11 Vict. c. 65); The *Disused Burial Grounds Act, 1884* (47 & 48 Vict. c. 72), ss. 2, 3, and The *Metropolitan Open Spaces Act, 1881*(44 & 45 Vict. c. 34).]

No appearance had been entered for any respondent, and no person appeared as respondent at the hearing of the appeal.

*Cur. adv. vult.*

Aug. 2. SIR ARTHUR CHARLES.

This is an appeal from the refusal by the Chancellor of the Diocese of Exeter to issue a citation on the petition of the rector and churchwardens of \*321 the parish of Bideford, and of the mayor, aldermen, and burgesses of the town of Bideford, for a faculty to permit of a portion of a disused consecrated burial ground being thrown into the adjoining public highway. The learned judge of the Court below was of opinion that he had no jurisdiction to grant a faculty for the proposed purpose, and on that ground refused the citation. It appears from the petition - the allegations in which, for the purpose of this appeal, must be assumed to be accurate—that the corporation of Bideford are desirous of effecting a much-desired improvement by widening a street in the town of Bideford called Honestone Street, and with that object desire to add to the highway a portion of the old consecrated burial ground, containing about 337 square feet. The plan annexed to the petition, and an enlarged plan produced at the hearing, shew exactly what is proposed to be done. There is no doubt that the street along the boundary of the burial ground is at present inconveniently narrow - it is only 16 feet wide—and that it is quite inadequate for the traffic which passes along it. The street, it may be observed, is the main approach from the rectory, and the whole of one side of the town to the market-place and church, and immediately opposite the burial ground stands the national school. The alteration, if made, would therefore be not only for the general convenience and safety of the public, but particularly of the rector and many of his parishioners, as well as of all persons who use the school.

The burial ground was closed by an Order in Council made on July 4, 1893, the contents of which appear from a previous Order in Council dated May 16, 1893, and giving notice of the proposed making of the subsequent Order. In the piece of land in question there are five graves and two head-stones, and the petitioners have obtained the consent of the representatives of those interred in three of these graves. The representatives of those interred in the remaining two graves cannot be found, but in all these cases the petitioners, should a faculty be granted, undertake decently and reverently to remove the remains to another portion of the ground, and, in the case of the head-stones, to re-erect them in a suitable position to be \*322 approved by the rector and churchwardens. The corporation are prepared to pay for the accommodation asked for, the sum of 42*l.*, to be applied by the rector and churchwardens in repairing the burial ground walls and putting the ground itself in order, and, further, to erect a new and sufficient boundary wall of the same height as the present wall. In the petition this sum of 42*l.* is spoken of as “purchase-money” of the land itself; but what is really desired is not a faculty for the actual sale of the land, but a faculty for the use of the land as a part of the adjoining highway, the ownership of the soil remaining unaffected. The parish vestry has unanimously passed resolutions in support of this application.

Under these circumstances the vestry, the rector, and churchwardens, and the corporation, being all assenting parties, and the alteration proposed being undoubtedly for the convenience of the parishioners and the public, the case appeared to the learned judge of the Court below to be one in which, if it were within the power of the Court, the faculty should be granted, or, at all

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events, a citation be issued. But he was of opinion that he had no jurisdiction. “It has long been decided,” he says, “by the Queen’s Bench and by the Court of Arches that there is no jurisdiction in the Ecclesiastical Court to authorize consecrated ground to be applied to secular uses: *Reg. v. Twiss*<sup>23</sup>; *Harper v. Forbes*.<sup>24</sup> I considered the question fully in a case in the diocese of Rochester a few years ago—*In re Plumstead Burial Ground*.<sup>25</sup> Nothing has happened since to change my view. There is, however, a later case, *In re St. Nicholas, Leicester*<sup>26</sup>, in the diocese of Peterborough, where the decision was the other way; and there are several cases in the diocese of London in which an opposite view to mine has been acted upon. Under these circumstances I cannot but feel great diffidence in restating my opinion, and were it not that the matter concerns my jurisdiction, and seems to me to have been definitely decided by authorities which bind me, I should feel even more hesitation. It is time this very important point were carried to the \*323 Court of Arches, and I hope this will be done in the present case.” There is unquestionably a great diversity of practice in the dioceses of this province as to the grant of faculties of this description. Whilst on the one hand the learned judge of the Court below has refused to grant them on two occasions—the first in the diocese of Rochester, and now in the diocese of Exeter—they have been granted in various forms and with various limitations by Dr. Tristram, the Chancellor of the dioceses of London and Chichester, and by the Chancellors of the dioceses of Worcester, Lincoln, Llandaff, and Peterborough. In the diocese of London, in particular, since 1872 they have been repeatedly granted, and a history of the origin of the practice will be found in the judgment of the Chancellor of the Diocese of London in the case of *St. Botolph Without, Aldgate*.<sup>27</sup> The same learned judge, sitting as Chancellor of the Diocese of Chichester, in *In re St. Andrew’s, Hove*<sup>28</sup>, gives his reasons at length for holding that, in the case of a churchyard closed for burials, an Ecclesiastical Court has a discretionary power to make an order of the kind now asked for; and in the Leicester case, *The Vicar and Churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester v. Langton and Others*<sup>29</sup>, all the authorities for and against the exercise of such a power were very fully considered by the Chancellor of the Diocese of Peterborough.

I believe I am correct in stating that, with the exception of the two cases to which the learned judge of the Court below referred, all the reported decisions on this subject are decisions of Consistorial Courts. But those two stand on a different footing, being decisions of the Court of Queen’s Bench and of the Court of Arches respectively. The learned judge founded his judgment upon them; and if they do in fact decide the point now under consideration they no doubt bind him—as indeed they would also bind this Court. It is necessary, therefore, to examine them carefully, and I will proceed to do so, taking them in order of their date. *Harper v. Forbes*<sup>30</sup> was decided in this Court by Dr. Lushington in 1859. It was there proved \*324 that the churchwardens of a parish at Reigate, with the approval of the vicar, rural dean, and bishop, but without a faculty, had permitted a part of the parish churchyard to be taken into a public road, and a suit was instituted against the churchwardens by a parishioner praying for their canonical correction, and also asking for an order that the churchyard should be restored. At the hearing, the churchwardens did not deny that there had been a violation of the law, nor did they apply for a confirmatory faculty. The suit, therefore, was practically undefended, and the observations of the judge at the outset of the hearing were certainly not necessary to the decision. Nothing, as the learned judge points out in *In re Plumstead Burial Ground*<sup>31</sup>, can be more emphatic than Dr. Lushington’s statement of the law—a statement which repeated in substance observations he had made when Chancellor of the Diocese of London in *In re St. John’s, Walbrook*<sup>32</sup>; but so far as the decision is concerned, it leaves me free to consider whether the general proposition laid down is applicable to the facts with which I have now to deal—whether, in other words, it can be applied without qualification to consecrated ground where the purpose for which the ground was originally consecrated can no longer be lawfully carried out. In 1869 *Reg. v. Twiss*<sup>33</sup> came before the Court of Queen’s Bench. In that case the guardians of the poor of a parish in the diocese of London applied to the Consistorial Court for a faculty—a confirmatory faculty—authorizing the erection on a consecrated burial ground of a chapel for the inmates of a workhouse and of certain other workhouse buildings. Before sentence a stranger to the parish applied for a prohibition on the ground that the Ecclesiastical Court had no jurisdiction to grant such a faculty. The application was refused for two reasons: first, because it was not clear that the faculty when granted would authorize more than the erection of the chapel, which would be a purely ecclesiastical purpose; and, secondly, because the applicant was a stranger to the parish. And the Chief Justice (Cockburn C.J.) in the \*325 course of his judgment, whilst expressing approval of the doctrine or proposition enunciated by Dr. Lushington, distinctly states that the application before the Court would be disposed of “on narrower grounds.” There is nothing, therefore, in the decision itself binding on the Court, although the utmost respect is, of course, due to the dicta of the learned judges as to the general law regulating the power of the Ecclesiastical Courts to make orders with reference to the use of consecrated ground. It may be observed that the language of Dr. Lushington and the Chief Justice would, if strictly construed, render it impossible lawfully to grant a faculty for secular even though combined with ecclesiastical uses. Yet such faculties have been repeatedly granted by the Ecclesiastical Courts without objection. It seems to me, therefore, that whilst the dicta in deference to which the learned judge of the Court below acted, no doubt, accurately express in general terms the law upon the subject, they must be read with some sort of qualification, and I say so with the less

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hesitation because my eminent predecessor does not appear to have himself acted upon them in their entirety. Thus I find that within two months of his decision in *In re St. John's, Walbrook*<sup>34</sup>, he granted, in *Campbell v. The Parishioners of Paddington*<sup>35</sup>, a faculty for the erection of a vestry on ground which had been consecrated for a burial ground, but which had never been used and was not intended to be ever used for interments. He points out, it is true, in explanation of his decision, that a vestry room is employed for ecclesiastical as well as secular uses, but he did not limit the grant of the faculty to the former uses. On the contrary, the application being for a faculty for a new and suitable building for vestry or *other* parochial purposes, he granted it for both.

I may note in passing that the case of *St. George's, Hanover Square v. Stewart*<sup>36</sup>, referred to in *Campbell v. The Parishioners of Paddington*<sup>37</sup> as illustrating the position that no faculty can be granted for the use of consecrated ground for any secular purpose whatever, does not appear to warrant quite \*326 so general a proposition. There the parish was cited to appear to shew cause why a faculty should not be granted for the erection of a charity school on part of the churchyard, and eventually a prohibition was granted; but it is not clear upon what ground the Court proceeded. As far as can be gathered from the very brief report, I think the Chancellor of the Diocese of Peterborough is probably correct in his view that there was some "special and accidental impediment" to the grant of a faculty, "such perhaps as interference with some common law right": *The Vicar and Churchwardens of St. Nicholas, Leicester, and the Corporation of Leicester v. Langton and Others*.<sup>38</sup>

There still remains one case to which reference should be made, because it is a decision of this Court. Sir W. Wynne is stated by Dr. Lushington to have refused a faculty to convert a part of the churchyard at Ewell into the public road. But no report exists of the circumstances of the case, and it is at any rate beyond question that at the time of the decision the churchyard must still have been available for the purposes for which it had been consecrated. Now, in the present case the faculty is asked for in respect of ground which can no longer be lawfully used for burials. It remains nevertheless under the jurisdiction of the Ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. For example, it can no longer be built upon either temporarily or permanently ( 47 & 48 Vict. c. 72, s. 3 ; 50 & 51 Vict. c. 32, s. 4 ). The care of it is vested in the churchwardens where there is no burial board, and they are bound to maintain it in order and do the necessary repairs of the walls and fences ( 18 & 19 Vict. c. 128, s. 18 ), and their expenses are to be repaid out of the poor-rate. It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter v. Mountague*<sup>39</sup>; and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty \*327 for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial; but I see no reason why the jurisdiction should not remain although the ecclesiastical purpose can no longer be carried out. And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.

In the result, therefore, I am of opinion that this appeal must be allowed. I think that the discretion which the learned judge of the Court below was asked to exercise was within the limits of the Court's jurisdiction; and if it be matter of discretion, there is no dispute that the faculty is one which ought to be granted. The proper course will, I think, be to follow the procedure adopted by Sir Robert Phillimore in *In re Bettison*<sup>40</sup>; to retain the cause, and, as the allegations in the petition have been verified by an affidavit which was transmitted to this Court with the process and is now in the registry of this Court, to direct a faculty to issue to the rector and churchwardens authorizing the setting back of the present wall and the rebuilding it in the new position indicated on the plan annexed to the petition, upon the terms to which the petitioners have expressed their willingness to submit. The faculty must be subject to a proviso that the remains to be removed shall be reinterred in another portion of the burial ground to be selected by the rector and churchwardens.

Representation

Solicitors for appellants: Peard & Sons .

*Appeal allowed. (C. F. J.)*

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**Footnotes**

- 1 The petition was addressed to  
“The Right Reverend Edward  
Henry, by Divine Permission  
Bishop of Exeter.”
- 2 The petition gave the date of  
the Order in Council in  
question as May 16, 1893. An  
Order in Council of that date  
(London Gazette, May 23,  
1893, pp. 2994-5) in fact gave  
notice that an Order in Council  
would be made closing the  
cemetery. The actual Order  
closing the cemetery, with an  
exception as to certain burials,  
appears to have been made on  
July 4, 1893 (London Gazette,  
July 14, 1893 pp. 3978-9).
- 3 *(1869) L. R. 4 Q. B. 407 .*
- 4 *(1859) 5 Jur. (N.S.) 275 .*
- 5 *[1895] P. 225 .*
- 6 *[1899] P. 19 .*
- 7 *[1895] P. 225 .*
- 8 *[1892] P. 161 .*
- 9 *[1895] P. 228 , n. (4).*
- 10 *[1898] P. 155 .*
- 11 *[1899] P. 19 .*
- 12 *5 Jur. (N.S.) 275 .*
- 13 *L. R. 4 Q. B. 407 .*
- 14 *5 Jur. (N.S.) 275 .*
- 15 *L. R. 4 Q. B. 407 .*
- 16 *(1740) 2 Str. 1126 .*
- 17 *(1852) 2 Rob. 515; 16 Jur. 645*  
.
- 18 *(1852) 2 Rob. 558 .*
- 19 *(1874) L. R. 4 A. & E. 294 .*
- 20 *(1874) L. R. 4 A. & E. 294 .*
- 21 *[1896] P. 95 .*
- 22 Consistory Court of London,  
July 19, 1900. Times  
Newspaper, July 20, 1900.

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23	<i>L. R. 4 Q. B. 407 .</i>
24	<i>5 Jur. (N.S.) 275 .</i>
25	<i>[1895] P. 225 .</i>
26	<i>[1899] P. 19 .</i>
27	<i>[1892] P. 161 .</i>
28	<i>[1895] P. 228 , n. (4).</i>
29	<i>[1899] P. 19 .</i>
30	<i>5 Jur. (N.S.) 275 .</i>
31	<i>[1895] P. 225 , at p. 238.</i>
32	<i>2 Rob. 515 .</i>
33	<i>L. R. 4 Q. B. 407 .</i>
34	<i>2 Rob. 515 .</i>
35	<i>2 Rob. 558 .</i>
36	<i>2 Str. 1126 .</i>
37	<i>2 Rob. 558 .</i>
38	<i>[1899] P. 19 , at p. 27.</i>
39	<i>(1836) 1 Curt. 253 .</i>
40	<i>L. R. 4 A. &amp; E. 294 .</i>

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# Order Decision

Inquiry and site visit held on 20  
November 2007

by **Martin Elliott BSc FIPROW**

an Inspector appointed by the Secretary of State  
for Environment, Food and Rural Affairs

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**Decision date:**  
14 December 2007

## Order Ref: FPS/E1855/7/15

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Worcestershire County Council Footpath No. 709 Alfrick Modification Order 2006.
- The Order is dated 14 December 2006 and proposes to add a public footpath at Alfrick to the definitive map and statement for Worcestershire County Council as identified on the Order map and in the schedule.
- There were 6 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to a modification set out below in the Formal Decision.**

## Preliminary Matters

1. The Order relates to an application made by Mr G P Brooke on 22 December 2004 for the addition of a public footpath at Alfrick. The application was rejected by the County Council and the applicant appealed to the Secretary of State under Schedule 14 of the Wildlife and Countryside Act 1981. The Secretary of State subsequently upheld the appeal and directed the Council to make an order resulting in objections being made. The Council adopted a neutral stance at the inquiry and the case in support of the Order was made by Mr D Elwin QC on behalf of the original applicant.
2. At the inquiry Mr D Elwin QC made an application for an award of costs against the Parochial Church Council and the Reverend Bullock. This application is subject to a separate decision.
3. Mrs Tebbit, representing a number of petitioners, made the point that she had received two letters from the Planning Inspectorate (16 November 2007) advising her that Simon Burn Solicitors had submitted their statement of case on 15 November 2007 and an additional statement on 16 November. Mrs Tebbit contended that the late submission did not provide sufficient time to consider the statements; this was contrary to advice given by the Inspectorate that proofs of evidence should be submitted four weeks before the start of the inquiry. As such an element of unfairness had been introduced which should be acknowledged. Mrs Tebbit did not seek an adjournment, although this was offered, and indicated that she did not wish to delay the proceedings. Mr Duncan also made the point that he had been provided with a limited time to study the submissions.
4. In response Mr Elvin QC advised that the main bundle of documents was a collation of those already in existence and that the bundle contained nothing

- new. The main bundle contained only two new items, namely witness statements which replicated the substance of earlier evidence and legal submissions which were not required to be submitted in advance. The later letter provided further legal submissions in relation to whether or not issues already considered and determined should be reargued.
5. In my view the late submission of documents could result in a party being prejudiced. However, although the advice is that proofs should be submitted four weeks in advance, there are no rules applying to Orders submitted to the Planning Inspectorate before 1 October 2007. Furthermore, the bundle of documents submitted on 16 November 2007 did not in my view contain anything new of material significance which had not already been available; the bundle provided a chronological collection of documents. There is no requirement for legal submissions to be submitted in advance. Taking all of the above into consideration I do not think that anyone will have been prejudiced.
  6. Parts I and II of the Schedule to the Order refer to the Order route commencing on the east side of the C2233 road. In my view this is incorrect since the route commences on the west side of the road; the Council acknowledged that there had been an error in describing the route. I do not think that anyone will have been prejudiced by this error since the intentions of the Order remain clear. The Order, if confirmed, will be amended accordingly.
  7. The submission from Mr Duncan requested that the decision made by Defra, which I understand to be reference to the overturning of the decision by Worcestershire County Council as a consequence of an appeal under Schedule 14 of the 1981 Act, should be overturned and the application rejected. It should be noted that I have been appointed to determine the Order before me, the direction at the Schedule 14 stage is not a matter for further consideration.

### **Main issues**

8. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i) of the 1981 Act. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates. The test to be applied to the evidence is on the balance of probabilities.
  9. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
  10. Section 31(8) of the 1981 Act provides that nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.
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11. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public.
  12. Mr Duncan, for the Parochial Church Council and the Reverend Bullock, did not challenge the claim that members of the public had walked the Order route for the full twenty year period of 1984 to 2004. However, it was not accepted that the path existed in any form prior to 1976. The case for the objector was confined to the legal issue of deemed dedication in the context of the Pastoral Measure 1983 and the effect of that Measure on section 31 of the Highways Act 1980.
  13. Mr Elvin QC submitted that issues already addressed at the Schedule 14 appeal stage, with the Secretary of State agreeing with the inspector's recommendation, should not be reargued. The points made by the objectors did not go to the evidence but related to the ability to dedicate a footpath in the context of section 31 of the Highways Act 1980 and consecrated ground. These issues had been raised fairly and squarely and could not be raised again. Had the Secretary of State been considered to be wrong the appropriate course of action was to seek Judicial Review however, the process of the making of an order had gone ahead.
  14. I was referred to the case of *Watts v Secretary of State for the Environment and another* [1991] 1 PLR 61 (*Watts*) which was considered to set out the criteria for the application of estoppel:
    - i) where the issue involves a mixture of fact and law the whole matter must be put fairly and squarely before the tribunal;
    - ii) the tribunal must fully address the matter
    - iii) the tribunal must make an unequivocal decision on the matter, and
    - iv) the fact that the first three conditions are fulfilled should be clear on the face of the decision.
  15. Mr Duncan asserted that the inquiry was part of the appeal process and the inspector, at the Schedule 14 stage, was misdirected and in error; there was no distinction in the elements of the appeal process. In the interests of natural justice the arguments should be heard. Mrs Tebbit agreed with the response of Mr Duncan. Mr Elvin QC thought that Mr Duncan's response was incorrect since the objection to the addition of a footpath had already been considered.
  16. In my view an appeal under Schedule 14 of the Wildlife and Countryside Act 1981 has a definite purpose, to decide whether or not there is a sufficient case to warrant the making of an order. The inspector, if appointed, in making their recommendation, is not taking a firm view on the evidence submitted as a consequence of the appeal but assessing the sufficiency of that evidence to justify the making of an Order. If there are sufficient grounds then an order should be made so that the case for the order can be tested at a public inquiry if necessary. Whilst the Secretary of State may agree with any recommendation made at the Schedule 14 stage no firm decision is made. The sole unequivocal decision relates to the Secretary of State directing the Order
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Making Authority into making a modification order; that is not the same as making a decision on the evidence. In making that decision the Secretary of State makes it clear that the decision to direct the Council to make the Order is given without prejudice to any decision that may be given by the Secretary of State in exercise of his powers under Schedule 15 (see correspondence 15 November 2006 tab 14 of Bundle prepared by Simon Burn Solicitors). Making an order provides an opportunity for the evidence to be tested and for other evidence to be submitted for consideration. As such the criteria, as set out in *Watts*, are not applicable in respect of appeals made under schedule 14 where an unequivocal decision has not been made on the evidence. The inquiry is not part of the appeal process but is held to consider objections made to the Order under schedule 15 of the 1981 Act.

17. In view of the above I deem it necessary for those issues which were raised at the Schedule 14 stage to be reargued but only in respect of those matters put before me.

## Reasons

### *Submissions in support of the Order*

18. The applicant contended that the objectors were relying on Section 31(8) of the Highways Act 1980. The applicant submitted that consecrated ground was not held for public or statutory purposes but for ecclesiastical purposes. The Church did not owe a public duty and was not accountable under public law; whilst the Church may take into account the public good the land was not held for public purposes nor was it in public ownership.
19. It was thought that the basis advanced by the objectors was misconceived:
- i) The presumed dedication did not require the actual dedication, disposal or alienation of consecrated ground. The Highways Act 1980 operated generally to create highways through long user absent of a contrary intention to do so. There was no disposal or actual dedication involved.
  - ii) The Pastoral Measure 1983 was not directed to the issue of dedication but directed to issues arising from redundant churches.
  - iii) The decisions of the Ecclesiastical Courts did not go as far as suggested by the objectors and actually supported the possibility of presumed dedication and presumed faculty.
20. In *Re St Martin Le Grand, York* [1990] Fam. 63 (*St Martin*) the Chancellor of York had to consider the specific issue of a right of way over a churchyard. The Chancellor considered the question of the existence of a right of way only because it was ancillary to the undoubted question as to the issue of a faculty. The question was raised as to whether a faculty was needed and if so if one could be granted. Having concluded that a faculty could be granted the Chancellor held that a grant could be presumed. The Chancellor made it clear that presumption was a matter for secular law and that a faculty could be presumed. Mr Elvin QC submitted that there was therefore no basis for precluding the presumption of dedication; if necessary it could be presumed to be dedicated by a faculty. Other authorities relied upon by the objectors did not assist on the direct questions addressed in *St Martin le Grand*.
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21. It was noted from *St Gabriel, Fenchurch Street v City of London Real Property* [1896] that while the fee simple to consecrated ground may be in abeyance the incumbent has a legal interest in the freehold of a churchyard akin to a life interest. Whilst there was no issue of seeking appropriation from the incumbent there was no reason why the incumbent would be unable to take steps to prevent the presumption of dedication from arising.
  22. The case of *Batten v Gedye* (1889) 41 Ch.D. 507 also confirmed the right of the incumbent to control access to a churchyard. Where the benefice is vacant there was nothing preventing the priest in charge or the Parochial Church Council to prevent the time running under section 31 of the Highways Act 1980. Even if there were no incumbent the control rested with the Ordinary. Furthermore, the Parochial Church Council had the management and maintenance of the fabric of the church and churchyard and would be able to take appropriate action; this would include the erection of notices. There was no suggestion that the church could not have prevented access before 2004.
  23. It was further submitted that the application of section 31 of the 1980 Act was not contrary to the purposes of the church. There was nothing objectionable in the principle of having a footpath through a churchyard; there existed two other footpaths which were more intrusive and had existed since 1949. Although it was suggested that footpaths were not to be expected to pass through a churchyard this was irrelevant in the context of section 31. If allowing a footpath was contrary to the purpose of the church then the 1976 faculty, for a licensed footpath, would no doubt never have been granted. In *British Transport Commission v Westmorland CC* [1958] A.C. 126 there was no power to create footpaths incompatible with the purpose of the railway, not whether a specific procedure had been followed. The issue was the application of section 31 of the 1980 Act to consecrated ground and any significance of the faculty jurisdiction. The reference to 'purpose' in section 31(8) added nothing to the debate.
  24. As regards the Pastoral Measure 1983, the section relied upon by the objectors dealt specifically with redundant churches; that was clear from the heading and also from section 56(1). Section 56(2) related to disposals which ought to follow other procedures. In any event, the presumption did not infringe the provision in section 56(2) against selling, leasing or otherwise disposing of a church or consecrated ground. Furthermore it did not preclude the presumption referred to in *St Martin le Grand*. The point was made that Mr Duncan did not dispute that the provisions were inferring that there was a need for a faculty but, the Pastoral Measure went no further than dealing with redundant churches.
  25. Overall it was submitted that the principles of section 31 of the Highways Act 1980 could be reconciled with the principles governing consecrated ground. Moreover, the law should lean against exempting parts of the community from general law without good reason.
  26. In respect of comments relating to the case of *Attorney General ex rel Yorkshire Derwent Trust v Brotherton* (1992) 1 All ER 230 (*Brotherton*), and the conclusions drawn by the inspector in the report to the Secretary of State being misplaced, this dealt with the 1932 Rights of Way Act. *R v Oxfordshire County Council and v Oxfordshire County Council and another ex part*
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*Sunningwell Parish Council* [1999] 3 All ER 385 (*Sunningwell*) had been misunderstood by Mr Duncan and there was no confusion that the inspector had confused consecrated and glebe land. The significance of the case, as considered correctly by the inspector, was the definition of as of right.

27. Mr Elvin QC noted the points made by Mrs Tebbit in respect of authority over the churchyard and made the point that the church had had twenty years to manifest its intention not to dedicate a right of way. There was no evidence of any lack of intention and this was a question of acquiescence. Mr Elvin QC also noted correspondence from the Worcester Diocesan Register and took the view that the letter only reiterated the points made by Mr Duncan.

***Submissions in opposition to the Order***

28. Mr Duncan, on behalf of the Reverend Andrew Bullock and the Parochial Church Council, asserted that the footpath had never been dedicated as a highway. A private path had been sanctioned under a licence dated 19 March 1976 granted to Malvern Hills District Council by the Rector authorised to enter into the agreement by a faculty issued 23 January 1976. The path was to enable the elderly residents of newly constructed bungalows to pass more conveniently to the centre of the village.
29. Mr Duncan contended that, whilst members of the public other than, and in addition to, those entitled to use the path, that use did not satisfy the requirements of section 31 of the Highways Act 1980. This was because the land over which the path passes formed part of the churchyard and as such was consecrated land.
30. Churches and consecrated land were protected by section 56 of the Pastoral Measure 1983. This stated that it was unlawful to 'sell, lease or otherwise dispose of any church or part of a church or the site or part of the site of any church or any consecrated land belonging or annexed to a church except in pursuance of powers under this Part or Section 30'. The creation of a public footpath abridged the rights of ownership over the surface of the land and was therefore a disposal in accordance with section 56(2). If the Order route was declared as a footpath this would prevent burials from taking place and this would be a permanent alienation. The suggestion that section 56 only applied to redundant churches was a misinterpretation of that section. Section 56(3) made it clear that a faculty was required to make use of any part of the church unless redundant.
31. The Pastoral Measure 1983 had the effect of prohibiting the creation of any interest in consecrated land except with a licence granted under the authority of a faculty. Such a provision was not curtailed by section 31(1) of the Highways Act 1980 which was a deeming provision as opposed to a statutory power contained within the Pastoral Measure; section 56 of the Pastoral Measure took precedent over section 31 of the Highways Act 1980. It was established that only with the authority of a faculty could a private or public right of way be established over a consecrated churchyard.
32. Apart from section 56(2) of the Pastoral Measure 1983 there was a line of authority dating back to the 19<sup>th</sup> century (*re St. Paul's Covent Garden* [1974] Fam 1, *re St. Clement's Leigh on Sea* [1988] WLR 720 and *re St Martin Le Grand, York* [1990] Fam 63). All the cases established that an incumbent had
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- no legal power to grant a right of way over a churchyard but that in all cases a faculty was requisite in order to vest such a right in individuals or the public at large. The faculty jurisdiction in this respect was demonstrated in *Batten v Gedge* (1889) 41 Ch. D 507. In *St Martin le Grand* certain presumptions were made based on the facts of the case. The circumstances in respect of the current case were entirely different since it related to a licensed private footpath under the authority of a faculty.
33. The fact that there were other footpaths crossing the churchyard was not contested although there was no evidence as to how the footpaths came into existence. This could have been after the grant of a faculty or could predate the faculty procedure. The footpaths clearly predated the Pastoral Measure 1983. Footpath 535 ran along the boundary of the churchyard and was not intrusive. Footpath 532 had been in existence for many years and passed between the graves. However, a path along the southern boundary would be intrusive and damage the sanctity of the churchyard. It was submitted that it was undesirable for footpaths through churchyards to be used for through routes; footpaths were provided to lead to the church.
34. The inspector determining the appeal under Schedule 14 of the 1981 Act had misapplied Section 31(1) and Section 31(8) of the Highways Act 1980.
- i) The granting of a faculty limiting the user of the way negatives an intention to dedicate a way for the benefit of the public.
  - ii) The acts or omissions of those with a limited interest (the incumbent, the Parochial Church Council and the District Council) are for this purpose immaterial.
  - iii) Under section 31(8) it would be *ultra vires* for the incumbent, the Parochial Church Council or any other body within the Church of England to dedicate a public right of way without an appropriate faculty.
  - iv) The establishment of a highway under section 31(1) was incompatible with the exercise of the faculty jurisdiction.
35. The reliance by the inspector upon *Attorney General ex rel Yorkshire Derwent Trust v Brotherton* (1992) as to the lack of capacity to dedicate was misplaced. The House of Lords was concerned with the construction of section 1 of the Rights of Way Act 1932 in the context of waterways; the terms of the Act differed materially from section 31 of the Highways Act 1980. In the context of churchyards there was an established procedure by way of petition to the Consistory Court or the Diocese whereby appropriate rights may be established.
36. The inspector had also relied on *R v Oxfordshire County Council and another ex parte Sunningwell Parish Council*, but failed to make the distinction between consecrated and unconsecrated land. For the purpose of the appeal there was a distinction between unconsecrated parochial land and consecrated land which was governed by section 56(2) of the Pastoral Measure 1983. In supposing that the same legal restrictions applied the inspector was mistaken and vitiates the conclusions reached at paragraph 99 of the Schedule 14 report and onwards.
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### ***Consideration of submissions***

#### *Pastoral Measure 1983 and the requirement of a faculty*

37. Section 56 of the Pastoral Measure is entitled '*Churches not to be closed or disposed of otherwise than under this Measure*'. Whilst the Measure does infer that a faculty may be required for authorising other suitable uses, those other uses are not stipulated. Nevertheless the Measure clearly relates to the disposal of redundant churches or the site of any church. There is nothing which can be read from the section which indicates that a public right of way could not be presumed to be dedicated without a faculty.
38. In dedicating a right of way there is nothing before me to suggest that the land over which the way would pass is being sold, or disposed of. The dedication of a right of way would result in a right over private land, the ownership would not change. For these reasons I do not accept that the Measure prohibits the creation of an interest in the form of a public right of way without a faculty. If, as it is argued, the existence of a footpath would prevent burials it appears to me, from the 1976 agreement, that the prospect of such burials are already limited as a consequence of the agreement. The grounds for termination of the said agreement are that the Licensee defaults on the requirement to maintain a footpath, and a fence if required by the Grantor. This does not suggest to me that the church intended, during the operation of the agreement, to conduct burials in this part of the churchyard. In any event, as suggested at the inquiry, if there was any intention to carry out burials in this part of the churchyard then any footpath could be diverted subject to meeting the relevant criteria.
39. As regards the precedent of section 56 of the Pastoral Measure over section 31 of the 1980 Act, I have concluded that the Measure relates to redundant churches and churchyards. Furthermore, I am of the view that dedication of a highway does not amount to disposal of land. As such I cannot agree with the view that section 56 has precedent over section 31 of the Highways Act 1980 since it does not relate to the particular issue. In any event Section 31 provides for a statutory dedication, subject to certain criteria; it is not a deeming provision but a statutory provision. Once the criteria have been met and in the absence of a contrary intention to dedicate it is presumed that the landowner intended to dedicate the way as a highway. There is nothing to suggest, in presuming the dedication of a way, that other actions, such as the granting of a faculty, should occur.
40. In respect of *St Martin Le Grand*, whilst the circumstances vary from those in relation to the Order route, there is a clear indication, as a consequence of use as of right, that a faculty could be presumed to be granted. As such the absence of a faculty should not be seen as an obstacle to dedication under section 31 of the Highways Act 1980. As outlined above, once the necessary criteria have been met, the way is presumed to have been dedicated. I accept that there may be some circumstances when a faculty may be required such as to provide for an express dedication, that is not the case in respect of the Order route.
41. As regards the other authorities relied upon by Mr Duncan *re St Paul's Covent Garden* [1974] Fam 1 specifically relates to the entering into a lease for use of
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parts of the churchyard for use as a car park. In *re St Clement's Leigh-on-sea* [1988] WLR 720 relates to the express grant of an easement which could not be granted without obtaining a faculty. The cases do not deal with the dedication of a right of way through presumption as is the case with section 31 of the 1980 Act. I do not think that the cases offer any assistance in demonstrating the need for a faculty in respect of presumed dedication. *Batten v Gedye* (1889) 41 Ch.D 507 clarifies the faculty jurisdiction but does not deal in any way with the establishment of rights through presumed dedication. However, the case does offer clarification in respect of the ability of an incumbent to take action for trespass and in my view therefore able to take action to prevent the presumed dedication of a way.

*Incompatibility of section 31(1) of the Highways Act 1980 with the faculty jurisdiction*

42. Mr Duncan argued that section 31(1) of the 1980 Act was incompatible with the faculty jurisdiction. I deal with use as of right and the lack of intention to dedicate at paragraphs 50 to 57 below. The remaining part of the section outlines that the provisions do not apply to a way of such a character that use of it could not give rise at common law to a presumption of dedication. I have outlined above at paragraph 11 the requirements for dedication at common law. In my view there is nothing to prevent the express dedication of a highway over a churchyard, accepting that this would normally be by way of a faculty. The granting of such a faculty would in my view equate to an express dedication of the way and there would seem to be nothing which would prevent the other requirements for dedication at common law from being met. A faculty may also be presumed (paragraph 40 above) and therefore give rise to implied dedication. As such there is nothing before me which indicates that the way is of such a character that use could not give rise at common law to a presumption of dedication. Arising from this, and the fact that a faculty can be granted or implied, I am of the opinion that this part of section 31(1) is not incompatible with the faculty jurisdiction since dedication at common law can apply.

*Highways Act 1980 Section 31(8)*

43. I have recited the relevant section at paragraph 10 above. I note the assertion that section 31(8) would be *ultra vires* for the incumbent, the Parochial Church Council or any other body within the Church of England to dedicate a public way without a faculty. In my view the church and churchyard is not in public ownership. Whilst the church may be used for the public benefit that is not the same as being in the possession of the public or being held for statutory purposes. As a consequence I do not consider that the section is relevant to land owned by the church.
44. Although I have concluded that section 31(8) is not applicable I consider it appropriate to consider matters of incompatibility since the issue has been raised. It is noted that a private agreement exists for the establishment of a footpath for use by certain individuals along the line of the Order route. In entering into such an agreement the then Rector must have given consideration to the appropriateness of such a route. Had the path been incompatible with the churchyard it would appear unlikely that such an agreement would have been entered into and a faculty granted. Furthermore,
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it is noted that two footpaths already exist through the churchyard; there is no evidence that these footpaths are intrusive or that the Order route would be any more intrusive than these. As suggested footpath 535 passes along the northern boundary of the churchyard. In my judgment the Order route follows the southern boundary and since it passes closer to the boundary of the churchyard it is less intrusive than footpath 535 and in particular footpath 532 which cuts through the middle of the churchyard. As such I cannot accept the dedication of the Order route would be incompatible with the purpose of the churchyard.

45. I note the observations in relation to footpaths through churchyards (paragraph 33) and that it was normal for footpaths to churches and churchyards to provide access to such destinations only. However, there is no general presumption that this should be the case. It should be recognised that public footpaths are highways over which the public have a right to pass and repass for reasonable purposes incidental with their use. Whatever the circumstances there exists two public footpaths which pass through the churchyard which, it has been accepted, are not intrusive. The existence of the Order route, as a through route, does not in my view result in the route being intrusive.

#### *Brotherton and Sunningwell*

46. I note the comments by Mr Duncan in relation to the above cases and the reliance of the Inspector at the Schedule 14 stage in support of the conclusions. As I have outlined above the recommendation made at that stage is not a matter for my consideration. However, the cases have been raised in relation to limited aspects of the objection promoted by Mr Duncan and it is therefore necessary to comment in this context.
47. *Brotherton* concerned itself with the construction of section 1 of the Rights of Way Act 1932, albeit in the context of a way over water. As Mr Duncan pointed out, and considered in *Brotherton*, the Act was aimed at the specific mischief of settled land lacking an identifiable owner. Section 31 of the Highways Act 1980 encompasses section 1 of the 1932 Act but with the requirement for there to be a landowner with a capacity to dedicate a way being removed. When considering the dedication of a route in accordance with the 1981 Act the issue of capacity is therefore not a relevant matter. In making my decision *Brotherton* does not offer any assistance.
48. In respect of *Sunningwell* whilst the case related to the claim for a village green on glebe land I attach no significance to this in relation to the Order before me. The case does not assist in relation to the acquisition of public rights over consecrated land. Nevertheless *Sunningwell* clarifies the definition of use as of right, a requirement for a statutory dedication under the 1980 Act. As of right is defined simply as use without force, secrecy or permission.

#### ***Evidence of User***

##### *When the right to use the way was brought into question*

49. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a
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reasonable opportunity of meeting it. Evidence suggests that the formal application under the Wildlife and Countryside Act 1981 dated 22 December 2004 was made following a public meeting at which public rights on the Order route were denied. Sections 7A and 7B (as inserted by section 69 of the Natural Environment and Rural Communities Act 2006) clarifies that an application for a definitive map modification order is, of itself, sufficient to bring a right of way into question for the purposes of section 31(2) of the Highways Act 1980. The right to use the way was clearly brought into question in 2004 and no evidence is before me to suggest otherwise. This sets a relevant twenty year period of 1984 to 2004.

*Evidence of use 1984 to 2004*

50. A number of signed statements submitted by the supporter of the Order indicate use of the way, by the public, without interruption during the relevant twenty year period. This was not disputed at the inquiry and there is nothing before me to suggest that the use did not take place. There is no evidence that those using the way did not use the way as of right. Whilst the granting of the licence in 1976 to use the way by some might be construed as permission, the use with permission by some does not preclude use by others from being without permission. None of those who have provided statements suggest that their use was with any permission.
51. Mr Duncan outlined that no part of the case, on behalf of his clients, challenged the claim that members of the public, other than those entitled to use the route under the terms of the 1976 licence, had used the way. However, it was disputed that any path existed prior to 1976 but that this was not relevant in relation to the inquiry. In respect of earlier use, this is not a matter for my consideration since the relevant period is 1984 to 2004 but there is certainly evidence of use from at least 1976.
52. In my view, although the evidence is not substantial, the evidence, on balance, demonstrates use of the way by the public as of right and without interruption for a full period of twenty years such as to raise the presumption that the way had been dedicated as a public footpath.

*Evidence of Landowners intention*

53. For there to be sufficient evidence that there was no intention to dedicate the way, other than those specifically provided for in section 31 of the Highways Act 1980, there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that he had no intention to dedicate.
  54. Mr Duncan asserted that the grant of a faculty limiting user by a particular group negated an intention to dedicate a way for the benefit of the public at large. Mr Duncan noted the assertion that no attempt had been made to deter or prevent those with a private right from using the licensed private footpath. In response Mr Duncan made the point that there were practical difficulties in identifying those who had a legitimate right to use the route and those who did not.
  55. In my view the faculty which relates to a licence between the District Council and the incumbent of the benefice of Alfrick with Lulsley and Suckley provides
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for access to a limited number of persons. Whilst those using the way in accordance with the licence may be aware of its existence, this is not known, there is no evidence that the public using the way had any knowledge of the faculty or licence. In any event there is no evidence provided from the faculty or licence of any reference to the fact that there was no intention to dedicate a way for the public. Since the faculty and licence makes no reference to such an intention they cannot be seen as providing sufficient evidence of a lack of intention; noting in addition that they were not brought to the attention of those using the way. The granting of a faculty alone does not evidence a lack of intention; as outlined above there must be some overt acts such as to disabuse the public of a right to use the way.

56. No other evidence has been put before me to suggest that those using the way were challenged or prevented from using the way during the relevant period. I note the assertions of Mr Duncan, that it was difficult to identify those not using the way in consequence of the licence, but other actions could have been taken, such as the erection of appropriately worded notices, to demonstrate a lack of intention.
57. I conclude that there is no evidence which is sufficient to demonstrate a lack of intention to dedicate the way as a public footpath.

### ***Dedication at common law***

58. In the light of my findings that the Order route can be presumed to be dedicated under section 31 of the Highways Act 1980 it is not necessary to consider whether the route has been dedicated at common law.

### ***Summary***

59. In summary section 56 of the Pastoral Measure does not demonstrate the need for a faculty to be provided for a way to be presumed to be dedicated. The land over which the Order route passes is not to be disposed of or sold and therefore a faculty is not required, in this context, for any dedication. There is nothing before me to suggest that the faculty provision is incompatible with section 31(1) of the Highways Act 1980 since dedication of the Order route is possible under common law. In addition the faculty provisions do not demonstrate use was not as of right nor any lack of intention to dedicate. Further, there is no conflict with section 31(8) since the churchyard is not land held for public or statutory purposes and the section is not applicable. In any event there is nothing to suggest that the Order route is incompatible with the land over which it passes.
60. The evidence of use satisfies the requirements for a statutory dedication. Although I have found that there is no conflict with the presumption of dedication and the faculty provision, and that the Pastoral Measure does not override section 31 of the 1980 Act, a faculty could in any case be presumed. The evidence as a whole leads me, on balance, to conclude that a public footpath has been dedicated along the Order route.

### **Other Matters**

61. Mrs Tebbit made the point that the licensed status of the footpath and the level of use of the way had worked satisfactorily for the past thirty years. The
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church had been implicated in the pursuit of the application and there was now an obligation to protect the church and churchyard. This was not a matter relating to a footpath but as to who determined what took place; this should remain with the Priest and the Parochial Church Council. Whilst I note these comments they are not matters which I can take into account in making my decision. The written representations made reference to a planning application for development in Alfrick. This and the circumstances surrounding the application and that for the Order are not for my consideration.

### **Conclusion**

62. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with one modification.

### **Formal Decision**

63. I confirm the Order subject to the following modification:

- At Parts I and II of the Schedule to the Order, at line one, delete the words 'east' and insert the words 'west'.

*Martin Elliott*

**Inspector**

**APPEARANCES****For the Order Making Authority:**

Mr D Goode Worcestershire County Council, County Hall, Spetchley Road, Worcester, WR5 2NP

**In support of the Order:**

Mr D Elwin QC Of Counsel, instructed by Simon Burn Solicitors, 107 Promenade, Cheltenham, Gloucestershire, GL50 1NW

**In opposition to the Order:**

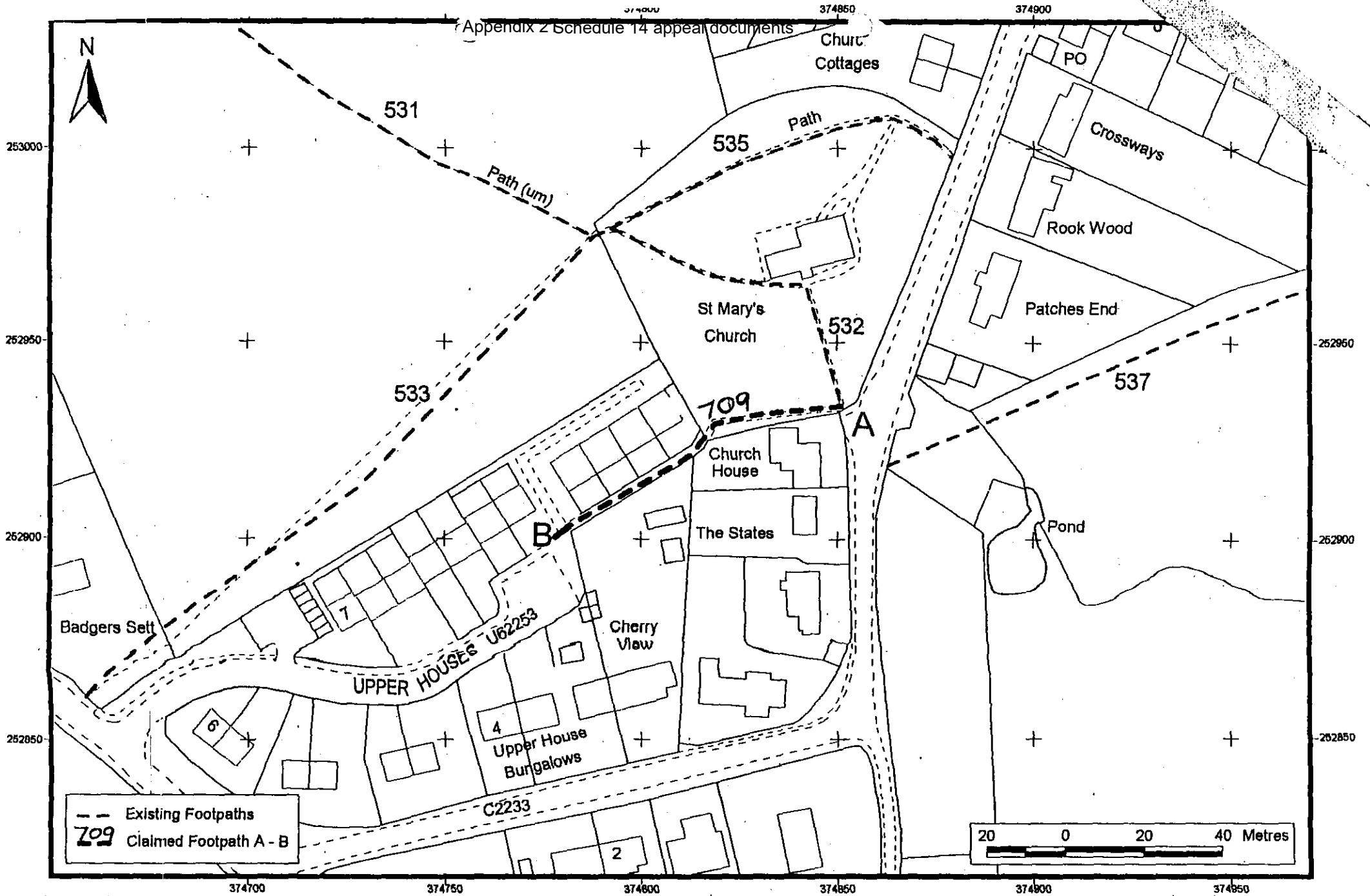
Mr A Duncan Representing the Reverend Andrew Bullock and the Parochial Church Council of Alfrick, Whatley Weston & Fox, 15 & 16 The Tything, Worcester, WR1 1HD

Mrs C A Tebbit The Briar, Crews Hill Court, Alfrick, Worcester, WR6 5ES

Mrs P Dawson Upper Mythes, Alfrick, Worcester, WR6 5HH

**DOCUMENTS**

- 1 Correspondence from Worcester Diocesan Registry 16 November 2007
- 2 Correspondence from Whatley Weston and Fox 19 November 2007
- 3 22 No. photographs taken 14 November 2007



- - Existing Footpaths  
**709** Claimed Footpath A - B

20 0 20 40 Metres



**WILDLIFE & COUNTRYSIDE ACT 1981**  
**DEFINITIVE MAP MODIFICATION ORDER**  
**DISTRICT OF MALVERN HILLS PARISH OF ALFRICK**  
**ADDITION OF FOOTPATH**

**SCALE: 1:1250**  
**DRG.NO**  
**M247-AK**

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# Order Decision

Site visit made on 16 July 2012

**by Roger Pritchard MA PhD MRTPI**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 07 August 2012**

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## Order Ref: FPS/M1900/7/66

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Widford 17) Modification Order 2010.
- The Order is dated 19 November 2010 and proposes to modify the Definitive Map for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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## Procedural Matters

1. The Order relates to an anomaly on the Definitive Map and Statement ('the DMS') for Hertfordshire. No path passing through the churchyard of St John the Baptist's Church ('the Church'), Widford, is recorded on the current Definitive Map, the relevant date for which is 1986. There is, however, a record of such a path in the Definitive Statement, the entry for which reads, '*...commences from county road just W of St John the Baptist's Church thence N through churchyard to junction with BR16*'.
2. This anomaly was highlighted by an application relating to another nearby path. The County Council, as Order Making Authority ('the OMA'), undertook the relevant investigations that it has a duty to carry out under the 1981 Act. These led it to conclude that, as a consequence of events specified in sections 53(3)(c)(i) and (iii), Order should be made under section 53(2)(b) to add a footpath to the Definitive Map whilst modifying the Definitive Statement to describe a path on a different route from that referred to above.

## The Main Issue

3. The main issue is whether the discovery by the OMA of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown on the DMS subsists over land in the area to which the Map relates. The test to be applied to the evidence is the balance of probabilities.
  4. The OMA presented its case on the basis of a claim for inferred dedication under common law. Dedication at common law requires consideration of three issues –
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- Whether any current or previous owners of the land in question had the capacity to dedicate a highway;
- Whether there has been express or presumed dedication by the landowners; and
- Whether there has been acceptance of the highway by the public.

Evidence of the use of a path by the public as of right may support a presumption of dedication and may also show acceptance by the public.

## **Reasons**

### ***Background***

5. The claimed path starts on the B1004, Widford Road, at a lych gate that is the main entrance to the churchyard. It runs north for some 35 metres to the Church porch before swinging for a further 10 metres around the Church's south-west corner. To this point, the path is well-defined, has a gravelled surface and is up to 2 metres wide. The path then runs for around a further 25 metres across mown grass to exit the north west corner of the churchyard by a kissing gate. It then descends a steep flight of steps for around 15 metres before meeting Public Bridleway B.R.16, which at this point runs east-west behind and below the churchyard. The total length of the claimed path is some 85 metres.

### ***The objections***

6. Three objections were unresolved when the Order was submitted to the Secretary of State for confirmation. One, from a local resident, L James, appears to misunderstand the purpose of the Order, erroneously believing that it diverts an existing farmland path into the churchyard. The OMA sought clarification of this objection but none has been received. This objector also has concerns about dogs and dog faeces in the churchyard. I appreciate these concerns but they are outside the scope of the matters before me.
7. Nevertheless, this objection also raises the issue of the safeguarding of churchyard. This matter is at the heart of the other two objections, which come from the current incumbent and churchwardens of the Church and from the Registrar of the St Albans Diocese<sup>1</sup>. Although both question the weight which the OMA has afforded to the documentary evidence supporting its case for the Order, their objections rest primarily on the legal argument that it is impossible to identify any current or previous owner of the churchyard who had the capacity expressly to dedicate a highway over this land. In these circumstances, neither can there be presumed dedication and the test for dedication at common law must fail.

### ***The documentary evidence***

#### *Pre-20<sup>th</sup> Century Evidence*

8. The OMA relies on documentary evidence from the early 20<sup>th</sup> century onwards. The objectors criticise this reliance but, as the OMA rightly points out, dedication under common law sets no specific timescale. Evidence that can demonstrate that a route had been used for a century or more would be well

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<sup>1</sup> Until August 2011, this post was held by Mr David Cheetham. On his retirement, the post has been taken over by Mr Lee Coley.

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within what the Courts have held is sufficient time to support dedication under common law.

#### *The Finance Act 1910*

9. The earliest documentary evidence to which the OMA refers is the Finance Act 1910. The Act sought to levy a tax on any increased value when land was sold. A national survey was conducted to establish baseline values. Details were recorded in field and valuation books for individual hereditaments. Provision was made for recording a deduction in value where hereditaments were crossed by Public Right of Ways (PRoWs).
10. The claimed path is shown on the survey's base map (the Ordnance Survey 2<sup>nd</sup> Edition, probably dating from 1898). It is in Hereditament 406, which comprises the Church and churchyard. A deduction of £65 for PRoWs is recorded for this hereditament. Although – as is usual in these circumstances – no details of the PRoW(s) are recorded, I agree with the OMA that it is difficult to see that the deduction can refer to any route other than the claimed path. That conclusion is strengthened by the recording of the claimed path across the churchyard on successive Ordnance Survey maps. These, whilst they cannot be determinative of a route's status, nevertheless show no path across the churchyard other than that now claimed.
11. The objectors suggest that the Finance Act evidence should be discounted on the grounds that it does no more than record the opinion of the then incumbent, who would have been unaware of any legal distinctions that might apply to paths running across churchyards. I have no doubt that the objectors are correct in their assessment of the limits of the incumbent's knowledge. However, the drawing up of Finance Act surveys was closely controlled and surveyors were given detailed instructions as to the criteria to apply. Nevertheless, I accept that that some degree of local variation in survey methodology can occur and that it is possible, if no objections were made, that a PRoW across a churchyard could have been recorded, irrespective of any legal limitations.
12. The objectors also make the additional point that if the claimed path were 2 metres wide throughout, it would impinge on some late 19<sup>th</sup> century graves. The Council accepts that it is unlikely that a right of way would pass over graves but suggests that the recorded width of the claimed path be amended to allow it to narrow in the vicinity of the graves. If confirmed as made, I see no objection to the Order being modified in this manner.

#### *Definitive Map Records*

13. Following the National Parks and Access to the Countryside Act 1949, the OMA undertook the procedures to produce the first Hertfordshire DMS. Critical to these were Parish Surveys, undertaken by parish councils or sometimes by user groups such the Ramblers. The claimed path appears on a survey conducted by a local representative of the Ramblers and is recorded as a '*Right of way through churchyard west side of church to connect with stile*'.  
*Right of way through churchyard west side of church to connect with stile*
14. However, for whatever reasons, the path that was shown on the draft DMS was not the claimed path, which I have no doubt both existed and was that recorded by the Ramblers' surveyor. Instead, a path was shown running parallel to the western edge of the churchyard, a route that required crossing

the churchyard's front wall at a point where there was no access. The Draft Statement for the recorded path reads as set out in paragraph 1.

15. No objections were made to the route for Widford 17 as recorded and it so appeared on the First DMS for Hertfordshire, the relevant date for which is 1953. Moreover, the balance of probabilities strongly points to the OMA then being convinced that a PRoW existed across the churchyard but that due to clerical/cartographic error, an incorrect route was recorded.
16. Although the Special Review of the DMS, required by the Countryside Act 1968, was abandoned in Hertfordshire in 1984, an amended DMS was produced in 1986 that showed all changes to the First DMS which had no outstanding objections. The Special Review Draft Map shows a path following the route recorded on the first DMS, but this path did not appear on the final Map. No evidence for this omission has been presented to me. The recorded path, however, continues to appear on the final Statement in the form already set out.
17. No objections or representations relevant to the recorded or claimed paths were made during the process of Special Review. The objectors suggest that the former's deletion from the final Map may reflect a realisation that there were legal bars to the establishment of a PRoW across the churchyard. I find this proposition implausible. Apart from the lack of any representations raising this issue, the retention of the recorded path on the revised Statement contradicts this argument. Furthermore, if the OMA had deleted the recorded route on the legal grounds put forward by the objectors, I see no reason why that part of Footpath 17 north of the kissing gate (and thereby outside the churchyard) was not retained to provide a link into the Church from B.R.16.
18. It is more probable that either the recorded route was omitted through clerical error, or, when drawing up the final revised Map, the draughtsman realised that the recorded route was practically impassable. However, the discrepancy was not resolved before publication.
19. Although it made no objection to the recorded route during the preparation of the Special Review, after publication of the revised DMS in 1986, Widford Parish Council ('the PC') made representations to the OMA that the recorded route of Footpath 17 was incorrect. The PC contended, supported by user evidence, that there had never been a path through the churchyard other than that which follows the route of the path now claimed. The OMA recorded its agreement with the PC and stated that it would amend the DMS. However, the OMA took no action until the process that led to the current Order began in 2009.

### ***User Evidence***

20. The Church is of 14<sup>th</sup> century origin and local people will have therefore been walking to it for some hundreds of years. The OMA has submitted three statements by long-standing local users that support the case that, for decades, the public has been using the claimed path without challenge. The user evidence also suggests that the path has been used not only to access the Church and churchyard, but also as a through route between Widford Road and what is now B.R. 16.
  21. Although this user evidence is limited, it not disputed by the objectors. They accept that the public has used the path unhindered for many years and that
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no steps have ever been taken to challenge or restrict that use. Indeed, they welcome public use of the path, providing it is accepted that it has not been as of right but has always been, and must always be, on a permissive basis.

### ***Conclusions on the Documentary and User Evidence***

22. The objectors suggest that the documentary evidence in support of the claimed path is unconvincing and limited in time-scale. I do not agree. For at least a hundred years – if not substantially longer - there is substantive and substantial evidence that a route has existed across the churchyard that corresponds to that of the claimed path. Furthermore, nothing in the documentary evidence suggests that the public's use of the claimed path had ever been brought into question prior to the objections to the Order before me. Nor have any steps ever been taken by the Church authorities to challenge or prevent the public's use of the claimed path.
23. I therefore conclude that, on the balance of probabilities, the documentary and user evidence would meet the second and third tests for presumed dedication under common law.

### ***Legal submissions***

24. The fundamental difference between the OMA and the objectors is whether there is a power to dedicate a right of way over consecrated ground. Both parties have put extensive legal submissions to me on this point. However, the main legal issues underpinning this case seem to be –
- Can express dedication of a right of way under secular law (and therefore by inference presumed dedication) be applied to a way over consecrated ground?
  - If the answer to the above is No, are there are other processes by which a right of way can be created over such land?; and
  - If there are other processes expressly to dedicate a right of way over consecrated ground, do these carry with them the inference that presumed dedication can also be claimed?
  - If the answers to the second and third questions above are Yes, my findings on the supportive weight of documentary and user evidence should lead me to the conclusion that the Order should be confirmed.
25. With respect to the first question, both parties' submissions focus on whether a Church of England incumbent has powers to dedicate a right of way. The objectors argue that incumbents hold their benefices under terms that make disposal of the fee simple, and thereby express dedication of a right of way, impossible as section 31(7) of the 1980 Act defines 'an owner' as someone who is entitled to '*...dispose of the fee simple.*'
26. The need for a current or previous owner of the land to have the capacity expressly to dedicate a highway is reinforced by case law. The statement by Laws J in *Jaques*<sup>2</sup> that, '*...a right of way cannot arise under section 31 [of the 1980 Act] if at some time during the relevant period there is no person at all having the legal right to create a public right of way*' seems clear on this point.
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27. However, other legislation suggests that incumbents do have powers expressly to dedicate a highway under specific circumstances. Section 11(1) of the Church Property (Miscellaneous Provisions) Measure 1960 (as amended) empowers incumbents to '*...dedicate for the purpose of a highway...*' land belonging to their benefice. This power is not unfettered. Incumbents have to seek the consent of their bishop and Diocesan Board but, more significantly, it only applies to '*...any land forming part of the garden, orchard or appurtenances of the residence house of the benefice and any land contiguous thereto...*'
28. The 1960 Measure therefore does not apparently apply to consecrated land or buildings, i.e. normally the church and churchyard. I find this distinction unsurprising given the nature and status of consecrated land. Consecrated land has been declared, under a Sentence of Consecration, to be separated from other land and set apart from all common and profane uses and dedicated to the service of God for sacred purposes for ever. Land can only be de-consecrated by a statutory process (e.g. under section 22 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991).
29. The restrictions of the 1960 Measure and the assumed exclusion by the terms of section 31(7) of the 1980 Act cause me to draw the strong inference that incumbents do not possess a power of express dedication in respect of consecrated land. In these circumstances, I conclude that any way so claimed will be, as section 31(1) states, '*...of such a character that use of it could not give rise at common law to any presumption of dedication*'.
30. The OMA seems not to dispute this point. Instead, it contends that an alternative power to dedicate a public right of way over consecrated land exists under ecclesiastical law. That alternative comprises the submission of a petition to the Diocesan Consistory Court, which has the power to grant a 'faculty' or permission for the use of consecrated land. The power to grant a faculty is not unlimited. There is a general presumption against the use of consecrated ground for secular purposes. I will not try to rehearse where the boundary of secular purposes might lie. However, case law strongly suggests that one permitted use would be to allow a part of a churchyard, which is still consecrated, to be '*...thrown into the public highway...*'<sup>3</sup>
31. It is a general principle that a highway, once established, can only be extinguished through statutory process, e.g. an Order under section 118 of the 1980 Act or an application to a Magistrate's Court under section 116. Furthermore, there are specific criteria, which relate to the public's need for the way, that have to be met for such an Order or application to succeed. However, a faculty can subsequently be set aside if it is considered just and expedient to do so. The criteria applicable to setting aside a faculty seem to me to be weighed more heavily on the needs of the Church as 'owner' of the consecrated land than those of the public as would be given precedence where the extinguishment of a PRoW is being considered.
32. Furthermore, I agree with the objectors that a faculty granted by a Consistory Court equates less to the irrevocable right to pass and re-pass associated with the dedication of a public highway than to the transitory circumstances that may be associated with a landowner's establishment of a permissive path. I

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<sup>3</sup> E.g. *Morley Borough Council v St Mary the Virgin, Woodkirk (Vicar and Churchwardens)* [1969] 3 All ER 952 and *St John's, Chelsea Re* [1962] 2 All ER 850

take this view despite evidence that some faculties have been granted in circumstances where it is difficult to see the 'permission' being practically, if not legally, withdrawn<sup>4</sup>.

33. I therefore agree with the objectors that the process by which a faculty may be granted does not equate sufficiently to the process of expressed dedication, or the criteria that need to be taken into account. Moreover, if there is no power expressly to dedicate a right of way over consecrated land, I conclude that a way over such land equally cannot be successfully claimed by presumed dedication under the common law. That conclusion arises both from the lack of any owner with the power to dedicate, but also the general point that if presumed dedication under common law were possible, the criteria to be applied could, and probably would, conflict with the conditions that result from the consecration of land. It is difficult to see how these two processes could be reconciled given the different jurisdictions that would apply.
34. Nevertheless, I recognise that my conclusion is weakened by any clear-cut legal precedents. Neither the OMA nor the objectors have put to me any case law that is specific to establishing a right of way over consecrated ground by means of presumed dedication. Both parties have, however, cited decisions on other Orders.
35. The OMA refers to a decision in 2008 (Ref. FPS/C1245/7/7) to refuse to confirm an Order to delete from the DMS a footpath that runs through a churchyard where the Order's supporters took the same view as the objectors to the Order before me, i.e. that as, the path crossed land under the jurisdiction of Ecclesiastical Courts, it cannot give rise to a presumption of dedication at common law. The Inspector disagreed and, although there were significant differences from the Order before me – the churchyard appears to have been extended and consecrated after the PRow had been established – his conclusions were clear. *'There are means available by which rights of way can properly be established across such church land and indeed many examples of such routes throughout the country. If the means exist by which a right of way can be dedicated, I see no reason why such dedication cannot also be presumed in such circumstances.'*
36. By contrast, the objectors refer to a Schedule 14 report (Ref. NATROW/X0225/529A/09/12) in 2010 recommending allowing an appeal to direct an OMA to make an Order to add two footpaths to the DMS. In the course of his recommendation, which was accepted by the Secretary of State, the Inspector commented about a section of one of the footpaths, *'In respect of the section of route which crosses consecrated ground, it is my view that this cannot have been dedicated as a public right of way. When a building or land is consecrated it is declared under the Sentence of Consecration that it is separated from other land and set apart from all common and profane uses and dedicated to the service of God for sacred purposes (such as a burial ground) for ever. This would suggest that nobody would have the capacity to dedicate a permanent public right of way over consecrated land and that even the grant of a 'faculty', that is a permission from the Consistory Court of the Diocese, would effectively only result in permissive use of a route rather than use as of right as required by the 1980 Act.'*

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<sup>4</sup> I would cite the Morley case already quoted where the faculty granted involved the construction of a road scheme on consecrated ground.

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37. However, as the OMA emphasises, in the absence of any specific case law, no decision by an Inspector or by the Secretary of State can represent a binding precedent. Moreover, in this context, I observe that the two cases quoted were decided by the same Inspector, illustrating the uncertainty inherent to this matter.
38. I also recognise that there are many cases where public rights of way cross churchyards. Nevertheless, the circumstances by which such ways may have been established can vary greatly. The right of way may pre-date the consecration of the land. Elsewhere, as occurred here when the first DMS was drawn up, the lack of any objection might have encouraged an assumption of dedication to be taken forward, irrespective of the legal position.
39. Nevertheless, on balance, my conclusion remains that it has not been proven that it is possible to establish a right of way by means of presumed dedication over consecrated land.
40. That conclusion would thereby suggest that the Order should fall and that I should refuse to confirm it. However, as I pointed out in my brief description of the claimed path, not all of it is over consecrated ground. The northernmost stretch, beyond the kissing gate, is outside the churchyard and provides a link to B.R.16. Furthermore, my conclusions on the documentary and user evidence and my findings that the restrictions on which I base my rejection of the claimed path within the churchyard do not apply over unconsecrated ground, lead me to the conclusion that the Order should be confirmed so far as it applies to the northernmost section. I recognise that the result will be a short section of footpath ending at the boundary of the churchyard. However, there seems to me to be no reason why an entry to a churchyard should not be an appropriate terminus for a PRow.
41. I will therefore confirm the Order with respect to that part of the claimed path outside consecrated ground, whilst deleting the greater part of the path within the churchyard. Footpath 17 will thereby be added to the Definitive Map, if on a more limited basis, whilst the current Definitive Statement will be modified to remove any reference to a path passing through the churchyard.

### Conclusions

42. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications.

### Formal Decision

43. The Order is proposed for confirmation subject to the following modifications –
- In **Part 1** of the SCHEDULE to the Order, **Modification of Definitive Map, DESCRIPTION OF PATH OR WAY TO BE ADDED –**
    - Delete the whole of the following section and substitute –
    - *‘Commences from kissing gate at the north west corner of the churchyard of St John the Baptist’s Church, Widford at TL 4131 1582 (Point C on the Order Plan) then continues generally north for approximately 15 metres to the junction with Widford Bridleway 16 at TL 4131 1583 (Point B on the Order Plan).*

*Width: 2 metres between TL 4131 1582 and TL 4131 1583*

*Limitations: None*

- In **Part II** of the SCHEDULE to the Order, **Modification of Definitive Statement**, Variation of particulars of path or way –

- Delete the section referring to Widford 17 and substitute –

- *'A new Statement shall be recorded for Widford 17 as follows:*

<i>Path No.</i>	<i>Status</i>	<i>HCC Map Ref</i>
<i>017</i>	<i>FP</i>	<i>HCC 47</i>

*'Commences from kissing gate at the north west corner of the churchyard of St John the Baptist's Church, Widford at TL 4131 1582 then continues generally N for approximately 15 metres to the junction with BR 16 at TL 4131 1583.*

*Width: 2 metres between TL 4131 1582 and TL 4131 1583*

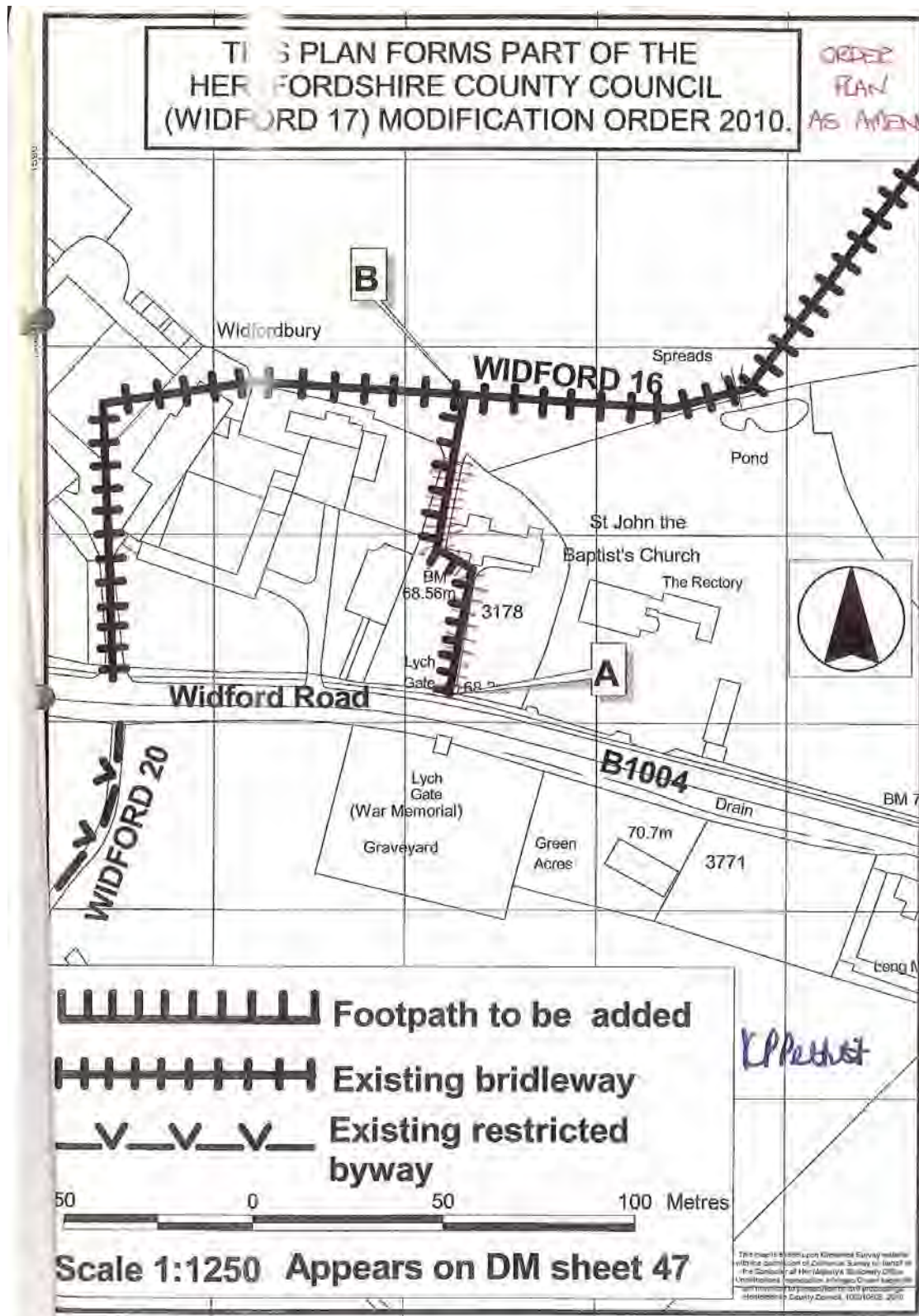
*Limitations: None*

44. Since the Order, as proposed for confirmation, would not show by far the greater part of the way as proposed in the Order as submitted, I conclude that the restriction set out in paragraph 8(1)(b) of Schedule 15 to the Wildlife and Countryside Act 1981 should apply. Paragraph 8(2) of the Schedule thereby requires that notice shall be given of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Roger Pritchard*

INSPECTOR





Map not to original scale



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# Order Decision

Inquiry into Published Modifications held on 16 April 2013

**by Roger Pritchard MA PhD MRTPI**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 24 May 2013

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## Order : Ref: FPS/M1900/7/66/M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Widford 17) Modification Order 2010.
- Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- The Order is dated 19 November 2010 and proposes to modify the Definitive Map for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of my proposal to confirm the Order subject to deleting that part of the claimed path that runs through the churchyard of St John the Baptist, Widford.

**Summary of Decision: I have confirmed the Order as made and without the modification that I formerly proposed.**

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## Preliminary Matters

1. The effect of the Order as made was to remedy an anomaly on the Definitive Map and Statement ('the DMS') for Hertfordshire. No path passing through the churchyard of St John the Baptist's Church, Widford ('the churchyard') is recorded on the current Definitive Map, although there is a record of such a path in the Definitive Statement. The County Council, as Order Making Authority ('the OMA'), concluded that an Order should be made under section 53(2)(b) to add a footpath through the churchyard to the Definitive Map whilst modifying the Definitive Statement to describe a path on what it believed to be the correct route.
2. The OMA presented its case on the basis of a claim for inferred dedication under common law. I concluded in my Decision Letter (DL) that, for at least a hundred years, there had been substantive and substantial evidence that a route had existed across the churchyard that corresponded to that of the claimed path. Furthermore, no steps had ever been taken by the Church authorities ('the Church'), either at parish or diocesan level, to challenge or prevent the public's use of the claimed path. Nor was there any suggestion that the public's use of the path had ever been brought into question prior to the Church's objection to the Order.
3. However, I also concluded, in support of the Church, that it was not possible to establish a right of way by means of inferred dedication under common law over consecrated land. I took this view primarily because there was, in my view, no current or previous owner of the land who had the capacity expressly to dedicate a highway. I therefore proposed to confirm the Order only in

respect of the small stretch of claimed path beyond the northern boundary of the churchyard.

4. The Church welcomed the decision. However, the proposed modification produced four objections, from the OMA who largely repeated its case for the original Order, from Mr Westley and Mr Pagan, who had presented user evidence for the claimed path, but also from the Ramblers' Association ('the RA'), who had not commented on the original order. The RA's representations are that not only could a path be established through the churchyard by inferred dedication under common law but that there was sufficient evidence for deemed dedication under section 31 of the Highway Act 1980 following 20 years uninterrupted user as of right.
5. My DL followed written representations and an unaccompanied site visit. Having considered the objections to the proposed modification, I concluded that, despite the dependence on legal submissions, there were matters on which I needed clarification. I therefore asked for a Public Local Inquiry ('PLI') to be held into the objections. This took place at Widford Village Hall on 16 April 2013. Submissions were made by the OMA, the Church and the RA.

## **Reasons**

### ***Unchallenged matters***

6. I shall begin by briefly identifying those matters on which my conclusions in the original DL were not challenged. No party disputed my decision to confirm the Order in respect of that part of the claimed path to the north of the churchyard which provides a link to Bridleway B.R.16. Nor did anyone challenge my conclusions on the use of the claimed path as set out in paragraph 2 above.

### ***Challenged matters***

#### *The proof of consecration*

7. The RA asked what proof there was that the churchyard was consecrated ground. Paragraph 28 of the DL sets out the process by which land is consecrated today. No Sentence of Consecration exists for the churchyard at Widford. This is to be expected for a church as old as St John the Baptist. Although the present buildings date from around 1400 AD, the Church submitted evidence that a church building had existed on this site since at least 1000 AD. Moreover, archaeological excavations suggest that burials had been taking place in the area of the churchyard for at least as long. Furthermore, a church must be consecrated before it can become the church of a separate parish, which Widford has been for many centuries.
8. The RA also expressed doubts as to the boundary of any consecrated ground and suggested that the claimed path might have been excluded from any act of consecration. There was no evidence to this effect and, as the Church explained, it is unlikely that such an exclusion would have been made. The balance of probabilities is strongly in favour of the presumption that the whole of the churchyard had been consecrated ground for many centuries. I therefore conclude that there is no reason for me to amend my assumption that the churchyard, including the land over which the claimed path passes, is consecrated.

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*Could the claimed path have existed before the churchyard was consecrated?*

9. It is accepted by all parties that if it can be demonstrated that a public right of way existed over land before any act of consecration, that act cannot extinguish the right. Because of the age of the church, it is difficult to distinguish between any date of consecration and when and how any public rights of way could have come into being. Nevertheless, again on the balance of probabilities, I find it most likely that the path which arrives at the north west corner of the churchyard was established to access the church for the purposes of worship and other religious functions. That finding is reinforced by the claimed path's place in the wider, local rights of way network. Widford village can be reached from the north via other paths and there is an absence of any links to the south that might directly connect with the southern entrance to the churchyard. I therefore conclude that there is no persuasive evidence that the claimed path existed as a right of way before the establishment of the church and the consecration of the churchyard around it.

*The process by which a right of way over the churchyard could be dedicated*

10. There are three means by which a right of way can be dedicated. The DL dealt primarily with whether a public right of way can be established over consecrated ground by inferred dedication under common law. It did so because inferred dedication was the means by which the OMA sought to establish a public right of way across the churchyard at Widford. My reasons for rejecting a claim made on this basis are set out in paragraph 3 above. However, because of the submissions put to me by the RA, I now need also to consider the alternative processes of express and deemed dedication.

*Express dedication*

11. Whether the Church can expressly dedicate a right of way across consecrated ground is intimately associated with the process by which a faculty for works in a church or churchyard can be granted. This process and the restrictions upon it are discussed in paragraphs 30 – 33 of the DL. I came to the conclusion that although the Church, through the Diocesan Consistory Court, could grant a faculty for access over consecrated ground, because the granting of a faculty was revocable, it more closely paralleled a licence rather than the permanent dedication of a public right of way.
12. The RA referred me to a more recent decision in the Worcester Consistory Court, *Re St Mary's, Longdon*<sup>1</sup>. In that decision, having reviewed conflicting authorities, Chancellor Mynors concluded that a public right of way could be established over consecrated ground through the granting of a faculty. The OMA supported the *Longdon* judgement, although describing the faculty as enabling the dedication of a right of way rather than achieving dedication itself. The distinction may be important: if a faculty dedicates, the process would be directly akin to express dedication, whereas if it is evidence of an intention to dedicate, it is more likely to support inferred dedication under common law.
13. The Church disputed Mynors Ch's findings in respect of a power to dedicate a public right of way by means of faculty (as opposed to creating a permissive path by licence). It pointed out that Diocesan Consistory Courts were independent of one another, as reflected in their (sometimes) conflicting decisions. Moreover, although faculty judgements can be reviewed in the

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<sup>1</sup> *Re St Mary's Longdon* (2011) Ecc LJ 370

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Court of Arches of the Province of Canterbury, no such review had taken place in the *St Mary's Longdon* case.

14. Notwithstanding the disagreement as to the powers of a faculty, no faculty has ever been sought or granted at St John the Baptist, Widford to establish a path across the churchyard. That alone persuades me that there has never been any express dedication of the claimed path by the Church, a fact agreed by all the parties. However, the RA also sought to persuade me that the *Longdon* judgement supports the case for the faculty jurisdiction to sustain a case for inferred dedication at common law.

*Inferred dedication under common law*

15. Central to the RA's submission in respect of inferred dedication under common law is that in the *Longdon* judgement, Mynors Ch also put forward the concept of a presumed (or sometimes 'lost') faculty. In essence, his argument was that where the evidence, for example on the basis of unchallenged user, would support inferred dedication under common law, '*...there is no reason in principle why it cannot be presumed that a faculty was granted.*' Mynors Ch seems to have come to this view on the basis that, historically, faculty jurisdiction was not exercised systematically and that many works that ought to have required a faculty were carried out without such explicit permission.
16. The RA thereby contended that, since I had already concluded that there was '*substantive and substantial evidence*' that a route equivalent to the claimed path had existed for at least a hundred years and had been used by the public without challenge, Mynors Ch's conclusions with regard to a presumed faculty would support inferred dedication under common law at Widford.
17. For a case for inferred dedication under common law to succeed, the onus of proof must lie with the claimant to demonstrate that the facts, taken as a whole, demonstrate that the correct inference was that there was an intention to dedicate. The Courts have accepted that whilst long user can be evidence of an intention to dedicate it cannot raise a presumption of dedication.
18. I am persuaded that the existence of a relevant faculty, if combined with long and unchallenged user, might be sufficient to sustain a claim for inferred dedication under common law. However, the details of the faculty would be relevant to the strength of that claim. The faculty could limit user, for example to parishioners or some other group, or have elements of permission, or introduce restrictions that would not exist on a right of way, for example with regard to dog walking. Any of these might defeat a claim for inferred dedication. There would have to be no doubt that what was being granted was of the character of a public right of way to enable it to cross the boundary from a licence granting permission to the acknowledgment of a right. The dedication of the public's right to walk a defined path is unambiguous: a faculty could be conditioned to result in something that is more limited. Where no relevant faculty exists or has ever been sought, it therefore seems to me a bold step to adopt Mynors Ch's '*...legal fiction...*' (his own words) that sufficient user should lead to the presumption of a faculty that would create a right of way.
19. I concluded in paragraphs 31 – 33 of the DL that inferred dedication under common law was not possible across consecrated ground because of the absence of an 'owner' who could expressly dedicate. I would now temper this conclusion to a degree by accepting that, under specific circumstances, a faculty could create the conditions, if combined with sufficient user, for a case
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for inferred dedication. However, those conditions do not exist at St John the Baptist, Widford. The case for inferred dedication under common law therefore continues to fall.

*Deemed dedication under section 31 of the Highways Act 1980 ('the 1980 Act')*

20. Although the RA has contended that the claimed path could be established as a right of way by inferred dedication under common law, the thrust of its submission is that a right of way has been created through deemed dedication under section 31 of the 1980 Act. I do not intend to rehearse in detail the RA's arguments. The main points are, firstly, that -

- i) The Rights of Way Act 1932 ('the 1932 Act') addressed the issue of the capacity to dedicate where there was no relevant owner by introducing a provision (in its Section 1(2)) that where 40 years' use could be demonstrated, a right of way would nevertheless be deemed conclusively to have been dedicated, irrespective of the presence of a relevant owner. This contrasted with the provision in Section 1(1) of the 1932 Act where a shorter period of 20 years was specified only if there was a person in possession of the land with the capacity to dedicate;
- ii) The National Parks and Access to the Countryside Act 1949 ('the 1949 Act') amended the 1932 Act by removing both the distinction between 40 and 20 years' user (in favour of the latter) and the condition on ownership set out in Section 1(1) of the 1932 Act. The outcome was that, irrespective of any issue of ownership, '*...in future there is a presumption of dedication of a right of way after 20 years user in all cases...*<sup>2</sup>; and
- iii) The 1980 Act carries forward the provisions of the 1949 Act in its Section 31(1) such that there are no circumstances in which the absence of a person with the capacity to dedicate can prevent a right of way arising through deemed dedication.

22. The RA supports its contention with reference to a number of judgements, particularly those of Lord Hoffman in the *Sunningwell*<sup>3</sup> and *Godmanchester*<sup>4</sup> cases. In respect of the latter, the RA asks me to set aside my conclusion in paragraph 26 of the DL that I should follow the ruling of Laws J in the *Jaques* case.<sup>5</sup> The RA argues that nobody dedicates under Section 31(1). Instead, the highway is deemed to be dedicated. There is therefore no necessity for an owner to have the capacity expressly to dedicate a right of way as is necessary to allow inferred dedication at common law. In these circumstances, the powers of a faculty, by whom it can be exercised, in what circumstances and whether it grants a right or a licence, become irrelevant.

23. In respect of all the above points, I agree with the RA's submission. My previous conclusion in respect of the need for a person with the capacity to dedicate where deemed dedication under section 31(1) is cited was, on reflection, incorrect. I also note that the Church offered no evidence against the RA's submission on this matter, and that the OMA agreed with the RA's fundamental proposition.

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<sup>2</sup> Quotation from the speech of Lewis Silkin MP, introducing the Bill, *Hansard* HC Deb, vol 463, ser 5, col 1485.

<sup>3</sup> *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335

<sup>4</sup> *R on the application of Godmanchester Town Council and Dr Leslie Drain* [2007] UKHL 28

<sup>5</sup> *John Kearsley Jaques v Secretary of State for the Environment* [1994] QBD

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24. Nevertheless, there are other issues associated with Section 31 of the 1980 Act on which the RA made submissions which I need to consider. In particular, -
- iv) The meaning of the words in Section 31(1) '*...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.*' The RA argue that these words must apply to the character of the way rather than the land over which it passes and, furthermore, that they cannot be interpreted as re-introducing the common law tests to the process of deemed dedication as to do so would undermine the fundamental purpose of Section 31; and
  - v) That the reference to 'owner' in Section 31(7) has no relevance to Section 31(1), where there is no reference to 'owner', but is instead associated with Sections 31(3), (5) and (6) whereby, where an owner exists, means by which they may prevent the acquisition of rights are set out.
25. In respect of both the above points, I again agree with the RA's submissions and conclude that there is nothing in respect of the character of the claimed way at Widford as set out in Section 31(1) or with regard to the application of Section 31(7) that would defeat the claim for deemed dedication.

*The meaning and application of Section 31(8)*

26. There remains, however, the relevance of Section 31(8) and whether it applies to consecrated ground in general and this case in particular. This Section reads,
- (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way a way over that land as a highway if the existence of a highway would be incompatible with those purposes.*
27. The RA argues that Section 31(8) in no way conditions the application of Section 31(1) because under the latter '*...the corporation or other body or person in possession of the land does not dedicate in any case.*' However, it seems to me that Section 31(8) has a different rationale, more akin to Sections 31(3), (5) and (6). Namely it provides a means whereby a specific class of landowner can defeat a claim for deemed dedication if they can demonstrate that the claimed right of way would be incompatible with the public or statutory purposes for which they hold the land over which it would pass.
28. I am reinforced in this conclusion by the RA's submission at its footnote 29. The RA there contends, that Section 31(8) does not '*...so free up the law as to allow a landowner to make an express dedication, if the land is held for statutory purposes with which the existence of a highway would be incompatible.*' I agree, but the conclusion I draw from this is not that Section 31(8) in anyway conditions the process of deemed dedication but rather that it provides a means, available only in very specific circumstances, where the acquisition of rights can be prevented. To argue otherwise would seem to me to create the nonsensical situation where some landowners are prevented from expressly dedicating a right of way by the nature of the activities for which they are responsible, but are unable to use that limitation against deemed dedication.
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29. Nevertheless, even if one accepts my interpretation of Section 31(8), the circumstances in which it could be applied must be limited and specific. Two, separate conditions must be met.
30. The first is that the land be held for public or statutory purposes. The RA argues that the church and churchyard are not governed by Section 31(8) as they are not held for '*...public purposes...*' However, the Church of England does not have the same status as '*...any other denomination or religious organisation...*' It is established by statute and, as such, has a position in law that is fundamentally different from other religious organisations, which are essentially voluntary bodies formed by association. Not only does Parliament legislate with respect to the powers of the Church of England but it has delegated statutory powers to the Church that currently operate through the General Synod. In that sense, the Church of England might be said to hold land under statutory purposes albeit particular ones.
31. However, notwithstanding whether it applies to the Church of England, if Section 31(8) is to be relevant, it must be demonstrable that the specific public right of way claimed is incompatible with the purposes for which the land over which it passes is held. Section 31(8) does not to my mind provide a blanket exemption. If a body falls within its scope, it still has to show that the particular right of way from which it seeks exemption from deemed dedication would be incompatible with its public or statutory purposes.
32. The RA and the OMA both argue that there is no reason why a public right of way through Widford churchyard should be incompatible with the purposes for which the Church holds this land<sup>6</sup>. They point to the fact that there are many examples where rights of way have been established across churchyards, including ground which is consecrated and where there may already be burials. I accept that. It is also undisputed that the Church has accepted and will continue to accept that persons cross the churchyard at Widford openly, without permission and unhindered by any restrictions or any indications, for example by way of signage, that any restrictions exist. Nor was it clear to me what restrictions on the public's access to the churchyard the Church might want to introduce in the future. (Some suggestion was made of problems with dog walkers, but it was not clear what the Church wanted to do or how it would accomplish this.)
33. In these circumstances, I find it difficult to see how Section 31(8) could be used to defeat a claim for deemed dedication in this specific case. Even if the Church of England is a body to which this section applies, it has not been convincingly demonstrated to me that the public walking along the claimed path through Widford churchyard is incompatible with the purposes for which that land is held.

#### *Conclusions on deemed dedication under Section 31*

34. The RA invited me to draw a conclusion as to whether the tests for deemed dedication under Section 31 of the 1980 Act had been met – setting aside the special issues of ecclesiastical law. On the assumption that the date of challenge to the public's use of the path through the churchyard is taken as when the Church objected to the making of the Order, i.e. 2010, there would

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<sup>6</sup> Both the RA and the OMA actually argue the general point that any path through a churchyard would be compatible with the purposes for which such land is held. However, it seems to me that this is an unnecessary extension of Section 31(8). All I have to be concerned with is whether the claimed path is incompatible with the purposes for which Widford churchyard is held.



seem to me to be no issues that would defeat a claim for deemed dedication under normal circumstances. There is clear evidence of 20 years prior user of the path by the public of right without force, secrecy or permission. Nor is there any evidence that the Church has ever brought to the attention of the public that their use of the claimed path was not as of right.

35. Do I therefore come to the conclusion that the claimed path, Widford 17, has been established by deemed dedication under Section 31 of the 1980 Act and that the DMS should accordingly be amended in the terms of the Order as made?
36. Unfortunately, the matter is not so straightforward. The Church did not specifically dispute the RA's submissions in respect of Section 31 at the PLI, but at the heart of its case is the reiteration that the jurisdiction of statute law cannot override ecclesiastical law when applied to consecrated ground. In summary, based on the dictum of 'one law, two jurisdictions,' ecclesiastical jurisdiction had precedence where and when the use of consecrated ground is concerned.

#### *Churchyards and public rights of way*

37. At this point, I need to address the self-evident fact that there are dozens, probably hundreds, of public rights of way that run through churchyards and thereby pass over consecrated ground. Even if one sets aside instances where the right of way may have pre-dated the establishment of the churchyard or its consecration, there are still many examples where public rights of way running through churchyards have been recorded on DMSs since that process was first undertaken in the early 1950s and long after the churchyard may have been consecrated.
38. It therefore seems to me that the question is not whether a right of way can co-exist with a churchyard or consecrated ground: it self-evidently can and does in numerous instances. Nor do I dispute that the Church could by means of a faculty create conditions for the inferred dedication at common law of a right of way across a churchyard. (I am less persuaded that the granting of a faculty is a form of express dedication but that issue is not material to this case.) It also seems to me that, by inaction, the Church could acquiesce, knowingly or unknowingly, in the establishment of a right of way by inferred or deemed dedication – and that it has probably done so in many cases across England.
39. Rather the issue that this case raises is whether the Church has the power, for whatever reason, to prevent the deemed dedication of a right of way if it chooses to object to that process. That question seems to me to depend not only on the specifics of Section 31 and how they might be applied to any particular case, but on the more general issue as to whether the Church of England is exempt from this legislation.

#### *The application of Section 31 of the 1980 Act to Church of England land and property*

40. There are two fundamentals in discussing this issue. The first is that there is nothing in Section 31 or the 1980 Act in general that bites on this matter. The second is that no party has directed me to any judgement that gives guidance. There may, however, be two precedents that I ought to consider.
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41. The first is the position of Crown land. Crown land is exempt from the provisions of the 1980 Act unless there is a specific agreement that these should apply. In the absence of such an agreement, deemed dedication cannot take place over such land. (Although inferred dedication under common law is possible.) Is the Church of England in a similar position? The answer seems to me to be no. Not only is Church of England property not included within the definition of Crown land, but there is a general and well-accepted process by which statute is applied or disapplied to Crown land. No such parallel seems to exist with regard to the land and property of the Church of England.
42. The second is the ecclesiastical exemption with regard to listed building legislation as set out in the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 that derives from Section 60 of the Planning (Listed Buildings and Conservation Areas) Act 1990. Essentially, for a number of ecclesiastical buildings, not necessarily only those owned by the Church of England, listed building control over their fabric (though not planning control) is transferred to the provisions of the Faculty Jurisdictions Act, i.e. changes can be approved by means of an application for a faculty as already discussed. However, the listed building arrangements also seem to me to lend little assistance to the Church's case if only because they point to the need for specific legislative provision to disapply statute law. No such disapplication exists in respect of the 1980 Act.
43. I therefore conclude that neither of these examples lends any weight to the case that Section 31 does not apply to Church property or consecrated ground. I would also go further and suggest that whilst the dictum of 'one law, two jurisdictions' provides strong support for ecclesiastical precedence in ecclesiastical matters, it is unlikely to create circumstances where ecclesiastical law takes precedence over statute law in secular matters. The dedication of a public right of way seems to me to be a secular matter.
44. If Section 31(8) applied to the Church of England and, in any specific case, the claimed path could be demonstrated to be contrary to its purposes, a defence against deemed dedication might be provided. However, I conclude that the latter condition is not met here where the Church has been unable to demonstrate convincingly how its interests would be materially harmed by the application of statute law.

*Conclusions on the challenged matters*

45. My conclusions are that –
- a) The findings of the DL in respect of the case for inferred dedication at common law of a right of way at Widford churchyard are not overturned by the objections to my proposed modification, i.e. that such a claim cannot be supported;
  - b) But, if evidence supports a claim for deemed dedication under Section 31 of the 1980 Act, the legal precedents suggest that the claim can be accepted;
  - c) The evidence at Widford does support such a claim in terms of twenty years' uninterrupted user as of right without force, secrecy or permission prior to the date of challenge; and
  - d) Therefore, the DMS for Hertfordshire should be amended to include the whole of the path (known as Widford 17) put forward in the original Order
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and the stretch within the churchyard deleted by my proposed modification should be restored.

**Conclusion**

46. Having regard to these and all other matters raised at the PLI and in the written representations, I conclude that the Order should be confirmed without the modification I previously proposed and in the form in which it was originally made by the OMA.

**Formal Decision**

47. The Order is confirmed as originally made.

*Roger Pritchard*

**INSPECTOR**

## **APPEARANCES**

### FOR THE ORDER MAKING AUTHORITY:

Brendon Lee	Solicitor, Hertfordshire County Council
Ian England	Definitive Map Officer, Hertfordshire County Council
Rosalind Emrys-Roberts	Rights of Way Officer, Hertfordshire County Council

### FOR THE DIOCESE OF ST ALBANS

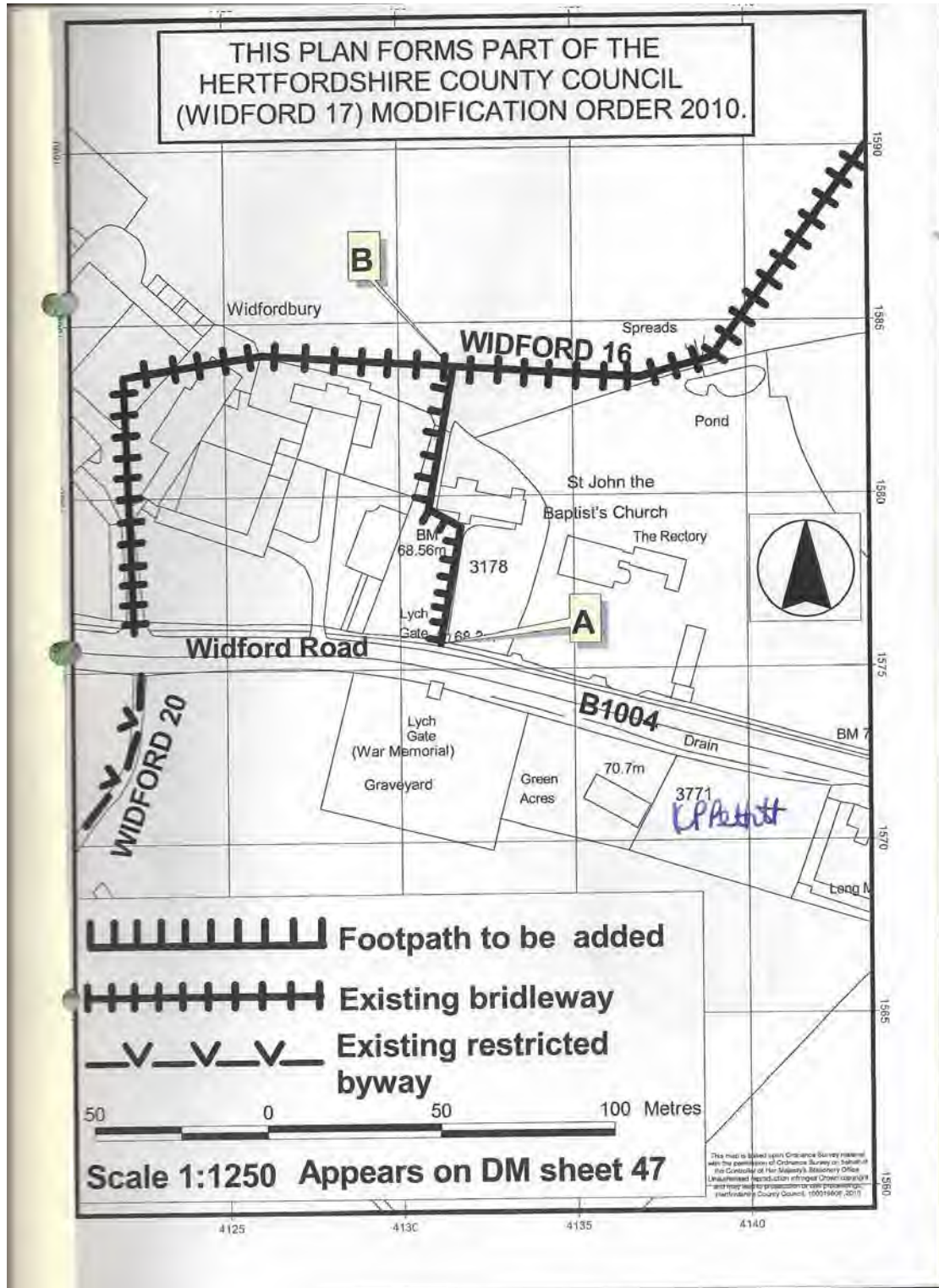
Lee Coley	Diocesan Registrar, Diocese of St Albans
David Cheetham	Former Diocesan Registrar, Diocese of St Albans
David Scott	Churchwarden, Parish of Widford

### OTHER PERSONS:

Mark Westley	Area Footpath Secretary, Hertfordshire and North Middlesex Area, Ramblers Association
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## **ADDITIONAL DOCUMENTS PRESENTED AT THE INQUIRY**

1. Pp 27-31 of Pratt and Mackenzie's *Law of Highways* (17<sup>th</sup> Ed., 1923) on the powers of Public Trustees and Corporate Bodies with regard to the Dedication of Highways. Submitted by Mr Westley.
2. Closing submission by Mr Lee



Oakley v Boston, [1976] Q.B. 270 (1975)

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## \*270 Oakley and Another v Boston



No Substantial Judicial Treatment

### Court

Court of Appeal (Civil Division)

### Judgment Date

5 June 1975

### Report Citation

[1975] 3 W.L.R. 478

[1976] Q.B. 270



Court of Appeal

Megaw and Orr L.JJ. and Goulding J.

1975 June 4, 5

*Easement—Prescription—Right of way—Lost modern grant—Glebe land—Approval of Ecclesiastical Commissioners necessary for valid grant of easement by incumbent—No evidence of knowledge by commissioners of acts of acquiescence by incumbent—Whether approval to be presumed— Ecclesiastical Leasing Act 1842 (5 & 6 Vict. c. 108), s. 20 (as amended by Statute Law Revision (No. 2) Act 1888 (51 & 52 Vict. c. 57), s. 1 Sch. )— Ecclesiastical Leasing Act 1858 (21 & 22 Vict. c. 57), s. 1*

*Ecclesiastical Law—Ecclesiastical property—Disposition—Easement—Right of way—Right to grant—Whether to be presumed— Ecclesiastical Leasing Act 1842, s. 20 — Ecclesiastical Leasing Act 1858, s. 1*

A strip of land belonging to the plaintiffs had been glebe land until 1952. In 1973 the plaintiffs brought an action against the defendant, the owner of adjoining land, claiming an injunction to restrain him from trespassing over the strip. The defendant claimed a right of way based on prescription under the [Prescription Act 1832](#) and lost modern grant. The judge rejected the defendant's claim based on the Act of 1832 on the ground that although there had been continuous user \*271 of the strip by the defendant's predecessors in title up to 1962 the user since 1962 had been insufficient. As to lost modern grant, he held that, having regard to the powers given to incumbents by the Ecclesiastical Leasing Acts the incumbent of the glebe land had been a capable grantor. He found lost modern grant established and gave judgment for the defendant.

On appeal by the plaintiffs: -

Held:

**Oakley v Boston, [1976] Q.B. 270 (1975)**

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(1) that the combined effect of the Ecclesiastical Leasing Acts 1842 and 1858 was that at all times since 1858 the incumbent of the glebe land had, subject to the necessary consents and approval, been empowered to grant a right of way over the strip to the defendant's predecessors in title post, pp. 277C - 278A, C-D, 283A).

But (2), allowing the appeal, that by [section 20](#) of the Act of 1842 and [section 1](#) of the Act of 1858 the approval of the Ecclesiastical Commissioners had been required before there could be a valid grant of an easement, that there was no direct evidence of any such approval; and that, in the absence of evidence of knowledge on the part of the commissioners of acquiescence by the incumbent of the glebe land in acts over the strip which would otherwise have been acts of trespass, it could not be presumed that they had given their approval to a grant by the incumbent of a right of way over it (post pp. 279E, 280H - 281A, D, 285E-F).

*Per* Goulding J. There are considerable difficulties in applying a doctrine of acquiescence to persons in a fiduciary position who have an active duty to others to fulfil before they can exercise their powers (post, p. 285D-E).

The following cases are referred to in the judgment:

*Barker v. Richardson (1821) 4 B. & Ald. 579 .*

*Dalton v. Angus & Co. (1881) 6 App.Cas. 740 . H.L.(E.).*

*Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528; [1971] 2 W.L.R. 711; [1971] 2 All E.R. 475, C.A. .*

The following additional case was cited in argument:

*Pugh v. Savage [1970] 2 Q.B. 373; [1970] 2 W.L.R. 634; [1970] 2 All E.R. 353, C.A. .*

APPEAL from Judge Harrison-Hall sitting at Ashby-de-la-Zouch County Court.

The plaintiffs, Harold Whittall Oakley and Hazel Louise Oakley, appealed from the judgment of Judge Harrison-Hall dismissing their action (commenced on July 27, 1973) against the defendant, Frederick John Boston, for an injunction and damages for trespass. Their grounds of appeal were that the judge had erred in law in presuming, from user prior to 1952, a lost modern grant of a right of way between points marked "A" and "B" on the plan annexed to the particulars of claim since at all material times prior to such date the plaintiffs' property had been glebe land and (i) the incumbent had had no power to grant a right of way there-over, (ii) alternatively, the incumbent had only had power to make such a grant with the consent of the Church Commissioners which consent could not be presumed on the evidence.

The facts are stated by Megaw L.J.

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*Kenneth Farrow* for the plaintiffs. [Section 1 of the Ecclesiastical Leasing Act 1858](#) gave an incumbent power to "sell or convey in exchange or by way of partition, or otherwise dispose of, all or any part or parts of "glebe land, but that did not include power to grant an easement in fee simple. [Reference was made to *Barker v. Richardson (1821) 4 B. & Ald. 579 ; Ecclesiastical Leasing Act 1842, ss. 1, 4, 7, 20 and 21 .*] "Other property" in section 1 of the Act of 1858 does not include easements. If the Act of 1858 had given power to incumbents to grant easements, there would have been no reason to enact section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 . This is borne out by precedent 53 in the *Encyclopaedia of Forms and Precedents*, 3rd ed., vol. 9 (1946), p. 117, which indicates that conveyancers considered that, if a statutory undertaker wanted to acquire such an easement, it was necessary for it to exercise its powers under the [Lands Clauses Consolidation Act 1845 .](#) [Reference was made to *Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528 .*]

Alternatively, the power of an incumbent to grant an easement could only be exercised subject to the consents or approval specified. The court cannot properly presume that such consents or approval were given. The presumption that the Church Commissioners gave their consent should be established with the same strictness as is necessary to prove the grant as against the incumbrancer himself.

*John Trenhaile* for the defendant. "Land" could include an easement in 1858: see [Interpretation Act 1889, s. 3](#) and *Blackstone's Commentaries* , 17th ed. (1830), vol. II, p. 21. "Other property" in section 1 of the Ecclesiastical Leasing Act

**Oakley v Boston, [1976] Q.B. 270 (1975)**

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1858 would include the items referred to in section 4 of the Act of 1842, which include easements. Section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 may have been enacted to abolish the limitations imposed by section 9 of the Act of 1842. Alternatively, it may have been enacted *ex abundante cautela*. As precedent 53 in the *Encyclopaedia of Forms and Precedents*, 3rd ed., vol. 9, p. 117, it was not uncommon for alternative powers to exist side by side in this way, especially for alternative powers to exist side by side with those provided by the [Lands Clauses Consolidation Act 1845](#), which were often cumbersome and accordingly not very popular.

Where the factual basis exists for the presumption that the incumbent made the grant of the easement, there is no reason why it should not be presumed also that the appropriate consents were given, in accordance with the presumption *omnia rite esse acta praesumuntur*.

[The court asked counsel for the defendant for further assistance in relation to ground (ii) of the appeal.]

It is a question of which is the right way of looking at it. After 20 years, so long as the court is satisfied that there was a capable grantor, it must infer that a grant was made. Once it has arrived at that position, it must assume not only that the grant was made but also that it was made by a deed which was in all respects a proper deed.

The way in which the plaintiffs put it is that before the court will make that assumption it must be satisfied that the deed, if deed there was, was proper in all respects. The signature of the party to the deed is the best evidence that consent was given but that signature can only be found on \*273 the deed which *ex hypothesi* has been lost. The defendant relies on the technicalities of the doctrine of lost modern grant. If there was such a deed, how did it come into existence?

Alternatively, where one finds 48 years' user, the courts will be slow to find a trespass. They will fall over backwards to assume a lawful origin for the user, and, therefore, that all necessary concomitants must have been satisfied. It is very difficult to see how the incumbent could have avoided reporting the grant to the Ecclesiastical Commissioners if their consents were necessary, since the incumbent must be presumed to have discharged his duties.

If one assumes a deed, why not assume that everything that needed to be done was done?

*Farrow* in reply. The defendant has not been quite accurate with regard to the plaintiffs' second way of putting it. Consent is not just a matter of procedure. The court must be satisfied that there was a capable grantor, but here this is a composite body: the incumbent and the commissioners. There would be other cases where the granting of an easement required the co-operation of more than one person, for example, where there was a tenant for years. Mere user against a tenant for years would not be binding against the landlord. The court would have to have some evidence that the landlord was aware of the user. Again, in the case of joint owners the co-operation of more than one person is required before there can be an effective grant.

The mere fact that the fee is vested in the incumbent is irrelevant: the court is concerned not with ownership of the fee but with the ability of the incumbent to grant an easement.

The court should treat the servient tenement here as though it had been subject to a tenancy until 1952. The adverse user would be binding on the tenant, but not, without further evidence, on the "other part" of the capable grantor.

[MEGAW L.J. Is it not for the plaintiffs to show that that other party did not consent?]

The defendant has to show established user and a capable grantor.

*Trenhaile*. As to the analogy of landlord and tenant, see *Gale, Easements*, 14th ed. (1972), p. 164. The defendant relies on *Pugh v. Savage* [1970] 2 Q.B. 373. The fact that the servient tenement is let is a factor to be considered, but it is not fatal to prescription against the fee.

MEGAW L.J.

This is an appeal against the judgment of Judge Harrison-Hall given in the Ashby-de-la-Zouch County Court on December



**Oakley v Boston, [1976] Q.B. 270 (1975)**

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19, 1974.

The plaintiffs, Mr. Harold Whittall Oakley and his wife Mrs. Hazel Louise Oakley, by an action which was started in the Chancery Division of the High Court and was transferred to the county court, claimed an injunction against the defendant, Mr. Frederick John Boston, to restrain him from trespassing on the plaintiffs' land. The defence was that the defendant was not trespassing, because he was entitled to a right of way over that part of the plaintiffs' land over which his alleged trespasses had taken place. The judge dismissed the claim, holding that the defendant had a right of way. The plaintiffs appeal.

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The plaintiffs are the owners of a property known as the Old Rectory at Appleby Magna in Leicestershire. It consists of a house which was formerly used as the rectory, and a substantial area of land surrounding it. At the south-east corner of the land there is a short and narrow projection, part of the plaintiffs' land - a tongue of land protruding in an easterly direction. At the tip of this tongue lies the boundary with the defendant's land. Immediately beyond the boundary at the tip of the tongue on the defendant's land there used to be a cottage, called Laundry Cottage. It has been demolished. The disputed right of way runs from the boundary at the tip of the tongue for the length of the tongue, between points "A" and "B" as marked on the plans annexed respectively to the statement of claim and the defence. At the western end of the tongue the alleged right of way abuts on to public footpaths which run to the west, and also to the east to the village of Appleby Magna, through the plaintiffs' land. The right of way claimed, if established, would enable the defendant to make his way from his own land over the plaintiffs' land without trespassing, so as to be able to use the public footpaths.

It is not necessary to go into detail as to the respective titles of the plaintiffs and the defendant. They are not in dispute. Until 1952, what is now the plaintiffs' land was glebe land. It was vested in the rector of Appleby Magna, in his capacity as corporation sole. On June 27, 1952, the whole of that land was conveyed, no doubt with all necessary consents under statutory powers, to a Mr. Cooper. It thereupon ceased to be glebe land. The plaintiffs became the owners of the Old Rectory and the surrounding land on April 8, 1965. The defendant became the owner of the land on which Laundry Cottage had stood, with its small area of surrounding land, on January 25, 1962. It had previously since 1956 belonged to the defendant's father. The defendant was the owner, since 1956, also of another piece of land abutting on, and lying to the south of, the southern boundary of the Laundry Cottage property. It was, however, in respect solely of his ownership of the Laundry Cottage property that the defendant asserted his right of way. According to his defence in the action, the Laundry Cottage land had constituted the dominant tenement and the plaintiffs' land the servient tenement in respect of the alleged right of way running for the short distance consisting of the length of the tongue of land which I have described. From the plans, it appears to me (though I do not think that the detail matters) that the length of the right of way claimed is some 30 or 35 yards. It was nowhere near the house, the Old Rectory.

It is not necessary to go into the evidence. Indeed, it is not possible, as we have not been provided, rightly in the circumstances, with any note of evidence. The judge's findings of fact are not in dispute. He held that the defendant had established that from a date prior to 1927 (counsel before us agreed, I think, that on the evidence it went back at least to 1914) there was a continuous use of this way - that is, between points "A" and "B" - up to the year 1962, and that that use would have been sufficient to have established the defendant's claim to a right of way under the provisions of the [Prescription Act 1832](#) if the action had been commenced in 1962. For the purposes of the Act of 1832, however, it is necessary that the period of use should have continued up to the time when the action was commenced. \*275 That did not apply in this case, because the judge held that there had not been sufficient use of the way on the part of the defendant since 1962. So the defendant's claim, in so far as it was based on the Act of 1832, failed. The defendant has not served a cross-notice, or sought to challenge that finding. As it was a finding of fact, it might well have been a difficult burden to undertake, just as it would have been difficult for the plaintiffs to challenge the finding of sufficient continuous user for many years up to 1962.

However, the defence asserted the claim to a right of way on another basis: the doctrine of the lost modern grant. On that basis, on the judge's findings of fact, the defendant was not put out of court by reason of the inadequacy of the user in the last 11 years before the action was brought, that is, from 1962 to 1973. For, unlike the requirements of the Prescription Act 1832, the doctrine of lost modern grant does not contain, as an essential element, proof of continued sufficient user up to the time of action brought. (We are not concerned here with any question such as that of abandonment.) As regards lost modern grant, however, the plaintiffs asserted that the defendant was unable to substantiate his claim for a different reason. It was

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contended that, since the plaintiffs' land, over which the right of way was alleged, had been glebe land up to 1952 (and it is conceded that it was), the incumbent of the glebe land had had no lawful power to grant an easement. Therefore, the court could not presume a lost modern grant made at any time preceding June 27, 1952, and no such grant could be presumed to have been made, and lost, after that date since the period would be quite inadequate. Alternatively the plaintiffs contended that if, contrary to their primary submission, there was a power during the relevant period to grant an easement, such power, depending on statutory provision, could be exercised only if certain consents or approvals were given, in particular the approval of the Ecclesiastical Commissioners, and that it was not open to the court to presume that such consents or approvals, necessary for a valid grant, had been given.

The argument for the plaintiffs begins with the judgment of Abbott C.J. in *Barker v. Richardson (1821) 4 B. & Ald. 579*. This appears to have been the only authority cited to the judge, and it is clear that he did not have the advantage of the detailed exposition of the statutes which has been developed before us. It may well be that the potential subtleties of argument had not been foreseen. The judge therefore did not have the books available, nor the advantage which we have had in being able to look at the texts of statutes and decided cases and textbooks. In *Barker v. Richardson* it was held that a presumption of a grant of an easement - in that case, an easement of light - could not be made because the grant, if it had been made, would have been made by a rector who was described as "a mere tenant for life" and who had no power to make such grant. Abbott C.J. said, at p. 582:

"Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, \*276 and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

The judge in the present case expressed the plaintiffs' argument succinctly in these terms:

"Until 1952 the servient land was glebe land and accordingly the plaintiffs rely on *Barker v. Richardson, 4 B. & Ald. 579*. It is thus argued that since it is essential to a lost modern grant that there be a capable grantor as well as a capable grantee the fact that the rector was the presumed grantor made it impossible for a grant to be made. The rector as the owner of the parson's freehold had not power to dispose of the fee simple without the consents necessary for a disposal. If this case is right and is still sound law then it is accepted that the rector was not a capable grantor."

The judge went on to reject the plaintiffs' submission on the ground that subsequently to the decision in 1821 in *Barker v. Richardson, 4 B. & Ald. 579*, power had been given by the Ecclesiastical Leasing Acts (1842 and 1858) to incumbents

"to sell, convey or exchange thereunder any part of the land which belonged to the incumbent including glebe land provided that certain provisions and consents to the sale took place."

Having dealt with the alternative submission on behalf of the plaintiffs as to the "certain... consents," to which submission I shall return later, the judge held that, on the basis of a lost modern grant, on the facts as found, the defendant had established the right of way asserted by him. So judgment was entered for the defendant.

The plaintiffs' appeal is based on two grounds. The first ground is that the judge was wrong in his conclusion that subsequent statutes had overtaken the decision in *Barker v. Richardson, 4 B. & Ald. 579*. The later statutes, it was contended, did not give any power to an incumbent of a benefice, whether with or without consents of other persons, to make a grant of an easement in fee simple. The statutes permitted other things to be done, such as leasing or selling or exchanging the glebe land or part of it, subject to restrictions and consents, but it did not give power to grant an easement in fee simple. On that point, for reasons which I shall give in a moment, I think that the plaintiffs' submission is not right.

The second, alternative, ground, on which I have come to the conclusion that the plaintiffs' submission is right, so that the appeal should succeed, is that, assuming against the plaintiffs that there is a statutory power to grant an easement in fee simple, that power can only be exercised subject to specified consents or approval and the court cannot properly presume that

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such consents or approval had been given; yet, without them, any purported grant would be invalid.

I return to the plaintiffs' first ground. The plaintiffs concede that since 1858 an incumbent has had statutory powers, subject to certain consents, to sell or convey in exchange or by way of partition, or otherwise dispose of, glebe land. \*277 Section 1 of the Ecclesiastical Leasing Act 1858 so provides. To that extent, says counsel, the judge was right in the passage which I have cited from his judgment as to power "to sell, convey or exchange" and so forth. But, counsel submits, such statutory power did not include a power to grant an easement, and the court may not presume a lost modern grant of an easement, even though the other conditions for such presumption are satisfied, if the presumed grantor did not have power lawfully to grant an easement over the land. The mere power to convey, exchange or dispose of land is not sufficient for this purpose. True, in the great majority of cases a person who had the power to convey land would also have the power to grant an easement over that land. But not necessarily so, and, it is submitted, this is one of those cases in which it is not so.

I would for myself accept, for the purposes of this appeal, that a mere power to sell or convey or otherwise dispose of land would not be sufficient if the person so empowered was not also empowered to grant an easement over the land. To that extent I agree with the argument of counsel for the plaintiffs. Where I part company with him on this issue is that I do not accept that the rector of Appleby Magna had no such power. I am satisfied that since the enactment of the Ecclesiastical Leasing Act 1858 he had power, subject to certain consents (which gives rise to the second point), to grant easements such as rights of way over the glebe land. The relevant words of the Ecclesiastical Leasing Act 1858 are to be found in section 1:

... absolutely to sell or convey in exchange or by way of partition, or otherwise dispose of, all or any part or parts of such lands, houses, mines, minerals, and other property,..."

The word "such" relates back to the beginning of the section, which shows that the section is concerned with lands, etc., or other property which are authorised to be leased by the provisions of an earlier Act, the Ecclesiastical Leasing Act 1842. When one looks back to that Act, one finds that section 1 deals with lands and houses. What, then, is the "other property" to which the Act of 1858 plainly refers as being comprised in the provisions of the Act of 1842? I think that counsel for the defendant is right in his submission that at least one item of such "other property" is to be found in section 4 of the Act of 1842. I shall read an extract from that section (as amended), omitting much of the plethora of words which appear in the section as enacted:

"It shall be lawful for any ecclesiastical corporation, aggregate or sole,... with such consent and under such restrictions as are hereinafter mentioned, by any deed or deeds duly executed, to grant by way of lease... any liberties, licences, powers, or authorities to have, use, or take,... any wayleaves... and other ways, paths, or passages,... or other like easements or privileges, in, upon, out of or over any part or parts of the... lands belonging to such corporation, in his or their corporate capacity,..."

So far as the Act of 1842 was concerned, the power was merely to grant those types of property by way of lease, not by way of grant of fee simple, but the Act of 1858, section 1, to which I have already \*278 referred, added the power absolutely to sell or otherwise dispose of such "other property."

Counsel for the plaintiffs submitted that this conclusion - that the Act of 1858 should be construed as extending to give power to grant rights of way - should not be reached because, if it did give such power, it would be remarkable that section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 should have been enacted. That section, expressly granting power to an incumbent to grant an easement over any land which forms part of the property of the benefice, would, it is suggested, have been superfluous and unnecessary if the power already existed in the Act of 1858. Counsel for the defendant submits that section 9 of the Measure of 1960 is not, on any view, superfluous because, at the least, it abolishes the limitations of section 9 of the Act of 1842. In any event, however, I do not find the argument of superfluity of sufficient weight to require revision of what I regard as the clear, combined effect of the relevant provisions of the Acts of 1842 and 1858.

Accordingly, in my opinion, since 1858, and at all times between 1858 and 1952, the rector of Appleby Magna for the time being, subject always to the necessary consents and approval, was empowered to grant a right of way over the glebe land to the defendant's predecessors in title. Subject, therefore, to the question of consents, in my judgment the judge was entitled, on his findings of fact, to hold that, on the basis of lost modern grant, the defendant had established the right of way.

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In this context I think that it is helpful to refer to a passage, to which we were referred by counsel, in the judgment of the court in *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 . Buckley L.J., delivering that judgment, said, at p. 552:

”In our judgment *Angus v. Dalton...* (1881) 6 App.Cas. 740 decides that, where there has been upwards of 20 years’ uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made.”

The second ground of the appeal involves supposing against the plaintiffs that which, in my view, has to be decided against them. This is the point which I have already considered: under the provisions of the Acts of 1842 and 1858, read together, there is a power to grant an easement in fee simple but such a grant by statutory provisions is only valid subject to certain consents having been given. It is therefore, I think, necessary to look further at the terms of the Acts of 1842 and 1858 to see what it is that is required by way of consent or approval. One goes, first, back to section 1 of the Act of 1842. In the early stages of the extremely long first section of that Act one finds that the grant of the power is expressed to be “... with such consent and under \*279 such restrictions as are hereinafter mentioned,...” One then turns to [section 7](#) , which provides (as amended):

”The execution of any lease, grant, or general deed by the person or corporation,... whose consent is hereby made requisite to the validity of such lease or grant or general deed shall be conclusive evidence that the several matters and things by this Act required to be done and performed previously to the granting or making of such lease, grant, or general deed have been duly done and performed,...”

The provision as to consents is found in [section 20](#) . This provides (as amended):

”Each lease or grant to be granted or made under the provisions of this Act shall be made with the consent of the said Ecclesiastical Commissioners,” (who changed into the Church Commissioners in, I think, 1947) “and also with such further consent as hereinafter mentioned;...”

I need not trouble with the details of further consents, which include a requirement of the consent of the patron, where there is a patron, of the benefice and also, where the land was copyhold, the consent of the lord of the manor. [Section 21](#) of the Act of 1842 (as amended) says:

”The consent of each person, whose consent is hereby required to any deed to be made under the authority of this Act shall be testified by such person being made a party to such deed, and duly executing the same.”

It follows, therefore, that the deed required to make the grant of an easement would be a deed to which the Ecclesiastical Commissioners would have to be parties, otherwise it would not have any validity.

I go on to the Act of 1858, which, as will be remembered, extended the power of leasing given by the Act of 1842 to comprise also a power to sell or otherwise dispose of glebe land. Section 1, in its opening words, prescribes what Parliament has laid down as being the considerations which are to move the Ecclesiastical Commissioners in deciding, if they do so decide, to give their consent to such a grant as that with which we are here concerned. The section (again omitting immaterial words) starts as follows:

”In any case in which it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners for England that all or any part of the lands,... or other property of or belonging to any ecclesiastical corporation, which are by the [Act of 1842] authorised to be leased, might, to the permanent advantage of the estate or endowments belonging to such corporation, be leased in any manner, or be sold, exchanged, or otherwise disposed of, it shall be lawful for any

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ecclesiastical corporation,... from time to time, with such consents as in the [Act of 1842] mentioned, and with the approval of the said commissioners, to be testified by deed under their common seal, to lease..."

**\*280** and so forth. Then later in the section there is, as I have already said, the power to sell, convey or otherwise dispose of the lands or part of them. So the approval of the commissioners (it is now called "approval") is required to be given, and the basis of such approval is that the commissioners are to be satisfied that that which they are asked to approve shall be to the permanent advantage of the estate or endowments belonging to the corporation - in this case, the corporation sole, the incumbent of Appleby Magna.

It is said for the plaintiffs, as their second ground, that, having regard to those statutory provisions, it is not permissible for this court to make the presumption that there has been a valid grant of the easement in question, the right of way: such a valid grant would have required the consent of the Ecclesiastical Commissioners; that consent would have been required to have been given and to have been shown by the Ecclesiastical Commissioners joining as parties in the deed of grant, showing in that deed their consent to the grant which was being made. Why, say the plaintiffs, should the court presume, or on what basis or material can the court presume, that there has been a grant made, and lost, to which the Ecclesiastical Commissioners, carrying out their statutory duty, gave their assent in the form prescribed?

For the defendant it is submitted that that is something which the court properly can assume: all that the court has to do is to see that there is a factual basis which gives rise to the presumption that the incumbent himself made such a grant and that it was on the basis of such a grant that the acts of the defendant's predecessors in title in walking between points "A" and "B" have been allowed to continue. Counsel for the defendant submits that the court is entitled to presume, and ought to presume, at any rate in the absence of some evidence to the contrary, that the rector, in making such a grant, did seek and obtain the necessary consent or approval of the Ecclesiastical Commissioners, and that this grant which has been fictitiously made and lost was a grant which contained, properly, the authorisation of the Ecclesiastical Commissioners as parties thereto.

It seems to me that the defendant's argument on that point cannot succeed. As I understand it, the basis on which the court is entitled to make the presumption of the lost modern grant, in what I may call the normal case where there arises no question of glebe land or complexities such as have arisen in this case, is that the owner of the allegedly servient tenement or a predecessor in title has, with knowledge of acts which would otherwise be acts of trespass, acquiesced in those acts and, therefore, it must be assumed that the owner of the servient tenement or some predecessor in title of his has given his consent in the proper way, namely, by a deed of grant of that easement. Why, however, should the court make that assumption, or how can the court fairly and properly make that assumption, in respect of the Ecclesiastical Commissioners who, by statute, before the deed can be valid, have got to be parties to it? There is no evidence produced of any knowledge on the part of the Ecclesiastical Commissioners of any of the acts in which the incumbent acquiesced. There is, as I see it, **\*281** no basis on which the court could, judicially, make the assumption that they must have known of those acts or that the incumbent for the time being told them that those acts were taking place and of his attitude thereto.

The interest and concern of the Ecclesiastical Commissioners, as appears from what I have read from section 1 of the Act of 1858, is an interest different from and wider than that of the incumbent for the time being. The Ecclesiastical Commissioners are concerned with the interest of the property in question - the benefice, the glebe land - not merely during the time of any particular existing incumbent but for all time. It is their statutory duty to protect that interest, and, unless there be some evidence, or some fair inference, that they knew of and assented to the acquiescence in the acts which would otherwise be trespass, I am unable to see how this court can fairly make such a presumption.

It follows, in my judgment, on this second ground, that the court cannot make the presumption that there has been a valid grant of the easement in question. The most that the court could assume would be a purported grant made by the incumbent himself, which would not be of any benefit to the defendant in relation to the right which he is now claiming. Accordingly, and I confess with some reluctance, on the basis of the second ground put forward on behalf of the plaintiffs I feel bound to hold that the appeal succeeds and that the plaintiffs are entitled to judgment.

ORR L.J.

I entirely agree, and do not wish to add anything.

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GOULDING J.

I also agree, but, as we are differing from the judge below, and in deference to the full arguments that we have heard, I will briefly state my reasons in my own words.

As Megaw L.J. has already said, the action relates to a short length of pathway at Appleby Magna in Leicestershire. The plaintiffs complain of trespasses to their land on which that short pathway lies. The defendant alleges that his entry on the plaintiffs' land is justified by his ownership of a private right of way belonging to part of the defendant's land adjoining the plaintiffs' land.

The judge below found that the defendant and his predecessors in title had actually enjoyed the right of way claimed from 1927, or some earlier date, to 1962, but he found that after 1962 the only user of the pathway had been (as he said) "... of a very minor nature."

The action was commenced only on July 27, 1973. Consistently with the facts which he found, as I have just stated, the judge rejected the defendant's claim to a prescriptive right of way under the [Prescription Act 1832](#) but upheld his claim to such a right by the inference of a lost modern grant. The judge therefore gave judgment for the defendant, and the plaintiffs now appeal. As Megaw L.J. has already said, there are two grounds of appeal, both based on the fact that, so far as the evidence goes, at all times before June 27, 1952, the plaintiffs' land, the alleged servient tenement, was glebe land of the rectory of \*282 Appleby Magna. There was no evidence that the plaintiffs' land and the defendant's land had ever been in common ownership. The two grounds of appeal are set out in the notice of appeal. Both have been argued before us. They are, first, that so long as the plaintiffs' land was land of the rectory the incumbent had no power to grant a right of way thereover, secondly, and alternatively, that the incumbent had power to make such a grant only with the consent of the Church Commissioners, which consent cannot be presumed on the evidence.

The first ground of appeal has led to an interesting excursion into ecclesiastical statute law. My first impression was that the appellants were right, but I am now convinced, having heard argument, that from and after the year 1858 the necessary power for an incumbent to grant an easement over glebe land existed by virtue of the Ecclesiastical Leasing Acts. I can state my conclusion on that point quite shortly. The Ecclesiastical Leasing Act 1842 empowered ecclesiastical corporations, sole and aggregate, with certain consents, to make leases of certain species of ecclesiastical property. The sections in which the leasing powers and the species of property appear are the following (the remaining sections of the Act consisting of procedural and ancillary provisions). Under section 1, the ecclesiastical corporations are empowered to grant leases of lands or houses for the purpose of building or rebuilding. Under [section 3](#) they are authorised to lay out and appropriate land for ways, yards or gardens for buildings comprised in leases under section 1, or

"... for ways, streets, squares, avenues, passages, sewers, or otherwise for the general improvement of the estate, and the accommodation of the lessees, tenants, and occupiers. ..."

Under section 4 the corporations are empowered to grant leases, not exceeding 60 years, of easements of water or of way. Under section 6, finally, they are empowered to grant mining leases, again not exceeding 60 years. Those powers are referred to, and additional powers - powers, namely, of outright alienation - are given, in section 1 of the Ecclesiastical Leasing Act 1858. That Act provides:

"In any case in which it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners for England that all or any part of the lands, houses, mines, minerals, or other property of or belonging to any ecclesiastical corporation, which are by the [Act of 1842] authorised to be leased, might, to the permanent advantage of the estate or endowments belonging to such corporation, be leased in any manner, or be sold, exchanged, or otherwise disposed of, it shall be lawful"

(and I put it shortly) for the corporation, with the consents required by the Act of 1842 and the approval of the Ecclesiastical Commissioners, to lease the land with greater freedom as to the terms of the lease than that provided by the powers of the Act

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of 1842 or absolutely to sell, exchange, partition or otherwise dispose of any of such lands, houses, mines, minerals and other property.

When one places that section of the Act of 1858 alongside the different empowering sections of the Act of 1842, it is, in my judgment, \*283 apparent that the words “other property” in section 1 of the Act of 1858 must include the easements of water and of way specified in section 4 of the Act of 1842. Accordingly, I take the view that from 1858 onwards the incumbent of a parish had power, with the approval of the Ecclesiastical Commissioners and the other consents and formalities required by the Act of 1858, to sell outright an easement over ecclesiastical land.

It was maintained in argument that there are at least two matters outside the Acts which cast doubt on that construction. The first is that a later piece of ecclesiastical legislation, namely, the Church Property (Miscellaneous Provisions) Measure 1960, provided, by section 9 (1) of that Measure, that the incumbent of a benefice should have power, among other things, to grant an easement over any land forming part of the property of the benefice, with a number of consents, and that such grant might be made either without monetary consideration or in consideration of a sum or sums of money. Why, it was suggested, should that section have been necessary if the power of granting an easement existed all the time under the Act of 1858? Secondly, we were referred to a precedent book in which, in one of the precedents, an incumbent was shown as granting an easement to water undertakers not under the Ecclesiastical Leasing Acts but by use of powers given in a special Act by reference to the [Lands Clauses Consolidation Act 1845](#). \* There again, it was suggested, it would on the whole have been more advantageous and convenient to have used the powers under the Ecclesiastical Leasing Acts, if they existed, than be involved in the formalities which attend a sale by a corporation under powers taken by reference to the Act of 1845.

For my part, I am clearly of opinion that the existence or subsequent grant of concurrent powers of carrying out the same transaction cannot cast doubt on the true interpretation of the Ecclesiastical Leasing Acts on their own language. It is not uncommon for corporate bodies and limited owners of all kinds to possess concurrent statutory powers. Moreover, the Measure of 1960 certainly extended pre-existing powers in certain respects. For example, it enables a gratuitous grant of an easement to be made in a proper case, and it extends to classes of ecclesiastical land which were excepted from the operation of the Ecclesiastical Leasing Acts. Further, the provisions in the Lands Clauses Consolidation Act 1845 were not specifically related to ecclesiastical corporations but included a great class of all kinds of owners with restricted powers or under disability.

Accordingly, in my judgment, the most that can be got out of these subsequent or collateral matters referred to in argument is that conveyancers generally were of opinion that it was impossible, or an act of doubtful validity, to grant an easement under the Ecclesiastical Leasing Acts. I confess that that was my own opinion until I came into this court. Having, however, been carefully taken through the language of the Acts, I now think that it is plain that the power did exist. I do not lose sight of the fact that in conveyancing matters a court is slow to \*284 disturb settled views of the law, even though thinking them ill-founded, if the consequence may be to disturb established titles. However, the view now being taken of the Ecclesiastical Leasing Acts cannot, so far as I can see, possibly have that effect; it would rather have the effect of confirming title to easements which may in the past have been taken under those Acts.

I now turn to the second ground of appeal. Under the Ecclesiastical Leasing Acts, for a sale either of corporeal land or of an easement the approval of the Ecclesiastical Commissioners (now replaced by the Church Commissioners) is necessary, and they have to be satisfied of the permanent advantage of the transaction to the benefice. Further, the consent of the patron of the benefice is required. We do not know who was the patron in the present case, and not much has been said about him in argument. A good deal has, however, been said about the position of the commissioners in relation to the doctrine of lost modern grant. Proof that an easement has been actually enjoyed over a sufficient period justifies, in our law, the fictitious inference that it was so enjoyed by virtue of a lost grant by the owner of the servient tenement, unless such a grant is shown to have been impossible. Before the Ecclesiastical Leasing Acts the court would not presume a grant of an easement over glebe land on the part of an incumbent in such a manner as would bind his successors, for he had no power to bind them: see *Barker v. Richardson*, 4 B. & Ald. 579, referred to by Megaw L.J.

On the facts as to enjoyment found by the judge below ought we to presume not only that the incumbent was willing to make, and did make, a grant but also that he had got the consent of the patron and the approval of the commissioners? To answer that question, it appears to me necessary to go back to the first principles on which the doctrine of lost modern grant is justified. I take them from the statement of Fry J. in the opinions of the judges given to the House of Lords in *Dalton v.*

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*Angus & Co., 6 App.Cas. 740*, already referred to. He said, at pp. 773-774:

”But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it \*285 reasonable for the courts to say that he shall not afterwards interfere to stop the act being done.”

Let me consider the third, fourth and fifth of those features of prescription referred to by Fry J. The third was the knowledge of the person affected that the act of trespass is done. In the case of an ordinary owner entitled to possession of the land knowledge is naturally presumed, though there are cases in which such an owner has been able to prove that he had in fact no means of knowledge and, thereby, displace the presumption which would otherwise have arisen against him. In the case of fiduciary or consenting parties, such as trustees, or the commissioners in the present case, it appears to me (no authority has been cited to us on the point) that it is quite impossible for a court to hold, in the absence of positive evidence, that such parties, who may never be near the land, have the means of knowledge, let alone actual knowledge.

The last two, the fourth and fifth, of Fry J.’s requirements require ability on the part of the party affected to interfere and effectively object to the trespass being carried on on the land. So far as has appeared in the argument, and so far as I know, the commissioners had at the relevant times no power whatever to take action against a trespasser on glebe land in the possession of an incumbent. Accordingly, there seem to me to be grave difficulties in saying that the commissioners can be credited with that kind of acquiescence which alone enables the court fairly to presume a fictitious grant. I would add that there are also considerable difficulties in applying a doctrine of acquiescence to persons in a fiduciary position who have an active duty to others to fulfil before they can exercise their powers. The commissioners in the present case in particular were not entitled to let anything go by default: it was their duty only to alienate if satisfied of the permanent benefit of the transaction.

Accordingly, I too take the view that, whatever inference the judge may rightly have drawn as to the operation of prescription under the doctrine of lost modern grant against the incumbent of Appleby Magna, it would be quite wrong to infer the execution by the commissioners, or indeed, the patron, of a deed under the Ecclesiastical Leasing Acts.

I would refer again to what Megaw L.J. has already said: that it is unlikely that the judge below had the benefit of the examination of the law which we have had.

Accordingly, in the circumstances I too would allow the appeal and grant the injunction.

**Representation**

Solicitors: Kingsford Dorman & Co. for Crane & Walton, Ashby-de-la-Zouch ; Fishers, Ashby-de-la-Zouch .

*Appeal allowed. Judgment below set aside. Injunction as asked in notice of appeal. Plaintiffs’ costs of appeal and below on scale 4, order not to be enforced without leave of court. Legal aid taxation of defendant’s costs. (M. G.)*

**Footnotes**



**Oakley v Boston, [1976] Q.B. 270 (1975)**

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1                      Encyclopaedia of Forms and  
                            Precedents. 3rd ed., vol. 9  
                            (1946), p. 117, precedent 53.

(c) Incorporated Council of Law Reporting for England & Wales

**In the Consistory Court of the Diocese of Worcester****Archdeaconry of Worcester: Parish of Longdon: Church of St Mary****Faculty petition 10-21 relating to wooden right of way sign****Judgment**

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**Introduction**

1. This petition is for the erection of a small sign to be erected at or near the south-east corner of the churchyard of St Mary's Church, Longdon, indicating that the path across the churchyard is a public footpath. The path in question is shown as a footpath (no 521) on the definitive map of public rights of way, maintained by Worcestershire County Council as surveying authority under section 53 of the Wildlife and Countryside Act 1981 ("the definitive map"). I have not seen an extract of the actual definitive map and list, but I have no reason to doubt that the map included with the petition is a genuine copy of the relevant portion of the definitive map; and that the definitive list accords with it.
2. The justification for the sign is said to be that it is required by law because the path in question is a public footpath, shown as such on the definitive map, and the County Council therefore has a duty under section 27(2) of the Countryside Act 1968 to erect and maintain a signpost at every point where the footpath leaves a metalled road.
3. The cost of the work is trivial; and there have been no objections to the petition.
4. Under section 56(1) of the 1981 Act, the definitive map is conclusive evidence as to the particulars contained therein, namely that there was at the relevant date a footpath

(that is, a highway over which the public have a right of way on foot) as shown on the map. I am not certain as to what was "the relevant date" in this case, but it will be some time between 1949 and the present.

5. The surveying authority is under a duty by virtue of section 53(2) of the 1981 Act, to make an order modifying the definitive map where it discovers evidence to show that there is no public right of way over land as shown on it (see section 53(3)(c)(iii)); and any person may make an application under section 53(5) for such an order. However, until such an application has been made and determined, the effect of section 56(1) is that there is a public right of way as shown on the map.
6. If as a matter of law there is no way in which there could be a public footpath across a churchyard – either across consecrated land in general or across this churchyard in particular – it might arguably be inappropriate to authorise the erection of this sign, as that would serve to perpetuate a misconception. Instead, an application should immediately be made for the modification of the definitive map, as indicated above. If, on the other hand, either there is an undoubted right of way across the land in question, or there might be one, then the effect of section 56(1) would mean that for the time being (and realistically for the foreseeable future) that must simply be accepted, so that section 27 of the 1968 must be complied with and a sign erected – subject only to the details being satisfactory.
7. I have therefore considered briefly whether that is the case, in view of some uncertainty as to the general position in law regarding rights of way across churchyards; and I have taken this opportunity to review a number of the older decisions, as they are sometimes referred to in the more recent cases – although, arguably, there is no need any longer to revisit decisions prior to that of the Court of the Arches in *Bideford*.

## Public rights of way

8. The origin of a public right of way is that the owner of the land is deemed to have dedicated the way for the use of the public – either expressly or, far more often, impliedly, by making no objection to the use of the land by the public. The latter possibility was the subject of the Rights of Way Act 1932, modified by the National Parks and Access to the Countryside Act 1949, and replaced by sections 31 to 33 of the Highways Act 1980.

9. Section 31 of the 1980 Act, as amended, provides (so far as relevant) as follows:

“(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 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.

...

(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.

...

(7) For the purposes of the foregoing provisions of this section “owner”, in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above “the appropriate council” means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the way or land is situated in the City, the Common Council.

[(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.<sup>1</sup>

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.

...”

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<sup>1</sup> Added by Natural Environment and Rural Communities Act 2006, section 69(1).

10. The question thus becomes whether the character of the ownership of ecclesiastical land is such that either section 31(7) applies, so that there is no owner entitled to dispose of the land, or section 31(8), so that the owner could not have had the capacity to dedicate it.<sup>2</sup>

### Rights of way across ecclesiastical land

11. The starting point seems to be the dictum of Lord Herschell in *Phillipps v Halliday*:

“Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. I hardly think that the proposition so stated was assailed by the learned counsel for the appellants.”<sup>3</sup>

That case related to the occupation of pews – but there seems to be no reason in principle why the same approach should not apply equally to the coming into existence of a right of way across a churchyard. In other words, wherever possible, if there exists a strip of land across a churchyard that is used just as though it were a footpath, the right of the public to use it to cross the churchyard should be presumed to have come into existence at some stage as a result of the due process of law.

12. Historically, there was some divergence of opinion as to whether there could be such a right. Thus in *Walter v Mountague and Lamprell*, a case in the Consistory Court of London, Dr Lushington held as follows:

“First, then, as to the church-yard; it is clear that by the common law the rector has the freehold therein, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass if his right be unjustly invaded. The churchwardens by virtue of their office are bound to see that the foot-paths are kept in proper order and the fences in repair.

<sup>2</sup> As with, for example, a registered charity (by virtue of section 36(1) of the Charities Act 1993.

<sup>3</sup> [1891] AC 228, HL, at p 231

Individuals may by prescription have a right of way; and parishioners have the same right for the purpose of attending divine worship, vestries, and other fit occasions. The public may also have a right of way which is not to be infringed upon.

I apprehend that neither the rector nor the churchwardens can make a new path without a faculty from this Court. In strictness that is by law required.”<sup>4</sup>

This made it clear that it was possible for a right of way on foot – either for a particular purpose or for exercise by parishioners – to come into existence by prescription. And by implication the incumbent could dedicate a new right of such a character for the benefit of the public. And each of these would require the authority of a faculty.

13. However, some years later, the same judge, by now in the Court of Arches, made it clear that that approach would not extend to allowing the separation of a portion of a churchyard to be taken into a public road:

“I may therefore at once declare what I believe to be undoubted law, that it is not in the power of any Ecclesiastical Court whatever to allow any portion of consecrated ground to be devoted to secular uses, or to grant a faculty to confirm such an appropriation. From the earliest period that I have been acquainted with these Courts I have heard the law so laid down. ... Applications have several times been made to me sitting in the Consistory Court of London to permit minute portions of churchyards to be appropriated to secular uses; but I have always refused, because if I had allowed small portions of consecrated ground to be so used, I could not have rejected applications extending to the whole. In fact, it would be leaving the matter to the discretion of the judge, which would be contrary to law.”<sup>5</sup>

It may be noted in passing that the court in that case seems to have been resisting the petition not necessarily because it envisaged the grant of a right of way, but because the use of part of a consecrated churchyard as a public road would be a secular use, and thus the court could not authorise it.

14. But the consistory courts were not unanimous in these matters. Thus, in *Re St Mary Abbot, Kensington*, the Local Board (the predecessor to the modern highway authority) wished to acquire a strip of the churchyard so as, in effect, to adopt it as a footway at a busy London road junction – a factual situation that is not particularly uncommon. The Chancellor, Dr Tristram, held:

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<sup>4</sup> (1836) 1 Curteis 253, at p 260.

“... the Court is being asked to sanction a grant of this strip of consecrated ground being made to the Local Board. This neither the Vicar nor the Court has power to do. The freehold of the churchyard is in the Vicar for the use of the parishioners, subject to the jurisdiction of this Court, but the fee is in abeyance. The Court cannot give away what it has not got. It may, however, I think, by Faculty give a leave and licence for this strip of land to be used as a public footway, so long as it may be required for the purpose. If at any time hereafter it should cease to be so required, it will revert to the churchyard.”<sup>6</sup>

15. This reflects the fact that the normal position is that a highway that is maintainable at public expense is owned by the highway authority: see now Highways Act 1980, section 263. That would not be possible in the case of consecrated land, since such land cannot be appropriated for a secular purpose. But it is possible for such land to be used as a public footway “by leave and licence”. However, it is interesting that the Chancellor used the phrase “public footway” to refer to something that was not (on his own analysis) in law a footway in the conventional sense, but something that looked like one, and was doubtless thereafter treated by everyone – the church, the incumbent, the parishioners, the highway authority, and the public – as though it was such a footway.
  
16. Some twenty years later, in *Re St. Botolph Without*, another London case, Dr Tristram authorised the appropriation of a portion of a churchyard for widening a street.<sup>7</sup> The faculty had been opposed by a parishioner in person, and the learned judge delivered a considered judgment, in which he explained that, although it had been contrary to the decisions of the Ecclesiastical Courts to sanction the curtailment of a churchyard used for burials “for the purpose of widening a public thoroughfare,” he had many years before, at the instance of the then Bishop of London and some of the London vestries, reconsidered the matter, with the result that, in order to save the expense of obtaining special Acts of Parliament and to meet the needs of the day, it had become his practice to grant such faculties.

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<sup>5</sup> *Harper v Forbes* 5 Jur (NS) 275.

<sup>6</sup> (1873) Trist 17, at p 19.

<sup>7</sup> [1892] P 161.

17. Dr. Tristram stated his view of the matter thus:

“The principle upon which the Court holds that it has jurisdiction to grant such faculties is that there is a discretionary power vested in it as to making orders relating to churchyards; and that it is the duty of the Court to exercise this discretion reasonably, and, as Sir John Nicholl observes, to vary the exercise of it according to the change of times and circumstances, and that during the last twenty-five years there has been such a change of circumstances, owing to the great increase of traffic in the City and in other frequented parts of the metropolis, as to warrant the Court in granting such faculties for the convenience of those who attend church as well as for that of the general public.”<sup>8</sup>

18. These authorities were considered by Sir Lewis Dibden in the Consistory Court in Rochester in *Re Plumstead Burial Ground*, a case in which it was proposed that part of a closed churchyard should be taken and made part of an adjacent highway. He thus first noted the coming into existence of routes across churchyards equivalent to footways:

“Many churchyards are traversed by public footpaths which neither provide access to the church nor are useful for access to graves, but nevertheless are legal footpaths existing by prescriptive right, and incapable of being interfered with by the Ordinary. How such paths when they are not churchways (that is, ways leading to the church) originated, it is not always possible to say. Sometimes, perhaps, the footpath was there before the churchyard; but however that may be, I take it that all paths of this sort, neither beginning nor ending in the churchyard, but merely crossing it as if it were a field, so far as they have a legal origin, are prescriptive.”<sup>9</sup>

This confirms that public paths that were in existence before the land in question was consecrated do not cease to exist as such upon consecration. However, his comment “sometimes, perhaps, the footpath was there before the churchyard” raises the obvious inference “but sometimes it was not”. And that is borne out by common observation – there are numerous paths across churchyards, but they surely do not all predate the consecration of the land in question.

19. However, the Chancellor in *Plumstead* continued:

“I am not aware of any authority except certain modern dicta for the grant of a faculty for such a footpath; and it seems to me that unless the footpath is needed in connection with the use of the church or churchyard for their proper ecclesiastical purposes, it

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<sup>8</sup> [1892] P 161.

<sup>9</sup> [1895] P 225, at p 235.



would be an application of part of the churchyard to a secular, and therefore an unauthorized, purpose.

The same observation applies with even greater force to a proposal to throw a strip of the churchyard into a high road so as to widen it, and with that object to alter the boundaries of the churchyard. It is a direct application of consecrated ground to a secular purpose, and, as it seems to me, equally so whether the freehold is purported to be given up, or only the right of user of the land as part of a highway. I do not think an attempt to retain on paper, as it were, the Ordinary's jurisdiction over the land after it has been turned into the highway can affect the substance of the transaction, which is the user of the land for a secular purpose."

He was there holding that, although a footpath across a churchyard that already exists may be taken to have come into existence by virtue of a prescriptive right (or, perhaps more accurately, presumed dedication), a faculty could not now be given for the creation of a new path, nor for the throwing into the highway of part of a churchyard – because that would be to sanction the use of consecrated land for secular purposes. And he explicitly declined to follow Dr Tristram's decision in *St Botolph*.

20. Shortly after the decision in *Plumstead*, the same chancellor, this time in the Consistory Court of Exeter, considered another petition to add a piece of a closed churchyard into the neighbouring highway, in *Re Bideford*. Not surprisingly, he took the same line as he had in *Plumstead*, and held that – however desirable such a proposal might be, the court had no jurisdiction to authorise it. However, this time he expressed his conclusion somewhat diffidently, noting that a different approach had been taken in various cases in the consistory courts in London and elsewhere (including in Worcester). The case therefore proceeded to the Court of Arches, where Sir Arthur Charles noted the divergence of views between the various consistory courts, and held as follows:

"Now, in the present case the faculty is asked for in respect of ground which can no longer be lawfully used for burials. It remains nevertheless under the jurisdiction of the Ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. ... It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter v. Mountague*; and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial; but I see no reason why the jurisdiction should not

remain although the ecclesiastical purpose can no longer be carried out. And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.

In the result, therefore, I am of opinion that this appeal must be allowed. I think that the discretion which the learned judge of the Court below was asked to exercise was within the limits of the Court's jurisdiction; and if it be matter of discretion, there is no dispute that the faculty is one which ought to be granted. ... The faculty must be subject to a proviso that the remains to be removed shall be re-interred in another portion of the burial ground to be selected by the rector and churchwardens."

21. As far as I am aware, the decision in *Bideford* has not been doubted subsequently. The position is therefore now clear. Once land has been consecrated, it may not be put to secular purposes. However, the incumbent may grant a private right of way across it, or may by dedication create a public right of way across it, subject in either case to being authorised to do so by the grant of a faculty. That may include throwing a strip of the churchyard in with an adjoining highway, provided that a record is made of the measurements of the land thus effectively transferred, and provided that any human remains be appropriately re-interred.
22. That in turn means that there is no impediment under s 31(7) or (8) of the 1980 Act to the coming into existence of a modern footpath, subject to a faculty being granted to authorise the dedication. And there would have been no impediment under those provisions or their predecessors to the coming into existence of a path at some time in the past.
23. The position was thus summarised as follows in the decision of the London Consistory Court in *Re St John, Chelsea*:

"... in *Walter v Mountague and Lamprell*, Dr. Lushington, sitting in this court, thought that a faculty could be issued for making a public footway across an open churchyard, and in *Re Bideford Parish*, the Dean of Arches evidently thought that Dr. Lushington's view was right and that such a faculty would be founded on public convenience. That

suggests a third category, where public convenience can justify a faculty at least for a public footpath. This category appears to have sprung from the first category, that is, from user for ecclesiastical purposes. For in *Corke v Rainger and Higgs*,<sup>10</sup> Sir Lewis Dbdin, in his discussion of ecclesiastical purposes stated, at p. 76: 'A churchyard path is allowable although persons may pass along it who are not going to church,' and in *Re Bideford Parish*, Sir Arthur Charles said that he could not distinguish between a path across a churchyard and one alongside it. These passages no doubt justify the practice that is now, I believe, followed in all dioceses, of allowing, in proper cases, small strips of a churchyard, open or closed alike, to be thrown into the public highway for the convenience of the public at large. But the practice has extended beyond public ways into the category of wayleaves generally. For instance, drains are often allowed to be laid under a churchyard, or an electrical transformer to stand on it, and I think (though I do not remember a case where I have been asked to allow it myself) that there would be no difficulty in a proper case in allowing water or gas pipes to be laid under a churchyard or electric or telephone wires to pass over it."<sup>11</sup>

### The need for a faculty

24. It is clear from the foregoing that a right of way on foot – either private or public – across a churchyard can only be created with the authority of a faculty. If therefore it is alleged that such a right has come into existence at some time in the past, it is perfectly proper to look for a faculty having been granted to authorise it.
25. Clearly there will be no problem if there can be produced a copy of an actual faculty. Nor will there necessarily be a problem if evidence (such as correspondence with the diocesan registry, or a resolution in the PCC minutes) is available that a specific faculty was actually granted, even though no copy of it has remained extant – the difficulty would merely be an evidential one.
26. It may incidentally be noted that, although the faculty jurisdiction has existed since the middle ages, it has not always been exercised with great vigour. Thus, Newsom (in *Faculty Jurisdiction of the Church of England*) comments :

<sup>10</sup> [1912] P 69.

<sup>11</sup> [1962] 1 WLR 706, per Newsom Dep Ch at p 712.

"... it seems that in the nineteenth century the ecclesiastical courts did not insist very strongly on the need for a faculty whenever any "material alteration" was made to a church or its contents. Thus it appears from the Appendix to the Charge of George Moberly, Bishop of Salisbury, issued in 1882, that since his visitation of 1879, only 18 faculties had been granted in the diocese, seven of them in Wiltshire, and 11 in Dorset. Indeed, in the years 1880 and 1882, none at all were granted in Wiltshire. On the other hand, he listed 20 churches "and probably others" which had been "restored or enlarged" in those years, only five of which were in parishes named as having had faculties. ... There is no reason to suppose that, around 1880, the administration of the diocese of Salisbury was unusually slack. But a great deal of works, including "restoration" of many churches, must have been done without the chancellor being concerned: the words "and probably others" are significant."<sup>12</sup>

Nor is there any reason to suppose that changes in the churchyard were dealt with any differently from those to church buildings.

27. The fact that an incumbent may appear to have failed to obtain a faculty for a particular item (including the grant of a private right across a churchyard or the dedication of a public right) may thus not be particularly noteworthy. But what is the situation in law if the diocesan and parish records have been scoured, and there is no suggestion of a faculty having been granted?
28. That was the situation confronting Chancellor Coningsby in *Re St Martin le Grand, York*. In that case, the chancellor found as a fact that a pedestrian way, both with and without trolleys, had been exercised over the churchyard in question for at least the previous 100 years. He held:

"I further find that it has been exercised as of right, that is to say *nec vi, nec clam, nec precario* [not by force, secrecy or permission]. ... I find that the use was of a kind and quality capable of giving rise to a right by way of prescription. ... Because of the legal principles to which I have already referred as to the right to grant a right of way being in the ordinary (that is, the bishop acting by the chancellor) and not in the incumbent ..., I conclude that the appropriate form of prescription in relation to the present case is that under the doctrine of lost modern grant (including a presumed faculty) rather than by use from time immemorial."<sup>13</sup>

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<sup>12</sup> Second edition, p 7.

<sup>13</sup> [1990] P 63 (PP, authority 11), at p 77E.

29. He then considered the authorities already referred to above (including *St Mary Abbot*) and concluded that:

“In these circumstances, the lost faculty that is to be presumed because of the use as of right to which I have already referred must be deemed to be a faculty for a licence and not an easement.”<sup>14</sup>

This seems slightly surprising, since the rights granted in the older cases – particularly those relating to road widening – were more in the nature of easements than licences. Alternatively, it may be that the true position is that the right being granted in those cases was by way of a quasi-easement.

30. In *St Martin Le Grand*, the right of way that was found by the court to have come into existence by prescription was a right of way on foot, with or without trolleys, for a defined group of persons – that is, essentially a private right – with a lost faculty deemed to have been granted accordingly. But I see no reason why a public right could not equally be held to have come into existence by dedication – subject again to the presumed existence of an appropriate faculty.
31. I therefore consider that, if the evidence in a particular case supports the proposition that a right of way across a churchyard – whether on foot, with or without a trolley, or on horse – has been (or may be deemed to have been) dedicated at some stage in the past, there is no reason of principle why it cannot be presumed that a faculty was granted – as with *St Martin le Grand*. I emphasise that this is of course a legal fiction – but that is no worse than the position that would otherwise arise in respect of all of those works carried out to churches all over Wiltshire and Dorset (and no doubt elsewhere) throughout the 1880s, which would otherwise be unauthorised.
32. Of course that is not an indefeasible presumption. If it can be shown when the apparent right can into existence (that is, the date prior to which there was undoubtedly no public use of the alleged right – perhaps because, for example, there

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<sup>14</sup> at p 82H.

was a wall blocking the route), and if it can be further shown that no faculty was granted then or has been granted at any time thereafter, then it will be possible for anyone who wishes to demonstrate that the doctrine of lost faculty could not apply, and to make an application for the removal of the route from the definitive map. Alternatively it would presumably be possible for a confirmatory faculty to be sought to regularise the apparent right – and such a petition might or might not be granted, according to the merits of the case.

### **Conclusion**

33. It follows from the foregoing analysis that there is no reason in principle why there should not be a public right of way on foot across a churchyard, notwithstanding the effect of consecration. Such a right could have come into existence prior to the land in question being consecrated – either by specific grant or by presumed dedication at common law. Alternatively, it could have come into existence following the consecration, again either by virtue of an actual dedication or by presumed dedication, authorised in either case by the authority of a faculty – even though, in the latter case, that is almost certain to be a legal fiction.
34. Where the definitive map shows a footpath across a churchyard, therefore, there is no reason why that should be incorrect, so as to negate the statutory presumption that it is conclusive evidence that there does indeed exist a public right of way on foot. As I have noted above, that does not mean that such an indication on the map is always correct; and the definitive map may therefore in some cases require rectification in due course by means of the appropriate procedure. However, it does mean that there is no reason to suppose automatically that there can never be such a right.
35. I thus conclude that there is no reason to suppose that the extract from the definitive map in the present instance is incorrect; and therefore, until such time as it is

amended, it is conclusive proof that a public footpath exists as shown on it across the churchyard at Longdon.

36. In the absence of any objection to the details of the proposed sign, a faculty should therefore issue to permit its erection, subject to a condition that no works be carried out until they have been notified to the County Archaeological Officer or another archaeologist approved by the court.

A handwritten signature in black ink, appearing to read 'Charles Mynors', with a small arrow pointing downwards and to the right below the signature.

**DR CHARLES MYNORS**  
Chancellor

4 November 2010

St John's, Chelsea, Re, [1962] 1 W.L.R. 706 (1962)

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## \*706 In re St. John's, Chelsea



Positive/Neutral Judicial Consideration

### Court

Consistory Court (London)

### Judgment Date

26 March 1962

### Report Citation

[1962] 1 W.L.R. 706



London Consistory Court

Newsom , Deputy Ch.

1962 March 6, 7, 26

*Ecclesiastical Law—Faculty—Secular purpose—Use of consecrated land—Jurisdiction of consistory court.*

The vicar and churchwardens of a church sought a faculty to enable the land on which the parish church formerly stood to be used for a commercial purpose, namely, a car park. The petition was opposed, the parties opponent contending that the land ought to be used as a children's playground:—

*Held*, (1) that the status of consecrated ground was indelible save by the authority of Parliament.

Dictum of Farwell L.J. in *Sutton v. Bowden* [1913] 1 Ch. 518; 29 T.L.R. 262 applied .

(2) That faculties could be granted, either in respect of a church site or a churchyard, for ecclesiastical user, for throwing small parts of a churchyard (whether still available for burials or not) into a highway or for granting other rights of user in the nature of wayleaves, and for secular user where the original purpose of consecration could no longer lawfully be carried out, but that there was no jurisdiction to grant any other relevant class of faculty; that the petitioners had failed to establish, on the evidence, that the purpose for which the ground was originally consecrated could no longer lawfully be carried out; and that, therefore, the petition failed and must be dismissed.

*Corke v. Rainger and Higgs* [1912] P. 69; 28 T.L.R. 130 ; *In re Bideford Parish, Ex parte Rector, etc., of Bideford* [1900]



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*P. 314; 16 T.L.R. 540 ; and In re St. Mark's Church, Lincoln [1956] P. 336; [1956] 3 W.L.R. 147; [1956] 2 All E.R. 579 followed .*

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*Per curiam* . The distinction between “profane” and “sordid” user is not part of the English ecclesiastical law.

The use of land as a children's playground is not an ecclesiastical user.

The following cases, in addition to those referred to in the judgment, were cited in argument:

*Steeven and Hollah v. Rector, etc., of St. Martin Orgars*<sup>1</sup> ; *Wood v. Headingley-cum-Burley Burial Ground*<sup>2</sup> ; *In re St. Nicholas Cole Abbey*<sup>3</sup> ; *Rector, etc., of St. Gabriel, Fenchurch Street v. City of London Real Property Co.*<sup>4</sup> ; *Williams v. Briton Ferry Burial Board*<sup>5</sup> ; *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White.*<sup>6</sup>

PETITION for faculty.

The vicar and churchwardens of St. John's Church, Chelsea, petitioned for a faculty authorising them to let the land upon which the church formerly stood to National Car Parks Ltd., for use as a car park for the sum of £250 a year. Adjoining that land was the land on which the vicarage of St. John's formerly stood, both pieces of land forming one triangular site bounded by Ashburnham Road, Damer Terrace and Tadema Road, in Chelsea. The church had stood at the south-eastern end of the site, at the base of the triangle. The church and vicarage were used as such from 1876 until 1940, when both were demolished by enemy action. Subsequently, the site was cleared and levelled and had remained unoccupied. Arrangements had been made to let the land on which the vicarage formerly stood, which was not consecrated land, to National Car Parks Ltd. for use as a petrol filling station. The planning authority had given permission for the whole site to be used in the way proposed. The petition was opposed by a parishioner and by a ratepayer who carried on business at a garage nearby.

Representation

E. Garth Moore Q.C. and John Worsley for the petitioners.

John Ellison for the parties opponent.

G. H. NEWSOM Q.C.

Deputy Ch., stated the facts and continued: I need hardly say that if the faculty is granted, the payment of £250 a year will not enure for the personal benefit of the vicar, but will be used for religious purposes in the parish under arrangements which will be made with the court's approval. It is conceded by the petitioners that, if I hold that they are entitled in principle to succeed, the case will have to be considered further by the court so that the detailed arrangements may be settled by the court. I am thus concerned at the present **\*708** stage solely with the questions of principle, namely, whether the court has any jurisdiction to allow the commercial user of the land on which the church formerly stood and, if so, whether in the circumstances it should exercise its jurisdiction in the way proposed.

I turn at once to the question of jurisdiction. The parties opponent submit that I have none. I am much indebted to counsel on both sides for their able submissions on this preliminary and very important point. Many reported cases were read; reference was to some extent made to some unreported cases in the personal experience of counsel, and a brief memorandum of some other unreported cases was prepared at my request by the registrar for the assistance of the court and the parties. The files of the respective registries in respect of many of the last mentioned cases were supplied to me.

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The church site itself was consecrated; its curtilage was not. But both sides agreed that I must deal with the whole of the land in question as if it were the consecrated site of a church, as distinct from a churchyard, if such a distinction is material.

A church is consecrated by the bishop of the diocese, usually with some solemnity, since the consecration is a great occasion; but the essential legal act is the signature by the bishop of the sentence of consecration, by which he separates and sets apart the building from all profane and common uses whatsoever, dedicates the same to the service of Almighty God for the performance therein of divine offices, and consecrates the same for the celebration of such offices. The sentence further pronounces, decrees and declares the building to be so separated, dedicated and consecrated and that it ought to remain so for ever. I take the form from *The Encyclopedia of Forms and Precedents*, 3rd ed., Vol. 3 (1946), p. 535; it is susceptible of minor variations, but these are the typical and essential provisions. The sentence, as Mr. Ellison observed, is definitive and operates in rem. In consequence of the sentence, the building, and with it the land on which it stands, becomes consecrated land, held to sacred uses, and subject to the jurisdiction of this court. The sentence in respect of a churchyard refers to the interment of the remains of the dead instead of to the performance of divine offices; but its other material wording is the same and its legal effect is equally to set the land apart as land held on sacred uses and to subject it to the court's jurisdiction.

In each case, the sacred uses are perpetual and can never be divested from the consecrated land, save by or under the authority of an Act or Measure. Equally, the court's jurisdiction over the land cannot be destroyed save by or under the authority of an Act or Measure. But, that being granted, what are the relevant powers of this court?

I shall start the inquiry with a quotation from the judgment of Farwell L.J. (sitting as an additional judge of the *Chancery Division*) in *Sutton v. Bowden*.<sup>7</sup> He said<sup>8</sup>:

“It has been decided by Dr. Lushington in *Campbell v. Paddington (Parishioners)*,<sup>9</sup> and approved by Cockburn C.J. in *Reg. v. Twiss*,<sup>10</sup> that ‘When ground is once consecrated,’ and dedicated to sacred purposes, ‘no judge has power to grant a faculty to sanction the use of such ground for secular purposes’; and the Lord Chief Justice adds that ‘nothing short of an Act of Parliament can divest consecrated ground of its sacred character.’ This proposition of Dr. Lushington is probably too broadly stated, as Sir Arthur Charles in the Arches Court of Canterbury in *In re Bideford Parish, Ex parte Rector, etc., Bideford*,<sup>11</sup> and Sir Lewis Dibdin in the same court, in *Corke v. Rainger and Higgs*,<sup>12</sup> have affirmed the jurisdiction of the Ecclesiastical Courts to grant faculties, in their discretion, for the erection of buildings and the like in consecrated ground under certain circumstances.”

It is the quoted statement of Dr. Lushington and not the addendum of Lord Cockburn C.J. which Farwell L.J. said was too wide. Thus this passage brings out the point that the status of consecrated land is indelible save by the authority of Parliament. Nowadays, of course, such authority is exercised not only directly by Act, but also by Measure or by delegated legislation.

This special status has been a striking privilege and protection of the Church of England. It is no part of the duty of this court to seek to whittle it away, and even if the faculty here sought is granted, the land will continue to be consecrated land subject to the jurisdiction of this court.

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What then are the circumstances in which the court has power “to grant faculties for the erection of buildings and the like on consecrated ground”? The reported decisions first disclose that the court can do so where the proposal is to erect a building for an ecclesiastical, as distinct from a secular, purpose. In *Corke v. Rainger and Higgs* ,<sup>13</sup> Sir Lewis Dibdin, Dean of Arches, granted a faculty on this principle. He said<sup>14</sup> :

“The test of what is a sufficient ecclesiastical use for the purpose in hand I take to be this. The ecclesiastical purpose must be a substantial and not an incidental part of the whole scheme. Thus a church vestry is allowable on consecrated ground although secular business may sometimes be transacted within its walls. A churchyard path is allowable although persons may pass along it who are not going to church. On the other hand a workhouse or a prison is not rendered ecclesiastical by the fact that somewhere in the building a room is set apart as a chapel.”

Applying that test, he allowed a church school to be built on land, adjacent to a church, which had been consecrated at the same time as the church but not specifically for burials, and which \*710 had not in fact been used for burials. In *Corke v. Rainger and Higgs*<sup>15</sup> the Court of Arches was therefore concerned with a church site, as I am in this case.

In *Campbell v. Paddington (Parishioners)* ,<sup>16</sup> Dr. Lushington, sitting in this court, similarly granted a faculty for the erection of a vestry-room on a piece of consecrated ground, originally intended for an additional burial ground, but in which there had been no interments. He said that a vestry-room is employed for ecclesiastical as well as secular uses. The test is evidently fairly generous towards allowing what is sought; for the report makes it clear that the building was wanted for “vestry or other parochial meetings,” at a date when a vestry was an active organ of local government. It also seems clear that there is no distinction in this class of case between church sites and churchyards. The premises concerned in *Corke v. Rainger and Higgs*<sup>17</sup> were a church site, and those in the *Paddington* case<sup>18</sup> were a churchyard.

Though the test of what is an ecclesiastical purpose is fairly generous, there must be a real and not a fanciful ecclesiastical element. Thus, in the *Paddington* case,<sup>19</sup> Dr. Lushington referred with approval to an earlier case, *The Rector of St. George's, Hanover Square v. Steuart* ,<sup>20</sup> which he regarded as a decision that a faculty ought not to be issued for erecting a charity school on a churchyard. For, he said,<sup>21</sup> “a charity school is purely secular.” I am not sure, looking at the very brief report, that that was what the Court of King's Bench decided in the *Hanover Square* case.<sup>22</sup> The court, at the suit of the rector and parishioners, granted prohibition in respect of proceedings instituted against them in this court seeking a faculty for the charity school. The only reason given is “for the ecclesiastical court has nothing to do with this, and cannot compel them without their consent.” Nevertheless, the view expressed by Dr. Lushington in the *Paddington* case<sup>23</sup> is material on the question what is an ecclesiastical user, and I can leave it at that. Another case of the same class is *In re Bettison* .<sup>24</sup> This was a decision of Sir Robert Phillimore, in the Court of Arches, allowing a church school to be erected on an unused part of a burial ground.

On these authorities, I am of the opinion that it is well established that this court can allow the erection of a building for an ecclesiastical purpose, defined as indicated by Sir Lewis Dibdin, either on a church site or on a churchyard. In the latter case, however, the *Disused Burial Grounds Act, 1884, s. 3* , restricts the right to allow the erection of buildings on disused burial grounds. I see no reason why this part of the jurisdiction should be confined to the erection of buildings; it would equally \*711 cover user of existing buildings. It is, I think, the justification for some of the unreported decisions which have been brought to my attention. For instance, in 1951, in this court, Ashworth Ch. granted a faculty for the formation of a parish room in a transept of St. Luke's Church, Hampstead, on condition that, unless otherwise ordered by this court, the room should be used only for Sunday schools, bible classes, church meetings and religious gatherings.

But none of these reported decisions is of any assistance to the petitioners, for the proposed user as a car park ancillary to a petrol filling station cannot by any test be called an ecclesiastical user. Nor can any of these cases assist the parties opponent in respect of their contention that the land ought to be used as a children's playground. For that would no more

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be an ecclesiastical user than the charity school.

The next group of cases deals with churchyards in which burials have been prohibited by or under the authority of an enactment. I refer to such churchyards as closed churchyards, to draw the distinction between them and churchyards that are merely disused de facto. There had been a good deal of confusion about this class of case at the end of the nineteenth century, some chancellors granting, and others refusing, faculties for secular user of closed churchyards. But the confusion was ended by the decision of Sir Arthur Charles, Dean of Arches, in *In re Bideford Parish, Ex parte Rector, etc., of Bideford*.<sup>25</sup> A faculty was granted authorising a strip of a closed churchyard to be thrown into the adjacent public street. In the crucial passage in the judgment,<sup>26</sup> the dean pointed out that the faculty was asked for in respect of ground which could no longer lawfully be used for burials, but was still subject to the jurisdiction of the Ordinary.

“It has become, in fact, simply an open space kept up by the parishioners, but not available for use for its former ecclesiastical purpose. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: *Walter v. Mountague and Lamprell*<sup>27</sup>; and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty for a path across a churchyard and for a path along one side of it... in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorising the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way.”

This is, therefore, a decision based on the fact that the former ecclesiastical user was no longer lawfully possible. It was so treated by Sir Lewis Dibdin in *Corke v. Rainger and Higgs*,<sup>28</sup> where he said<sup>29</sup>:

“Land once consecrated cannot be used for secular \*712 purposes, subject to this exception, namely, that having regard to the case of *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>30</sup> decided in this court by my learned predecessor Sir Arthur Charles, it must be taken that the Ordinary has jurisdiction by faculty to allow a disused churchyard, which has been closed for burials, to be used for a secular purpose... But the question here is not whether this land, which although consecrated and unused is neither a disused churchyard nor a churchyard at all, can be used for a secular purpose, but whether the purpose to which it is proposed to be put is secular or ecclesiastical. If the former, the petition must be refused because I have no jurisdiction to grant it; but if the latter, then there is undoubted jurisdiction to decree the faculty asked for.”

And he went on to hold that the church school was an ecclesiastical purpose.

This passage seems, however, to make too clean-cut a distinction between cases of closed churchyards, which can be allowed to be used for secular purposes, and any other cases of consecrated land, which can be allowed to be used only for ecclesiastical purposes. For in *Walter v. Mountague and Lamprell*<sup>31</sup> Dr. Lushington, sitting in this court, thought that a faculty could be issued for making a public footway across an open churchyard, and in *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>32</sup> the Dean of Arches evidently thought that Dr. Lushington's view was right and that such a faculty would be founded on public convenience. That suggests a third category, where public convenience can justify a faculty at least for a public footpath. This category appears to have sprung from the first category, that is, from user for ecclesiastical purposes. For in *Corke v. Rainger and Higgs*<sup>33</sup> Sir Lewis Dibdin, in his discussion of ecclesiastical purposes, stated<sup>34</sup>: “A churchyard path is allowable although persons may pass along it who are not going to church,” and in *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>35</sup> Sir Arthur Charles said that he could not distinguish between a path across a churchyard and one alongside it. These passages no doubt justify the practice that is now, I believe, followed in all dioceses, of allowing, in proper cases, small strips of a churchyard, open or closed alike, to be thrown into the public highway for the convenience of the public at large. But the practice has extended beyond public ways into the category of wayleaves generally. For instance, drains are often allowed to be laid under a churchyard, or an electrical transformer to stand on it, and I think (though I do not remember a case where I have been asked to allow it myself) that there would be no difficulty in a proper case in allowing water or gas pipes to be laid under a churchyard or electric or telephone wires to pass over it. Some of these arrangements could not conflict with burials at all (as with wires in the air); \*713 some are at

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times justified as affording a facility to the adjacent church (for example, the electrical transformers); and the drains and other pipes would normally be laid under a verge or in a part of the churchyard never likely to be wanted for burials. Whatever the justification of these practices, the element that they have in common is that the matter authorised is in the nature of a wayleave, either conferring no legal possession at all, or minimal possession. I think that there may well have been unreported cases in which faculties have been granted in supposed reliance on this line of authority, but going beyond the narrow class of case that I have indicated. A liberal interpretation of the scope of this category of jurisdiction is not, in my opinion, justified by any reported authority. This part of the jurisdiction ought, therefore, to be exercised sparingly, bearing in mind throughout that its legal justification seems to stem only from *Walter v. Montague and Lamprell*<sup>36</sup> and the passages from *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>37</sup> and *Corke v. Rainger and Higgs*<sup>38</sup> which I have just cited.

In the present case it is not a wayleave, but exclusive possession of the whole site by National Car Parks Ltd. that is sought by the petition. Accordingly, these cases cannot assist the petitioners. Nor, in my opinion, can they assist the parties opponent with their proposed playground, since someone would have to be put into possession of it in order to manage it.

Under the categories so far defined, all the reported cases that were cited to me can, I think, be subsumed. *In re Plumstead Burial Ground*<sup>39</sup> and *St. Nicholas, Leicester (Vicar) v. Langton*<sup>40</sup> are examples of the conflicting decisions before *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>41</sup> to which I have already referred.

*In re St. Benet, Sherhog and In re St. Nicholas, Acons*<sup>42</sup> were cases in which an electricity supply company was authorised to put tunnels under the churchyards to facilitate access to some of its apparatus. It seemed to me, reading the report, and both counsel agreed, that these two churchyards must have been closed. *St. John the Baptist, Cardiff (Vicar of) v. Parishioners of Same*<sup>43</sup> was a case of a public footway across a closed churchyard. There remains *In re St. Mark's Church, Lincoln*<sup>44</sup> decided by Macmorran Ch., and on appeal by the present Dean of Arches. There the petitioners had a burial ground, one corner of which they had allowed to be used as a rubbish dump, the churchyard had been closed for burials, so, on the authority of *Corke v. Rainger and Higgs*,<sup>45</sup> the court had jurisdiction to authorise its user for a secular purpose. The petitioners sought to throw the \*714 site of the rubbish dump into the local omnibus station. The proposition could have presented no difficulty in itself and a faculty was granted for it. But the petitioners sought also to put a canopy over the place, so that people waiting for an omnibus could stand there in shelter from the rain. It was held that this structure was a building within the Disused Burial Grounds Act, 1884, s. 3, the erection of which was therefore prohibited by that Act. This part of the decision turns on a statute that has no bearing on the present case. The decision is, however, of interest in that the Dean of Arches referred to *In re Bideford Parish, Ex parte Rector, etc., of Bideford*,<sup>46</sup> and said<sup>47</sup>:

“This case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorised though the ownership of the land remains unaffected.”

I respectfully and gratefully adopt this short and precise statement of the effect of the *Bideford* case,<sup>48</sup> and I note that the Dean did not differentiate in this matter between church sites and churchyards. The question to be asked is: Can the purpose for which the ground was originally consecrated no longer be lawfully carried out? If so, a faculty may issue for a secular user. If not, we are thrown back on *Corke v. Rainger and Higgs*<sup>49</sup> and the need to prove that the proposed user is ecclesiastical, unless the case is of a wayleave, where the faculty may be justified by *Walter v. Moutague and Lamprell*.<sup>50</sup>

To sum up on this part of the matter: 1. Faculties can be granted, either in respect of a church site or a churchyard, for ecclesiastical user. One example is a church school, as in *Corke v. Rainger*,<sup>51</sup> but the principle is not, in my opinion, confined to buildings.

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2. Faculties can be granted for throwing small parts of a churchyard (whether still available for burials or not) into a highway, or for granting other rights of user in the nature of wayleaves. These faculties are justified by *Walter v. Mountague and Lamprell*,<sup>52</sup> as approved in the *Bideford* case.<sup>53</sup> But those decisions have been somewhat stretched in practice. This part of the jurisdiction must be sparingly exercised and should not be extended.

Faculties may be granted for secular user where the original purpose of consecration can no longer lawfully be carried out. (See the *Bideford* case<sup>54</sup> and the *Lincoln* case.<sup>55</sup>

I can find no jurisdiction in the reported authorities for any relevant class of faculty except these three. The result is, in my judgment, that a faculty for secular user cannot be granted unless the user falls in the restricted category of wayleaves, or if the \*715 purpose for which the ground was originally consecrated can no longer lawfully be carried out.

With these authorities and propositions in mind, I can refer briefly to the various unreported cases that have been brought to my attention. Most of them can be accounted for by one or other of the three propositions, if one bears in mind (a) that in the case of a closed churchyard a secular user can be authorised and (b) that the jurisdiction in the wayleave type of case has tended to be stretched — stretched too widely, in my opinion. There is, however, one case in this court in the time of Ashworth Ch. that fits no category. It was not opposed or argued, so that it is to be received with caution as an authority. It was this: In 1954 this court allowed the letting, at a rent, of the basement of a church to a business firm for storage purposes. The chancellor made a note that the course he was taking was exceptional. I was also informed that a faculty was recently granted by the deputy chancellor in the Diocese of Southwark in circumstances indistinguishable from those of the present case. This was also an unopposed case and one that was not heard in open court. These two decisions, in my opinion, are out of line with the authorities, must have been given per incuriam, and cannot be supported. To find, in connection with a subject upon which there are no recent reported authorities, that orders out of line with those authorities have been made in unopposed cases is hardly surprising. Nor is it without recent precedent: see *Chapman v. Chapman*.<sup>56</sup>

The third of the propositions set out above is that secular user may be authorised where “the user for which the ground was originally consecrated can no longer be lawfully carried out.” That is to say, to put it another way, that such purpose is frustrated by a change in the law, of which an Order in Council forbidding burials is one example.

There remains the question whether, since frustration can found the jurisdiction, frustration in fact will do so as much as frustration by law. Mr. Ellison has stated in argument that he was prepared to admit that jurisdiction could arise in such circumstances, though none of the reported authorities expressly so decides. The point was therefore not argued before me and it would, therefore, be wrong for me to decide it unless I must. It is not necessary so to do; for in my judgment and for reasons which I shall set out later, the facts here proved fall far short of establishing the requisite impossibility. I therefore leave open this point for future decision.

Mr. Garth Moore submitted first that the law was summed up in the two *Lincoln* judgments,<sup>57</sup> especially that of the Dean of Arches. I agree, and have set out the effect of those judgments above. He further submitted that the dividing line between \*716 inability in law to grant a faculty and the cases where the court has a discretion is in twilight, and that there is no hard-and-fast line as to the jurisdiction. For the reasons stated above, I do not agree. He suggested that the court has a comparatively free hand to grant faculties for the use of consecrated land for purposes that are seemly. For this purpose he adopted a distinction taken by the Roman Catholic Canon Law (canon 1187 in the Codex of 1918) which allows a church, of which it can be predicated that “nullo modo ad cultum divinum adhiberi possit,” and that “omnes aditus interclusi sunt ad eam reficiendam” to be turned over by the ordinary “in usum profanum non sordidum.” This canon has its origin at the Council of Trent, and it is therefore not part of the medieval canon law which was retained in this country at the Reformation; see the observations of Lord Westbury in *Bishop of Exeter v. Marshall*.<sup>58</sup>

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The cases which I have recited do not show that there is, in our law, any such distinction as is suggested between “profane” and “sordid” user, and I decline to introduce it. In passing, I note that in the present case I am not in the least satisfied that the second prerequisite of the canon law is fulfilled; it is not established that every approach to the restoration of this church is cut off.

Mr. Garth Moore further submitted that consecrated land is to be likened to the corpus of a charitable trust fund, that where property held on charitable trusts can no longer be used for its original purpose, the court may allow it to be used for another, and that the purposes of consecration would be sufficiently respected if the proceeds derived from the changed user are secured for a godly purpose. I do not accept this analogy. Property is devoted to charitable trusts in order to provide wealth by which a charitable purpose is served; the form taken by the wealth, the fund, is normally immaterial. Land is consecrated in order that it, the physical land and the buildings on it, may be devoted for ever to sacred uses as church or churchyard. This branch of the law is concerned with the user of the thing itself. It may be that there are good grounds for wishing that the law of consecrated land was assimilated to the law of charitable trusts, though I express no such opinion. Be that as it may, there is no warrant in the reported cases for the submission, and I reject it. I have to apply the law, not to reform it.

Mr. Garth Moore further submitted that the church site had been derelict for 22 years, and that it was now “scheduled,” so that it would soon have to be used for the secular purpose of schools that are not church schools. The petitioners pray in aid on this point the statement in the planning permission that

“The site forms part of a site defined on the development plan for educational purposes and is programmed for the period \*717 1960–1972.”

From these premises they derive the submission that the user proposed in the petition is

“a very temporary user for at most seven years until the scheduling operates, and then, short-circuiting this jurisdiction, the site will be used for another purpose.”

Of course, it is true that under [section 28 of the Town and Country Planning Act, 1944](#) , various public authorities have power compulsorily to purchase consecrated land, and the land so purchased becomes freed from consecration under the statute. If it were established that this site was in fact about to be purchased compulsorily or even that it had been designated as being subject to compulsory acquisition under section 5 (2) (b) of the Town and Country Planning Act, 1947 , I should feel no difficulty in holding that it would shortly come about that the purposes for which the ground was originally consecrated could no longer lawfully be carried out, that the jurisdiction would then arise under the *Bideford* case, <sup>59</sup> and that in the short interim it would be futile to insist upon the sacred uses and that a secular and lucrative user could be authorised. But nothing of the sort has occurred, or is about to occur, here. Words like “scheduled” and “programmed” serve merely to darken counsel, and it is needful to examine the situation that in fact exists under the Town and Country Planning Acts and their subordinate legislation. On this point useful memoranda were, at my request, submitted to me by Mr. Ellison and Mr. Worsley, after the hearing, to supplement the oral arguments which were not as full as I desired. These memoranda almost entirely agree, except in their conclusions.

Until 1940, this site was occupied by a church. In 1940, the church suffered war damage. When the Town and Country Planning Act, 1947 , came into effect, on July 1, 1948, the site was vacant and unoccupied. Under section 12 (1) of the Act of 1947 it is necessary to obtain permission (usually called “planning permission”) for any development of land carried out after that date, subject however to the provisions of the section. By section 12 (1), development is defined as including in effect the execution of any building operations or any change of user. But by section 12 (5) (c) , no planning permission is required

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“in the case of land which on the appointed day is unoccupied, in respect of the use of the land for the purpose for which it was last used.”

Thus this site can be used for a church without planning permission. In the Act “use” does not, in relation to land, include the carrying out of any building operations thereon; see section 119 (1) . So far, then, it is still necessary to obtain planning permission to rebuild the church. But, since this is a war-damaged site, such permission is given by delegated legislation. For, in the case of war damaged land, permission to rebuild buildings which have sustained war damage is given by the Town and Country Planning General Development (S.I. 1950, No. 728), Article 3 and Schedule 1, Part 1, Class XI , subject only to the conditions that the cubic content must not be increased and that the external appearance must not be materially altered without permission. There is thus no statutory impediment in the Town and Country Planning legislation to the immediate rebuilding of this church, and no such impediment by other legislation was suggested. The Minister could, of course, take action in a contrary sense under [section 26](#) of the Act, or article 4 of the General Development Order might be applied. But there was no suggestion that any such action is in the present contemplation of the Minister or of the London County Council.

I must now consider the law and evidence about the so-called “scheduling” or “programming.” Under section 5 of the Act of 1947, every planning authority has to draw up for its area a “development plan” showing “the manner in which they propose that land in that area should be used,” and by section 6 this plan has to be revised at least every five years. These plans have to go to the Minister for approval.

The material parts of the London County Council’s development plan were not put in evidence by the petitioners; but the parties opponent produced what appears to be a “town map” made under section 5. This exhibit shows the site as being situated about on the boundary between quite a large area indicated as being for a secondary school and a small area described as a “new open space link or parkway.” Churches are not shown as such; for instance, Chelsea Old Church is left uncoloured, and is thus shown as “residential.” Presumably, however, it is on this map that the petitioners rely for the proposition that the site is “scheduled” for a school. A development plan may designate areas as subject to compulsory acquisition by the local authority, in which case the plan operates as a warning to a purchaser of what may be in store for him. Nothing of the kind is proved here. Apart from such designation, and some other things which it is not suggested apply here, all that a development plan does is to indicate how the planning authority (with the Minister’s approval) proposes that the land should be developed; that is to say, it is an indication of what is likely to be the result of an application for planning permission. But to re-erect St. John’s Church no planning permission is required, so this consideration is immaterial. Besides, the development plan is quite fluid, being subject to review at least every five years, and I am not prepared to assume that, if the site is again used for its proper purpose, the planning authority will seek to interfere.

It was faintly suggested that if a church were put up on this site and the area were later taken compulsorily for a school, no compensation would be payable. In his memorandum, Mr. Worsley rests this proposition on the [Land Compensation Act, 1961, s. 5 \(5\)](#) , which is as follows:

“Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.”

I cannot see how this provision assists. For if there were a church on this site, and if it were to be demolished after a compulsory purchase order, the parish would still need a parish church elsewhere, and reinstatement elsewhere in the parish would be, in all good faith, intended.



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There is, therefore, nothing in the planning law to prevent the church being re-erected, nothing to establish that if it were erected it would soon be taken compulsorily and demolished, and nothing to suggest that if it were so taken it would not be compensated for fully. No other type of statutory impediment was suggested. In my judgment, therefore, the petitioners fail to establish that the purpose for which the ground was originally consecrated can no longer be lawfully carried out.

Finally, it was suggested in effect that it is impracticable for the church ever to be re-erected on this site. But the evidence did not make this point good. Mr. Barber, the incumbent, who is working valiantly in a difficult parish, and with the slenderest resources in money, told me that he thought that this site was not in a good position from which to minister to the people, because at some future date he thought that no one would be living in the parish west of Ashburnham Road. He had written that his intention is eventually to build a new church on the site of the present temporary one near World's End, that is, at the extreme north-eastern corner of the parish. He told Mr. Ellison that that site, too, has some pastoral inconvenience. I think that his ideas on this matter have largely been coloured by speculation as to how the area may eventually be developed, if effect is eventually given to the London County Council's present town map. But all this is surmise. He has also been influenced by considering the site not as a piece of consecrated land, and so the natural site for his church, but as a "parish asset" to be turned to account. Mr. Underhill, the vicar's warden, was also looking at the problem as one of "canalising" the money that a commercial user of the site would make available. Mr. Ling, deputy secretary of the London Diocesan Fund, was asked whether the diocese has any intention of re-erecting the church or the vicarage on the site of the former church and vicarage. His answer was: "Not at the present time." He was then asked for his reason, to which he replied:

"The reason dates back to the re-organisation consideration and discussions shortly after the war, when from all the available evidence it did not seem that the likely numbers of people who would \*720 eventually come to live in that part of Chelsea justified a rebuilding of the church and vicarage on that site."

As he also said that the present population of the parish is about 8,000, that being the figure also given by the incumbent, I was not convinced that there is no justification for rebuilding the church on this site, which lies in the very middle of it. I was not told where the diocesan authorities think that the church ought to be. Mr. Ling said that no diocesan authority had any objection to the proposals in the petition; but that is purely negative. He was also asked whether he knew what was likely to happen to the parish in the future, and whether it would be amalgamated with, or split between, neighbouring parishes. His answer was: "The final decision has not yet been taken."

In the meantime, of course, the parish exists and the incumbent has 8,000 parishioners to whom he seeks to minister. Many of them live in the crowded streets west of Ashburnham Road. No resolutions of any of the statutory and other diocesan bodies that might have powers and responsibilities in regard to this matter were put in evidence. The evidence called for the petitioners on this part of the case was indeed conspicuous by its scantiness. Mr. Ellison, not unnaturally, found it unnecessary to ask the deputy secretary of the London Diocesan Fund any questions at all in cross-examination. In my judgment, therefore, the petitioners fail to establish that it is impracticable to re-erect the church on this site in due course. Moreover, I am not satisfied that it would be unwise so to do. Of course the money is not forthcoming at the moment; but it emerges clearly from the petitioners' evidence that hitherto no one has been trying to raise money for this purpose.

I have considered whether, despite all these circumstances, I should be justified in holding that, since there is no immediate prospect of the church being rebuilt, the site can and should be turned to account for an interim period of, say, five years, while plans are being thought out more fully. That would mean granting the petition either as a whole, or perhaps to the extent only of permitting vehicles approaching the petrol filling station to pass across the consecrated land. In my judgment, however, I should not be justified in so exercising my discretion, even if I were satisfied as to my jurisdiction. So to decide would tend to postpone the day when the officers of the parish and diocese face the problems of either rebuilding the church on this site, or causing this site to be freed from consecration under some Act or Measure. Moreover,

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to do so would establish a commercial user of the consecrated land, albeit temporarily at first. The company would tend to remain as long as possible in order to recoup its initial expenses, which are likely to be £15,000, and the incumbent and churchwardens would naturally tend to let it do so in order to use the income for their work. The court, once having granted the faculty, would be in a difficulty in \*721 refusing an application for an extension of time. Further, the authorities of the parish and the diocese would have greater difficulty in defending land actually used for commerce against attempts at compulsory purchase than they would have in so defending an empty consecrated site awaiting the restoration of the church.

I have some sympathy with the petitioners, who are working in circumstances of difficulty, and who feel that the extra income for a few years would be of great value to them in their work. But the court must apply established legal principles, and I regret that I can find no justification in the reported authorities for the concept that a consecrated site is a "parish asset" in the sense of an income-producing asset. Nor can I find in these authorities justification for the petitioners' proposal or anything really comparable with it. The petition will, therefore, be dismissed.

The cross-petition is not before me in the sense that the parties opponent did not, at the hearing, seek any relief on it. They felt that they could not do so because no citation had been issued upon it. But all the allegations of the cross-petition were before me as a matter of defence against the petition, and a number of witnesses were called by the parties opponent. They consisted, apart from the parties opponent themselves, of a young man who had collected several score of signatures to sheets of paper stating that the signatories object to the site of the church being used as a petrol-filling station and supporting the application to use the said site as a children's playground. No one suggests that the church site should be used as a petrol-filling station. That is the vicarage site, which is not within the jurisdiction of this court. In any case, I did not find this witness helpful. Then there were six witnesses, resident near the site, who said that they thought it should be a playground for children. I have visited the streets near the site, and I accept that they are mainly of houses with no gardens. I also accept that these witnesses genuinely felt that a children's playground would be a very desirable thing to have near by. But I am not convinced that a playground alongside Ashburnham Road (which several witnesses stated is one that is constantly full of very heavy traffic) is a suitable or safe place for such a playground.

The first party opponent, Reilly, also gave evidence. I accept him as sincerely believing that the church site as land would be better used in the public interest as a children's playground than as a car park, and I noted that he said that he would contribute quite a lot of money towards its equipment and maintenance as a playground. The other party opponent, Bevis, owns and conducts a garage near the site. He thinks that the proposed arrangements would injure his trade, and for this reason opposes the petition. This is, of course, a legitimate point of view, but one not entitled to much weight in the present context. He thought it proper to assert in his examination-in-chief that he \*722 thought "it is a bad thing to use consecrated ground at all for a business." In cross-examination, he stated that he felt "a concern for the use of consecrated land" and that he "really meant that." In further cross-examination he admitted that in 1958 he had himself tried to buy the consecrated land for the purposes of his own business. He claimed that he did not then know it was consecrated. In my judgment, his concern in this matter is purely with his own financial advantage.

Quite apart from the particular criticisms applying to Bevis, I thought that the evidence called for the parties opponent was misconceived. These witnesses seem to think that the court was conducting a planning inquiry. But the issue is what is the right use of a piece of consecrated land, consecrated as a church site and now derelict, but still held for sacred uses.

The petitioners do not think that the church site ought to be used as a children's playground, and have not offered it for that purpose. They think that they ought to be allowed to let it so that the resultant money can be applied for ecclesiastical and religious purposes. But a children's playground is not such a purpose. If I had found that I was entitled to grant a faculty I should, without hesitation, have preferred the petitioners' scheme to that of the parties opponent. The latter were entitled to

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come to the court, and they have succeeded, by legal argument, in destroying the petitioners' case. But I should not have exercised my discretion in favour of their positive case. In this sense they, too, have failed.

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

**Representation**

Solicitors: Milles, Day & Co.; S. Kalman.

*Petition dismissed. Cross-petition dismissed by consent. Petitioners to pay one-third of the costs of the parties opponent.*

**Footnotes**

- 1 (1842) 2 *Add.Eccl.Rep.* 255 .
- 2 [1892] 1 *Q.B.* 713 ; 8 *T.L.R.* 217, *D.C.*
- 3 [1893] *P.* 58 .
- 4 [1896] *P.* 95 .
- 5 [1905] 2 *K.B.* 565, *D.C.*
- 6 [1947] *K.B.* 263 ; 62 *T.L.R.* 706 ; [1946] 2 *All E.R.* 604 ; [1948] 1 *K.B.* 195 ; 63 *T.L.R.* 523 ; [1947] 2 *All E.R.* 170, *C.A.*
- 7 [1913] 1 *Ch.* 518 ; 29 *T.L.R.* 262 .
- 8 *Ibid.* 518, 551.
- 9 (1852) 2 *Rob.Eccl.* 558 . 559.
- 10 (1869) *L.R.* 4 *Q.B.* 407 , 412.
- 11 [1900] *P.* 314 ; 16 *T.L.R.* 540 .
- 12 [1912] *P.* 69 ; 28 *T.L.R.* 130 .
- 13 [1912] *P.* 69 .
- 14 *Ibid.* 76.
- 15 [1912] *P.* 69 .
- 16 (1852) 2 *Rob.Eccl.* 558 .
- 17 [1912] *P.* 69 .
- 18 (1852) 2 *Rob.Eccl.* 558 .
- 19 *Ibid.*
- 20 (1740) 2 *Stra.* 1126 .
- 21 (1852) 2 *Rob.Eccl.* 558 , 560.
- 22 2 *Stra.* 1126 .

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23	<i>2 Rob.Eccl. 558 .</i>
24	<i>(1874) L.R. 4 A. &amp; E. 294.</i>
25	<i>[1900] P. 314 ; 16 T.L.R. 540 .</i>
26	<i>[1900] P. 314 , 326.</i>
27	<i>(1836) 1 Curt. 253 .</i>
28	<i>[1912] P. 69 .</i>
29	<i>Ibid. 74 .</i>
30	<i>[1900] P. 314 .</i>
31	<i>(1836) 1 Curt. 253 .</i>
32	<i>[1900] P. 314 .</i>
33	<i>[1912] P. 69 .</i>
34	<i>Ibid. 76 .</i>
35	<i>[1900] P. 314 , 326.</i>
36	<i>(1836) 1 Curt. 253 .</i>
37	<i>[1900] P. 314 .</i>
38	<i>[1912] P. 69 .</i>
39	<i>[1895] P. 225 .</i>
40	<i>[1899] P. 19 .</i>
41	<i>[1900] P. 314 .</i>
42	<i>[1893] P. 66 n.</i>
43	<i>[1898] P. 155 .</i>
44	<i>[1956] P. 166 ; [1955] 3 W.L.R. 844 ; [1955] 3 All E.R. 699 ; [1956] P. 336 ; [1956] 3 W.L.R. 147 ; [1956] 2 All E.R. 579 .</i>
45	<i>[1912] P. 69 .</i>
46	<i>[1900] P. 314 .</i>
47	<i>[1956] P. 336 , 341.</i>
48	<i>[1900] P. 314 .</i>
49	<i>[1912] P. 69 .</i>
50	<i>1 Curt. 253 .</i>
51	<i>[1912] P. 69 .</i>
52	<i>1 Curt. 253 .</i>
53	<i>[1900] P. 314 .</i>
54	<i>Ibid.</i>

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- 55                    *[1956] P. 166 .*
- 56                    *[1954] A.C. 429 ; [1954] 2  
W.L.R. 723 ; [1954] 1 All E.R.  
798, H.L.*
- 57                    *[1956] P. 166 , 336.*
- 58                    *(1868) L.R. 3 H.L. 17, 55, H.L.*
- 59                    *[1900] P. 314 .*

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## \*336 In Re St. Mark's Church, Lincoln.



Positive/Neutral Judicial Consideration

### Court

Arches Court

### Judgment Date

15 May 1956

### Report Citation

[1956] 3 W.L.R. 147

[1956] P. 336



Arches Court

Willink, Dean of Arches

1956 March 27; May 15.

*Ecclesiastical Law—Faculty—Burial ground—Disused churchyard—Proposed user of part as footpath and omnibus shelter—Whether omnibus shelter a “building” within meaning of section 3 of Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72).*

*Cemetery. “Building.”*

A faculty was sought to adapt part of a disused churchyard as a footpath and to suspend a covering over the footpath to protect persons using the same from the weather:-

Held:

(1) that the court had no jurisdiction to grant the faculty since the proposal involved the erection of a structure which was \*337 a “building” within the meaning of section 3 of the Disused Burial Grounds Act, 1884 , <sup>1</sup> and which was therefore prohibited by that Act. *St. Nicholas Acons v. London County Council [1928] A.C. 469; 44 T.L.R. 656* applied.

(2) That a faculty would be granted authorizing the petitioners to adapt and use part of the churchyard as a footpath, but not to erect or suspend any covering over that part of the churchyard.

*In Re Bideford Parish [1900] P. 314; 16 T.L.R. 540* applied.

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*Decision of Macmorran Ch.*, ante 166; [1955] 3 All E.R. 699 affirmed.

APPEAL from Macmorran Ch., delivered on November 21, 1955, at Lincoln, refusing the grant of a faculty to the Reverend Prebendary Arthur Oswald Jones, vicar, and two churchwardens of St. Mark's Church, Lincoln, and the Lincolnshire Road Car Co. Ltd., who sought authorization to adapt part of the disused churchyard appurtenant to St. Mark's Church, so that it might form part of a footpath which the company proposed to construct, and so that a covering might be suspended over it to protect persons using the same from the weather. The petition was supported by unanimous resolutions passed by the Parochial Church Council of St. Mark's Church, and was unopposed.

The facts appear fully in the judgment.

*Cur. adv. vult.*

*W. S. Wigglesworth* for the petitioners. The petition raises two questions: (1) can a faculty issue authorizing consecrated land to be used as a footpath for secular purposes, and (2) if so, does the structure which it is proposed to erect over the footpath come within the meaning of a "building" prohibited by [section 3 of the Disused Burial Grounds Act, 1884](#)? As to the first question, a faculty can so issue in respect of a private right of way (*St. Gabriel, Fenchurch Street (Rector, etc.) v. City of London Real Property Co. Ltd.*<sup>2</sup>), and as to a public right of way (*In Re Bideford Parish*<sup>3</sup>). This is supported by *Corke v. Rainger*,<sup>4</sup> which suggests no limit to secularization; there is no need to limit secularization to cases where the approaches to a church or churchyard are concerned, as suggested in *St. Nicholas Acons v. London County Council*.<sup>5</sup> The petitioners seek a right of way for their servants and passengers, and this is a private right, for although the passengers form part of the general public, they are only that part of the travelling public which uses the services provided by the company.

As to the second question, while it is clear that [section 3 of the Disused Burial Grounds Act, 1884](#), applies to this burial ground, the section does not prohibit what the petitioners now seek to do. In *St. Botolph, Aldersgate Without*<sup>6</sup> an arcade built to protect frescoes on a churchyard wall was held not to be a "building" within the meaning of the section, but in *St. John's, Hampstead*<sup>7</sup> a columbarium was held to be such a building. Subsequently the proposals in that case were amended so as to be outside the section and were approved in chambers. In *Paddington Borough Council v. Attorney-General*<sup>8</sup> Lord Halsbury L.C. considered that the object of the [Disused Burial Grounds Act, 1884](#), was to prevent disused burial grounds from becoming building ground and to keep them free as places of exercise, ventilation and recreation. In *Bermondsey Borough Council v. Mortimer*<sup>9</sup> a urinal was held to be a "building" within the meaning of the Act, and in *St. Nicholas Acons v. London County Council*<sup>10</sup> an electricity transformer chamber which would have been built below the surface of the churchyard was also held to be a "building." This latter case overruled *In Re St. Nicholas Cole Abbey*,<sup>11</sup> *In Re St. Benet Fink Churchyard*<sup>12</sup> and *In Re St. Benet Sherehog*,<sup>13</sup> where faculties for similar transformer chambers had been granted.

The covering which the petitioners now seek to erect is analogous to that in *St. Botolph, Aldersgate Without*<sup>14</sup> and is therefore not a "building" for the purpose of the Act, and its presence will not make the land building ground. The land will remain free for exercise. Further, the building (if such it is) will not be erected upon a disused burial ground, since it will be so constructed that there is no contact between it and the burial ground. In all other cases the building has been erected upon ground, and this case is thus clearly distinguishable.

*John Ellison* as amicus curiae. The petitioner company is a commercial undertaking and there is no direct authority for the grant of a faculty to such a body; the court has no jurisdiction \*339 to grant the right sought, since the true nature of what the petitioners seek is a licence or a lease and not an easement. (For all practical purposes they seek absolute possession.) In *Reilly v. Booth*<sup>15</sup> it was held that if the general effect of a contract is to pass the right to the exclusive possession of land, even though subject to restrictions of user, it is a lease and not an easement. This view is supported in *Copeland v. Greenhalf*,<sup>16</sup> where the right in fact exercised and claimed by prescription amounted virtually to a claim to the whole beneficial user of the servient tenement, and was held to be too extensive to constitute an easement in law. In *In Re Ellenborough Park*<sup>17</sup> this jus spatiandi was further considered.

The [Disused Burial Grounds Act, 1884](#), must be read in conjunction with the [Open Spaces Act, 1887](#), and the words "land" or "burial ground" must be taken to be governed by the common law rule that land includes the air space above it. See Coke on this subject, which was fully analysed and discussed by Hahn J. in *Swetland v. Curtiss Airports Corporation*,<sup>18</sup> who was upheld on appeal.<sup>19</sup> It follows, therefore, that any building occupying air space over a disused burial ground is a building

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upon a disused burial ground, and therefore the erection proposed by the petitioners is forbidden by the Act. Neither “on” nor “upon” is an operative word, and they are not defined in the appropriate definition sections. They are merely a nexus between two operative defined words, “building” and “burial ground.” “On” in the same context is synonymous with “in” or “within.” For example, “a memorial stone *on* a grave *in* a burial ground.”

May 15. WILLINK, Dean of Arches,

read the following judgment: This is an appeal by the vicar and churchwardens of the parish of St. Mark, Lincoln, and the Lincolnshire Road Car Co. Ltd. from a decision of the learned Chancellor of the Diocese of Lincoln, the matter arising upon a petition dated September 16, 1955. On the hearing of the appeal Mr. Wigglesworth of counsel appeared for the appellants company. By the courtesy of the Dean of Westminster and with the consent of the appellants’ counsel I sat to hear the appeal in the Deanery of Westminster. In view of the fact that the petition, though unopposed, raised questions of importance I invited Mr. John Ellison of \*340 counsel to attend the court as amicus curiae. I am greatly indebted to Mr. Ellison for the assistance he gave to the court.

By their petition the petitioners sought authority for the use of a small part of a closed churchyard as part of a projected omnibus station. Included in the use prayed for was a proposal to roof the area in question in order that those using the station should be protected from the weather. The learned chancellor took the view that apart from the proposed roof the petition could and should be allowed, but that the proposed roof constituted such a structure as is prohibited by the combined operation of the [Disused Burial Grounds Act, 1884, s. 3](#) , and the [Open Spaces Act, 1887, s. 4](#) ,<sup>20</sup> and the definition of “burial ground” in the [Open Spaces Act, 1906, s. 20](#) .<sup>21</sup>

The facts of the case are not in dispute, and I have not thought it necessary to require affidavits to add to the evidence, including plans, given in the consistory court by Mr. A. A. Briggs, an architect employed by the British Transport Commission.

The land in question is a small oblong projection, 26 feet by 6 feet, at the southern end of the western boundary of the churchyard. The churchyard was closed for burials by an Order in Council dated February 8, 1855. There are no human remains in the area in question. The whole western wall of the churchyard is dilapidated, and if the company is permitted to carry out its plan it is prepared to undertake to rebuild its whole length together with a further length on the north side of the churchyard at a cost of about £1,000 and to a design to be approved by the parochial church council. The small piece of land has no amenity value, and the vicar and churchwardens, in supporting the petition, are acting with the unanimous authority of the parochial church council.

The city of Lincoln has found a need to establish a comprehensive omnibus station to accommodate the large number of \*341 services that run between the city and the surrounding countryside, and the land to the west of the churchyard is designated for this purpose in the town map prepared under the Town and Country Planning Act, 1947 . The land is owned by the appellants company who plan to lay it out with island platforms, but with a continuous pavement 8 feet in width along the eastern boundary. The oblong projection of the churchyard constitutes an obstacle.

For the comfort and convenience of their customers and staff the company wishes to cover the station and proposes that the oblong projection shall be covered in a particular manner to which I shall refer later.

Although the company’s project is a unified scheme in that they would be unlikely to leave part of the station uncovered, the issue before me appears to me, as it appeared to the learned chancellor, to fall into two parts. Can, and if so, should this area of consecrated ground be used as part of an omnibus station? If so, is the proposed roofing permissible?

As to the first of these issues I see no reason to differ from the learned chancellor. Until the decision of this court in [In Re the Parish of Bideford](#)<sup>22</sup> there was considerable doubt and some apparent conflict of authority whether it could be permitted that land once consecrated to a sacred use should be used for a secular purpose. This case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorized though the ownership of the land remains unaffected.

The [Bideford](#) case<sup>23</sup> was one in which the wall of a churchyard was moved, part of the area of the churchyard being thrown



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into the highway. But the earlier case of *St. Gabriel, Fenchurch Street (Rector, etc.) v. City of London Real Property Co. Ltd.*<sup>24</sup> shows that the principle is not limited to the widening of a highway: the Court of Arches in that case protected and treated as valid a faculty permitting the construction and fencing of a private pathway to be used only by a commercial concern in common with the rector and churchwardens.

Mr. Ellison suggested that the use asked for was of a character inconsistent with the established concept of an easement in the nature of a right of way. It is not necessary, in my view, so to particularize. In the *St. Gabriel's* case<sup>25</sup> Lord Penzance found it unnecessary to define the exact nature of the right of user which may be authorized, and in my judgment the \*342 principle is fully stated by Sir Lewis Dibdin as Dean of the Arches in *Corke v. Rainger*<sup>26</sup> when he said: "having regard to the case of *In Re the Parish of Bideford*,<sup>27</sup> decided in this court by my learned predecessor, Sir Arthur Charles, it must be taken that the Ordinary has jurisdiction by faculty to allow a disused churchyard, which has been closed for burials, to be used for a secular purpose."

In a later case, that of *St. Nicholas Acons v. London County Council*,<sup>28</sup> the same judge, referring to the *Bideford* case,<sup>29</sup> suggested that "it is perhaps worthy of consideration whether it is applicable to cases where questions of convenience of access to the church or churchyard are not involved." In my judgment there is no such limitation to be added as a rider to the principle as stated in *Corke v. Rainger*.<sup>30</sup> I cannot see that any question of convenience of access to a church or churchyard arose in the *St. Gabriel's* case,<sup>31</sup> and consider that the matter is one for judicial discretion once it is established that the land is land which may be used for some secular purpose. The question is whether permission to rebuild the churchyard wall in the new position and to use the land outside the wall as part of an omnibus station is, on the terms proposed, in the interest of the public, including the parishioners. I find, as the learned chancellor found, that the petitioners successfully establish this part of their case, including their proposal that the land should be included in the area occupied by the 8-foot-wide pavement. Such a pavement would usually, if not invariably, be incidental to the extension of a highway over part of a disused churchyard and has never, so far as I am aware, been questioned in such a case.

By the statute of 1884, to which I have already referred, it is provided that "It shall not be lawful to erect any buildings upon any disused burial ground" except for purposes irrelevant to this case. It is conceded by the petitioners that the land in question is part of a disused burial ground. The statute is closely linked with others providing for the maintenance of open spaces for the benefit of the public and I have been referred, in particular, to the speech of Lord Halsbury L.C. in *Paddington Borough Council v. Attorney-General*<sup>32</sup> - a case where a disused burial ground was being administered by the local authority as an open space.

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It is, however, to the language of section 3 of the Act of 1884 that I am bound to pay particular regard, together with the reported cases in some of which a proposed structure has been held to be within the prohibition and in others of which it has been permitted. In the *St. Nicholas Acons* case<sup>33</sup> the Privy Council held without hesitation that the building of a subterranean transformer chamber was prohibited; in *Bermondsey Borough Council v. Mortimer*<sup>34</sup> Chancellor Hansell took the same view as to the building of urinals. On the other hand, in *St. Botolph, Aldersgate Without*,<sup>35</sup> Chancellor Tristram authorized the construction of an arcade or covered way on the inner side of a churchyard wall, and the House of Lords in the *Paddington* case<sup>36</sup> held that a screen erected to prevent the acquisition of rights of light over a churchyard was not a building.

No case cited to me is, in my judgment, at all closely analogous to that now before me, and in my judgment it is necessary to specify with precision what is proposed and then to ask whether, if carried out, a building will have been erected on or upon the land in question.

The company's scheme for roofing their proposed station is for a structure covering a considerable area. Taken as a whole I have no doubt that it is a building. It is clear, however, that in designing the building the architect had in mind the prohibition expressed in the Act of 1884. By the use of modern engineering methods he has so designed such part of the roof as would cover the land now in question that it is supported entirely from the company's own land. At its eastern extremity it is proposed to hang a vertical glazed panel in approximately the same plane as the new churchyard wall, but nowhere in contact with it nor with the ground.

It was urged for the petitioners that by this somewhat ingenious design they had found a means of avoiding the difficulties placed in their way by the statute: and that the *St. Botolph's* case<sup>37</sup> in particular was authority for the contention that the

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roofing over of space does not necessarily constitute building upon it. I cannot, however, regard the *St. Botolph's* case,<sup>38</sup> in which the arcade remained within the churchyard and was ancillary to an embellishment of the churchyard wall, as affording any guidance for the decision of the present appeal.

**\*344**

It is with regret that I find myself unable to allow what is sought by the petitioners.

It would be artificial to rely on the fact that the words “on” and “upon” usually imply contact: the clear intention of the Act of 1884 is to prohibit all building in churchyards other than such building as is expressly permitted. Moreover, I agree with the learned chancellor that it is not possible or in accord with common sense to isolate one portion of the roof on the western side of the proposed building. The proposed building would appear to be and would in fact be a building erected partly upon the company's land and partly upon consecrated land, and it is clear to me that there is no jurisdiction in this court to permit the use of a disused burial ground for the accommodation of such a building.

For these reasons I find myself in agreement with the learned chancellor and obliged to dismiss the appeal with costs.

#### Representation

Solicitor: M. H. B. Gilmour.

*Appeal dismissed. Cause to be retained in Court of Arches. Faculty limited to adaptation and use of part of churchyard as a footpath, but not extending to the erection or suspension of any covering over that part. ([Reported by M. B. KELLY, Esq., Barrister-at-Law.] )*

#### Footnotes

- 1 [Disused Burial Grounds Act, 1884, S. 3](#) : “It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other place of worship.”
- 2 [\[1896\] P. 95](#) .
- 3 [\[1900\] P. 314; 16 T.L.R. 540](#) .
- 4 [\[1912\] P. 69](#) , 74.
- 5 [\[1928\] P. 102](#) , 112.
- 6 [\[1900\] P. 69](#) .
- 7 [\[1939\] P. 281](#) .
- 8 [\[1906\] A.C. 1](#) , 3.
- 9 [\[1926\] P. 87](#) .
- 10 [\[1928\] A.C. 469; 44 T.L.R. 656](#) .
- 11 [\[1893\] P. 58](#) , 66n.; Tristram's Judgments 274.

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- 12 *[1893] P. 58 , 66n.; Tristram's Judgments 274.*
- 13 *[1893] P. 58 , 66n.; Tristram's Judgments 274.*
- 14 *[1900] P. 69 .*
- 15 *(1890) 44 Ch.D. 12 .*
- 16 *[1952] Ch. 448; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809 .*
- 17 *[1956] Ch. 131; [1955] 3 All E.R. 667 .*
- 18 1930 U.S.AV.R. 21, 29.
- 19 1932 U.S.AV.R. 1.
- 20 **Open Spaces Act, 1887, S. 4 :**  
**"In the Disused Burial Grounds Act, 1884 , ... the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881 , As amended by this act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or order in council, and the expression 'building' shall include any temporary or movable building."**
- 21 **Open Spaces Act, 1906, S. 20 (Part): "the Expression 'Burial Ground' Includes Any Churchyard, Cemetery or other Ground, Whether Consecrated or Not, Which Has Been at Any Time Set Apart for the Purpose of Interment."**
- 22 *[1900] P. 314; 16 T.L.R. 540 .*
- 23 *[1900] P. 314; 16 T.L.R. 540 .*
- 24 *[1896] P. 95 .*
- 25 *[1896] P. 95 .*
- 26 *[1912] P. 69, 74; 28 T.L.R. 130 .*
- 27 *[1900] P. 314 .*
- 28 *[1928] P. 102 , 113; [1928] A.C. 469; 44 T.L.R. 656 .*
- 29 *[1900] P. 314 .*

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30	<i>[1912] P. 69 .</i>
31	<i>[1896] P. 95 .</i>
32	<i>[1906] A.C. 1, 3; 22 T.L.R. 55 .</i>
33	<i>[1928] A.C. 469 .</i>
34	<i>[1926] P. 87 .</i>
35	<i>[1900] P. 69 .</i>
36	<i>[1906] A.C. 1 .</i>
37	<i>[1900] P. 69 .</i>
38	<i>[1900] P. 69 .</i>

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## \*63 In Re St. Martin Le Grand, York



No Substantial Judicial Treatment

York Consistory Court

Coningsby Q.C. , Ch.

1988 Feb. 15, 16, 17; 29

**Court**  
Consistory Court (York)

**Judgment Date**  
29 February 1988

**Report Citation**  
[1989] 3 W.L.R. 1207  
[1990] Fam. 63

*Ecclesiastical Law—Ecclesiastical property—Churchyard—Right of way over churchyard to adjacent printing works—Whether consistory court having jurisdiction to determine existence and scope—Whether easement or licence—Whether licence of indefinite duration terminable— Ecclesiastical Jurisdiction Measure 1963 (No. 1), s. 6(1) (e)*

<sup>1</sup> The petitioners were the owners and occupiers of a printing works adjacent to the churchyard of a parish church over which they had rights to pass for purposes of access to the works, the churchyard having been closed for burials for many years. The petitioners sought, inter alia, rulings as to the extent of those rights and, where necessary, a faculty to ensure their future use and to extend them to cover use by their licensees and other visitors to their premises. The petition was opposed by the incumbent, the parochial church council, the feoffees of the parish and a number of individual objectors, on the ground that the churchyard should be maintained as a peaceful place, not open to the public at large, and under the control of the church. At the hearing it was agreed that, subject to the court's approval, the petitioners should have vehicular access to the churchyard in case of emergency for a period of not more than 30 months, by which time it was expected that the petitioners' printing business would have moved to a new site.

### \*64

On the petition: -

Held:

(1) that, as, in practical terms, it was no longer possible to carry out the purpose for which the churchyard had been consecrated, namely, for burials, it was open to the court to allow a limited secular use of the churchyard; and that, given the very limited and short term use of the vehicular access proposed, a faculty for a licence in the agreed terms would be granted (post, pp. 71D-F, 72A).

*In re St. Benet Sherehog; In re St. Nicholas Acons [1893] P. 66n .; In re Bideford Parish [1900] P. 314* and dictum of Newsom Q.C., Ch. in *In re St. John's, Chelsea [1962] 1 W.L.R. 706* , 714 applied.

(2) That the court did not have jurisdiction under section 6(1)(e) of the Ecclesiastical Jurisdiction Measure 1963 to determine the questions relating to the existence, legal status and scope of the pedestrian right of way over the churchyard, since the rights concerned were not even substantially of an ecclesiastical nature; but that there was a long-standing practice whereby the ecclesiastical court determined matters of a temporal nature which were incidental to the exercise of the ecclesiastical jurisdiction; that, since the right to deal with the fee in the churchyard was vested in the ordinary on whose behalf the court might act, the court had jurisdiction to grant a faculty for a more extensive pedestrian access over the churchyard than that to which the church bodies were willing to agree; and that, accordingly, since the issues as to the existence and scope of the pedestrian right of way were genuinely ancillary to the question of whether such faculty should be granted, the court had jurisdiction to decide them (post, pp. 73F-H, 74C, G-H, 76B-D).



*St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95 ; *In re St. Paul's, Covent Garden* [1974] Fam. 1 and *In re St. Andrew's, North Weald Bassett* [1987] 1 W.L.R. 1503 followed.

(3) That, on the evidence, a pedestrian right of way across the churchyard had been exercised as of right by the occupiers of the buildings around the churchyard for at least the last hundred years and had been exercised by the petitioners throughout, not only by themselves and their servants, but also by and for their licensees having a legitimate business interest in coming to their premises; that it was to be presumed that such right had been conferred by way of lost faculty; that, as a matter of law, the churchyard being consecrated land, that faculty could not have conferred an easement, but did confer a licence of indefinite duration; and that that licence could be terminated only by faculty if the ordinary was put on notice that it was being abused and the consistory court determined that it should be terminated (post, pp. 77C-D, G-H, 81B, 82C-D, G-H).

*Baxendale v. North Lambeth Liberal and Radical Club Ltd.* [1902] 2 Ch. 427 applied.

The following cases are referred to in the judgment:

*Baxendale v. North Lambeth Liberal and Radical Club Ltd.* [1902] 2 Ch. 427  
*Bideford Parish, In re* [1900] P. 314  
*Butt v. Jones* (1829) 2 Hagg. Ecc. 417  
*Hammond v. Prentice Brothers Ltd.* [1920] 1 Ch. 201  
*Hilcoat v. Archbishops of Canterbury and York (1850)* 10 C.B. 327 \*65  
*Keith v. Twentieth Century Club Ltd. (1904)* 73 L.J.Ch. 545  
*Liddell v. Rainsford* (1868) 38 L.J. Eccl. 15  
*Linnell and Walker v. Gunn (1867)* L.R. 1 A. & E. 363  
*Proud v. Price (1893)* 63 L.J.Q.B. 61, C.A. .  
*St. Andrew's, North Weald Bassett, In re* [1987] 1 W.L.R. 1503  
*St. Benet Sherehog, In re; In re St. Nicholas Acons* [1893] P. 66n .  
*St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95  
*St. John's, Chelsea, In re* [1962] 1 W.L.R. 706; [1962] 2 All E.R. 850  
*St. Mary Abbots, Kensington (Vicar and Churchwardens) v. St. Mary Abbots, Kensington (Inhabitants)* (1873) Trist. 17  
*St. Mary of Charity, Faversham, In re* [1986] Fam. 143; [1985] 3 W.L.R. 924; [1986] 1 All E.R. 1  
*St. Mary the Virgin, Woodkirk, In re* [1969] 1 W.L.R. 1867; [1969] 3 All E.R. 952  
*St. Paul's, Covent Garden, In re* [1974] Fam. 1; [1973] 1 W.L.R. 464  
*St. Peter's, Bushey Heath, In re* [1971] 1 W.L.R. 357; [1971] 2 All E.R. 704  
*Thornton v. Little (1907)* 97 L.T. 24  
*Walter v. Mountague and Lamprell (1836)* 1 Curt. 253  
*Wood v. Saunders (1875)* L.R. 10 Ch.App. 582  
*Woodhouse & Co. Ltd. v. Kirkland (Derby) Ltd.* [1970] 1 W.L.R. 1185; [1970] 2 All E.R. 587

The following additional cases, supplied by the courtesy of the chancellor, were cited in argument:

*Anon.* (1575) Jenk. 142  
*Attorney-General v. Dean and Chapter of Ripon Cathedral* [1945] Ch. 239; [1945] 1 All E.R. 479  
*Philipps v. Halliday* [1891] A.C. 228, H.L.(E.) .  
*St. Mark's Church, Lincoln, In re* [1956] P. 166; [1955] 3 W.L.R. 844; [1955] 3 All E.R. 699  
*St. Mary's, Aldermary, In re* [1985] Fam. 101; [1985] 3 W.L.R. 396; [1985] 2 All E.R. 445  
*Stileman-Gibbard v. Wilkinson* [1897] 1 Q.B. 749

## PETITION

By petition dated 13 November 1986, the petitioners, Westminster Press Ltd., sought a faculty (1) confirming a presumed grant of a right of way on foot or with laden or unladen trolleys across the churchyard of St. Martin Le Grand, York, alternatively, granting a licence conferring such rights, alternatively, validating an agreement made in October 1967 in so far as it related to pedestrian access with trolleys; (2) confirming the grant of a similar right of way with motor vehicles; and (3) to remove a barrier at the entrance to the churchyard. The petition was opposed by the incumbent, Canon John Armstrong, the parochial church council, the feoffees of St. Helen's and St. Martin's and 22 individual objectors.

The facts are set out in the judgment.

## Representation



Michael Douglas for the petitioners.  
John Bullimore for the parties opponent.

*Cur. adv. vult.*

29 February. The following judgment was handed down (by post).

\*66

CONINGSBY Q.C., CH.

These are proceedings under the Faculty Jurisdiction Measure 1964 in relation to the churchyard of the Church of St. Martin le Grand in Coney Street, which is part of the central area of the City of York. The petitioners, Westminster Press Ltd., own and occupy a printing works which lies partly between the church and the River Ouse and partly alongside the churchyard with a frontage onto Coney Street. The petitioners' premises are basically in the shape of an L with the longer side fronting onto the River Ouse. The churchyard consists of the area between the church and the printing works and extends round to the rear or west end of the church. The entrances from the printing works onto the churchyard are mainly in that part of the yard.

The petitioners' case is that they have had certain rights to pass over the churchyard for many years and in the proceedings they seek rulings as to the extent of those rights and, where necessary, they seek a faculty to ensure the future use of those rights, to ensure that a gate erected by the parochial church council of St. Martin's across the Coney Street entrance to the yard should be of such construction as not to interfere with their use of the yard, and, again so far as necessary, to extend their use of the yard to cover use by their licensees and other visitors coming to and from their premises for purposes connected with their business or their staff.

The basic position of the parties opponent is that they are concerned to maintain the churchyard as a peaceful place to which the public at large do not have general access and over which the church retains control. Prior to the erection of the gate in late 1985 or early 1986 the parochial church council and team vicar having responsibility for St. Martin's had become much concerned over the parking of cars and other vehicles in the churchyard which had occurred when a previous "gate" in the form of a chain and movable post had fallen into disuse. The parties opponent opposed any vehicular use of the churchyard by the petitioners, notwithstanding an agreement in 1967 between the then incumbent and the petitioners for a very limited vehicular use of the churchyard in cases of emergency and for the moving of machinery; they did not admit the existence of any right of way over the churchyard, even a pedestrian way, and, though it was accepted that by a temporary arrangement with the petitioners there was de facto pedestrian access for the petitioners and their employees, it was disputed that the petitioners exercised this use as of right and the parochial church council asserted their own right to maintain a gate across the Coney Street entrance so as to prevent all access to the churchyard other than by permission of the parochial church council or clergy.

The pleadings in the case consist of a number of documents. The petition for faculty is dated 13 November 1986. The schedule of works contained in that petition was subsequently amended by insertion of an additional paragraph 1A. It asks in paragraph 1 for confirmation of a presumed grant of a right of way on foot with laden or unladen trolleys for the benefit of the petitioners and their successors. In the alternative it asks for the grant of a licence conferring such rights. In the alternative (by the new paragraph 1A) the petitioners in effect ask for a \*67 confirmatory faculty to validate the agreement made in October 1967 in so far as it related to pedestrian access with laden or unladen trolleys. By paragraph 2 of the amended schedule the petitioners seek "confirmation" of the grant of a similar right of way with motor vehicles subject to the conditions set out in the 1967 agreement. Again I construe this as a prayer for a confirmatory faculty. Paragraph 2 pleads that the vehicular right exists by virtue either of presumed grant by reason of long user as of right or by purported grant by the court of a licence. That is presumably a reference to the doctrine of prescription by lost modern grant. Finally the amended schedule asks for "the removal of the barrier erected at the entrance to the said churchyard (and completed on 3 February 1986)." I read this as an application for a faculty to remove the barrier and it was conceded by both counsel at the hearing that once the barrier had been erected, whether lawfully or not, a faculty would be required for its subsequent removal. The petition was accompanied by a letter dated 13 November 1986 from Messrs. Lee Bolton & Lee, acting for the petitioners, to the registrar of the court. This letter became part of the evidence at the hearing and it contains a material admission to the effect that the 1967 deed was not by itself effective to confer new rights of a permanent nature in the absence of a faculty, it being further conceded that no such faculty was asked for or obtained. The letter also gives further information about the petitioners' claim to pedestrian and trolley access having arisen by prescription.

The case of the individual objectors is set out in a large number of letters received at the registry from these persons following citation of the petition. Subsequently all these individual objectors (except Mrs. Robinson)



agreed to be represented by Messrs. Harland & Co., who by that time were also representing the incumbent, the team vicar and the parochial church council, and also the feoffees of St. Helen's and St. Martin's, being the trustees inter alia of certain lands or their proceeds of sale, and probably certain other assets, previously connected with the Church of St. Martin's. On 19 November 1987 Messrs. Harland & Co. wrote a letter to the registrar setting out in detail the objections of the individual objectors. On the same date they wrote another letter to the registrar setting out the detailed objections of the feoffees. These letters have also been taken for the purpose of the proceedings as setting out any objections of the parochial church council, churchwardens and clergy of the team ministry. Messrs. Lee Bolton & Lee supplied an answer dated 11 December 1987 to the two letters of objection. As far as directions are concerned I gave directions on 20 January 1987 and 5 March 1987 and some further directions were given by consent at a directions' appointment which was held before the registrar on 13 November 1987, when a formal order for directions was drawn up.

In the event the issues which arose at the hearing were somewhat different from those raised in the pleadings. To some extent this was due to certain concessions made on either side and to certain agreements between the parties as to some of the issues. In particular the parties had virtually reached an agreement, prior to the opening of the case, as to the limited extent of any vehicular access to the churchyard in future, subject to my being satisfied that a faculty should issue to implement \*68 such agreement. Also and by the same stage the parties opponent had come to accept the petitioners' case that they had in fact been using the churchyard for access on foot and by trolley for themselves and their servants, so that broadly-speaking the main issues relating to pedestrian access were (a) whether a right of pedestrian way was limited to the petitioners and their servants, or extended to licensees such as suppliers and customers and (b) whether such right amounted to an easement or merely to a licence. The parties opponent were no longer opposing all use by the petitioners of the yard, but were conceding pedestrian access as above and were also prepared to grant a limited amount of vehicular access (in case of emergency only) for a period of not more than 30 months. That period was put forward as reasonable on the basis of the petitioners' statement that their printing and newspaper business which they carried on from their premises would be coming to an end within such period of time. The question of the future form of the gate, and who should have a key to it, would fall to be decided in the light of the other issues.

In the background there was a problem about the future development of the petitioners' site and the implications which would arise as to future use of the yard by pedestrians and vehicles in relation to the site as developed. It became clear that the attitudes of both sides in relation to the existing position were coloured by their wishes and fears in relation to the position as it would be after redevelopment. Although it appeared to me after the opening of the case that some of the issues which I was being asked to decide were not fully pleaded by the petitioners and that as a result I might make decisions in certain areas where the amended schedule to the petition did not indicate that this would occur, I nevertheless decided that it was not necessary to adjourn the proceedings for the purposes of amendment of the schedule or for recitation of the amended petition. That was because I was not asked to do this by either counsel and it seemed to me that all the possible parties opponent who might have an interest in the new issues were either before the court or had received a sufficient general notification as to the scope of the issues likely to be decided at the hearing.

[The chancellor described the church and its history; noted that no regular church services were held but that the church was used extensively during the week for retreats and counselling work; described the petitioners' premises and business operations; and continued:]

As far as the parties opponent are concerned I have already made reference to the feoffees of St. Helen's and St. Martin's. There was originally a separate parish of St. Martin but by an Order in Council dated 13 October 1910 the benefice of St. Martin was united with the benefice of the nearby Church of St. Helen, Stonegate, and by a further Order in Council dated 19 October 1954 the parish of St. Martin and the parish of St. Helen were united to form one parish. Finally in 1975, when the then incumbent of St. Helen's and St. Martin's, Canon Porter, retired, a team ministry was formed, known as the York Central Team Ministry, whereby the ministries of St. Helen and St. Martin and a further church, All Saints, Pavement, were brought together in a team ministry. The team rector and incumbent of the three churches was (and \*69 is) Canon John Armstrong. There are two team vicars, one for each of the other churches and the team vicar of St. Martin's is the Reverend Peter Dodson. He is the clergyman responsible for the day-to-day administration of St. Martin's and one of his main ministries is the running of retreats at St. Martin's. The freehold of St. Martin's is therefore legally vested in Canon Armstrong during his incumbency.

[The chancellor enumerated the witnesses called for the parties opponent, referred to his visit to St. Martins and the petitioners' printing works and to the witnesses called on behalf of the petitioners, including their service managers past and present, and to the evidence of the Ven. Leslie Stanbridge, the Archdeacon of York, who gave him the views of the Diocesan Advisory Committee as to the current use of the yard and its future use and





continued:] I formed the view that all the witnesses, on both sides, who gave evidence as to the extent and nature of the use of the yard over the years were reliable witnesses. This is not a case where I have to decide a conflict of evidence as to the facts, but on the basis of all the evidence given I have to decide on the basis of those facts what inferences I should draw as to the existence, legal status, and scope of any rights to the use of the yard.

### Vehicular access

Prior to the opening of the case substantial agreement had been reached between the parties as to (a) the extent of any vehicular use up to the date of the hearing and (b) what vehicular use should be allowed subsequently. There had been no agreement at the time of the pleadings. What emerged from the evidence was that no vehicular access was possible prior to 1965 when the small walls and railings at the Coney Street end were removed for the purposes of building work on the church. It was common ground between witnesses on each side that during the course of the building works vehicles were able to come into the yard and were in fact brought in. Some of the vehicles related to the building works, some to the petitioners' business and some may even have belonged to members of the public taking advantage of the position. As the building works were nearing a conclusion both sides desired to regularise the position with regard to future use of the yard and eventually, after much discussion in meetings and in correspondence, an agreement (by deed) was entered into on 4 October 1967. In relation to vehicular access there was an agreement (in clause 3) that the petitioners should be entitled from time to time to pass with motor vehicles of a laden weight not exceeding 15 tons over the churchyard to and from their premises for the purpose of bringing into or taking out of the premises any equipment apparatus or machinery. By clause 4 there was an agreement that they should be permitted, on first obtaining on each and every occasion the written consent of the incumbent which consent should not be unreasonably refused, in case of emergency, to pass with motor vehicles over the churchyard for the purpose of collecting newspapers for delivery, and it was agreed that an emergency should be deemed to include a situation in which, by virtue of abnormal congestion of traffic in Coney Street, the collection of newspapers for delivery from the petitioners' normal collection point should be prevented or affected to a substantial degree. By clause 5 it was provided that the \*70 resurfacing of St. Martin's churchyard - which was about to take place - should be carried out in such a way as to bear the weight of vehicles of up to 15 tons. The petitioners agreed to pay a sum of £300 towards the resurfacing of the churchyard and by a separate agreement (in correspondence) they agreed to pay a further £1,500 to York Civic Trust, a charitable body concerned in the restoration of St. Martin's. The clauses relating to vehicular traffic clearly gave the petitioners additional rights in the yard but in law such rights without a faculty could not amount to more than a licence granted by the incumbent for the duration only of his own incumbency, and could not be binding on his successors in title to the freehold. That was conceded on behalf of the petitioners at the hearing, a faculty for any more extensive rights not having been sought at the time.

[The chancellor set out the evidence as to subsequent vehicular use of the churchyard and the installation of the present gate early in 1986, and continued:] During the opening counsel were able to announce that there was agreement between the parties to vehicular access rights being conferred for a maximum period of 30 months should the petitioners not have moved during that time, but for a period of time up to the completion of their move should they move within 30 months. The only difference between the parties was that the petitioners asked for liberty to apply for an extension of time beyond 30 months whereas the parties opponent did not wish any extension. Eventually, however, during closing speeches a formula was agreed whereby there should be liberty to apply to me for an extension of time, but on the basis that a good case would have to be made out for an extension of time and that it was accepted that I might not grant it. In relation to vehicular access the only matter which remains to be considered is whether the court has legal jurisdiction to grant a limited vehicular access of this kind, for a limited period of time, over land which is consecrated, but which has clearly not been used for burials for at least 100 years.

Any faculty will be for a licence for a fixed period of time and no question arises of granting an easement, quasi-easement or licence of indefinite duration. There have been a number of faculty cases where a licence has been granted for a private right of way over consecrated land. In *In re St. Benet Sherehog*; *In re St. Nicholas Acons* [1893] P. 66n. Tristram Q.C., Ch. granted faculties to the City of London Electric Lighting Company to construct flights of steps in portions of two disused churchyards for the purposes of their employees gaining access to electricity sub-stations underneath public streets adjoining the churchyards. He said, at p. 66:

"The court has undoubtedly jurisdiction to grant by faculty the user of a way across a churchyard for public convenience or to an individual for private convenience, provided no detriment will thereby accrue to the parishioners."



He granted licences for 21 years in each case. In *St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd.* [1896] P. 95 Tristram Ch. confirmed a previous grant by him (a year or so earlier) of a right of passage on foot across a consecrated churchyard, closed for burials by \*71 Order in Council, for the benefit of the occupiers of an adjoining property and this was done by a licence for 80 years. He declined to grant a faculty for a similar right of way in favour of the occupiers of another adjoining property, which right of way would have interfered with the one which he had previously sanctioned. Tristram Ch.'s decision was approved on appeal by Lord Penzance, Dean of the Arches [1896] P. 95, 106. In *In re Bideford Parish* [1900] P. 314 a faculty was granted for a portion of a disused consecrated burial ground to be thrown into the adjoining public highway. It was argued that the ecclesiastical court had no authority to allow consecrated ground to be applied to secular uses, but Sir Arthur Charles, Dean of the Arches, said, at pp. 326-327, that in the case of a churchyard closed for burials an ecclesiastical court had the discretionary power to make an order of the kind asked for. It is clear that the purpose of the faculty was that the piece of land to be transferred to the mayor, aldermen and burgesses of the town of Bideford should be used for the passage of vehicular traffic.

In *In re St. John's, Chelsea* [1962] 1 W.L.R. 706 Newsom Q.C., Deputy Ch. reviewed some of the earlier cases and said, at p. 714, that, in deciding whether or not to allow consecrated land to be used for secular purposes, the central question was: "Can the purpose for which the ground was originally consecrated no longer be lawfully carried out?" If so a faculty may issue for a secular use. If not the faculty may only issue for an ecclesiastical use, except in the limited case of a wayleave. Seeking to apply that dictum to the present case I have reached the conclusion that in practical terms it is no longer possible to carry out the purpose for which the churchyard was consecrated, namely for burials, and that it is in fact closed for burials. That was the effect of the evidence given to me by the parties opponent and a visual examination of the site shows that in practice it would be impossible to bury people there. I consider that it is therefore open to me in my discretion to allow a limited secular use of the churchyard to the extent proposed, particularly having regard to the time limit of 30 months, the fact that the licence will not allow vehicles to remain parked in the yard, and that it will allow vehicles into the yard only on rare occasions and on permission first being obtained from the incumbent, the team vicar or his deputy.

This conclusion is further supported by *In re St. Mary the Virgin, Woodkirk* [1969] 1 W.L.R. 1867 where the deputy auditor, Owen Stable Q.C., granted a faculty for a strip of graveyard measuring 260 yards by some 12 yards to be transferred to the borough council for the purpose of road widening, thereby allowing secular use of consecrated land, and this was done notwithstanding the opposition of the vicar, churchwardens and parochial church council concerned. Parts of the graveyard were still in use for burials. The deputy auditor granted the faculty because he was satisfied that it was in the public interest to do so. The land was required to widen an existing road into a dual carriageway, this being part of a very substantial road-widening scheme stretching over many miles. The case can be distinguished from the present one in relation to the public interest factor but it illustrates the proposition that the \*72 principle whereby consecrated land should be protected from secular use is not an absolute one.

Having considered these authorities, I have reached the conclusion that I should exercise my discretion in favour of granting a faculty for the very limited and short term vehicular use of St. Martin's churchyard which is proposed by the petitioners and agreed to by the parties opponent. The faculty and the licence will be in the terms of clauses 3 and 4 of the 1967 agreement but limited as to time in the manner agreed between the parties and with the words "incumbent or team vicar having responsibility for St. Martin's" in substitution for the word "incumbent" in clause 4. Further, the licence will be subject to a condition similar to clause 5 of that agreement, that is to say, the petitioners are to make good all damage caused by them to St. Martin's churchyard or to the Church of St. Martin by reason of the exercise of their rights of vehicular access above referred to.

### Bicycles and motorcycles

The evidence before me was that employees of the petitioners have over the years been allowed by the parties opponent to park a limited number of bicycles and motorcycles in the area between the west wall of St. Martin's Church and the printing works. The 1967 agreement referred to this and identified the area in which these vehicles should be parked. At the hearing it was indicated to me by both counsel that there was agreement that this practice should continue. For the sake of good order I will include in the faculty a licence for the identified area to be used for the parking of bicycles and motorcycles used by staff of the petitioners, but this licence will be for the limited period of time already provided for in relation to the vehicular access. The requirement as to the making good of damage will apply to the licence relating to bicycles and motorcycles as well as the licence for vehicular access.

### Pedestrian access



In discussing this matter it can be taken that the phrase "pedestrian access" includes that form of access in conjunction with the use of trolleys. It was common ground between the parties at the hearing that the use of trolleys had gone on over the years as an adjunct to pedestrian access. The petitioners claim a right of way for pedestrians, with or without trolleys, arising from longstanding user as of right. They claim this either by prescription at common law or by prescription under the doctrine of lost modern grant. They contend that the existence of a faculty should be presumed. They ask me to find that such a right exists and that it exists as an easement. Failing that they ask me to say that it is a quasi-easement, and failing that they ask me to say that it is a licence intended to be of permanent duration, such that it cannot be terminated without a further order of the court (which would be in effect a faculty to terminate the existing right). The parties opponent agree that the petitioners have exercised a right of pedestrian access for very many years and they do not dispute evidence that the right was being exercised in 1935.

The petitioners then asked me to determine the scope of the right, and they contend that it extends to the petitioners' licensees, such as its <sup>\*73</sup>business suppliers, its customers, for example, people wanting printing work carried out, representatives of companies seeking to do business with it, and other persons having reason to come to the premises such as relatives and friends of staff of the petitioners coming to leave messages or to meet members of staff at lunch break and the like. The parties opponent contended from the start that any right of pedestrian access should not extend to licensees or visitors, but only to the petitioners themselves and their staff, and the parties opponent maintained that position throughout the hearing and asked me to find that the pedestrian access is limited to the petitioners and their servants.

The first question which I have to decide in relation to pedestrian access is whether I have jurisdiction in the consistory court to decide the questions relating to the existence, legal status and scope of a right of way. Basically the nature of the right of way claimed is similar to any other right of way and the principles applicable to the decision which I have to make are not affected by the fact that the right of way happens to be over ecclesiastical property. The law which I have to apply in reaching a conclusion is the ordinary secular law rather than any specifically ecclesiastical law. It was conceded by counsel for the petitioners that the relief which he sought in relation to the pedestrian access could equally well have been sought in the secular court, but he contended that it was convenient for me to deal with it in the ecclesiastical court and he maintained that I had jurisdiction. Clearly it is necessary to ensure that the ecclesiastical court does not trespass on the secular court's jurisdiction and there have been numerous cases, particularly in the last century, where the writ of prohibition has been used in the secular court to prevent the ecclesiastical court determining issues which ought to have been raised in the secular court.

I have considered whether I might have jurisdiction under section 6(1)(e) of the Ecclesiastical Jurisdiction Measure 1963 which includes in the original jurisdiction of the consistory court of the diocese

"any proceedings . . . which, immediately before the passing of this Measure, it had power to hear and determine, not being proceedings jurisdiction to hear and determine which is expressly abolished by this Measure."

This residual jurisdiction is referred to in *Halsbury's Laws of England*, 4th ed., vol. 14 (1975), p. 758, para. 1344. A footnote says that the third edition of *Halsbury*, in which the law stated was in general that in force on 1 October 1955, contained a statement to the effect that in some cases civil rights in connection with ecclesiastical property or with the recovery of money applicable to ecclesiastical purposes could be tried and decided in the ecclesiastical courts though such proceedings were uncommon. Reference was made to *Butt v. Jones* (1829) 2 Hagg. Ecc. 417; *Linnell and Walker v. Gunn* (1867) L.R. 1 A. & E. 363; *Liddell v. Rainsford* (1868) 38 L.J. Eccl. 15 and *Proud v. Price* (1893) 63 L.J.Q.B. 61, 64-66. Having looked at these cases I am satisfied that it would not be right for me to attempt to deal with the questions which arise in relation to the right of way in the present case by seeking to rely on the residual jurisdiction provision of the Measure of 1963. Some of the cases <sup>\*74</sup>cited in the third edition of *Halsbury's Laws*, vol. 13 (1955), p. 491 are faculty applications in which a preliminary issue arose to be decided, and these are therefore in the category of cases to which I will refer in due course. There are only one or two examples of decisions involving civil rights or the recovery of moneys not connected with the faculty jurisdiction. *Liddell v. Rainsford*, 38 L.J. Eccl. 15 related to a dispute as to which of two clergymen should be entitled to retain and use communion alms for distribution to the poor of the parish. The right to administer communion alms was clearly a matter of ecclesiastical law, not appropriate to be litigated in a secular court. *Proud v. Price*, 63 L.J.Q.B. 61 related to a dispute over whether pews could be altered by the incumbent and



churchwardens without the concurrence of a member of the congregation who claimed to be entitled to the exclusive use of the pews.

Neither counsel has invited me to decide the issues about the right of way as a matter within my residual jurisdiction under the Measure of 1963, and it is my independent view that I should not do so because the rights with which I am concerned are not exclusively or even substantially of an ecclesiastical nature but are rights existing wholly in the secular field. For the purpose of determining whether the rights are of an ecclesiastical nature so that they could be determined under the residual jurisdiction I consider that it is purely incidental that in the present case the rights are claimed in respect of ecclesiastical property, i.e. the churchyard of St. Martin's. The issues as to the existence and scope of the rights would be the same whether the rights were claimed in respect of ecclesiastical property or secular property. The issue as to the legal status of the right requires some consideration of the law relating to the effects of consecration on land such as a churchyard but it is an area of law which can be considered as well in a secular court as in an ecclesiastical court. The fact that in relation to this one aspect of the case the secular court would have to take into account the law relating to consecration and the existence of the faculty procedure is in my view insufficient to justify me in regarding the issues as a whole which I have to decide as being issues relating to ecclesiastical rather than secular rights.

I am urged, however, to decide these issues on the basis that they are ancillary to the petitioners' application for a faculty. If the petitioners do not have an existing pedestrian right of way, with or without trolleys, they ask for a faculty granting them such right of way. If they have a right of way which does not extend to licensees they ask for a faculty granting such extension. It is argued that in order for me to decide whether faculties are required for these purposes I must first decide what the petitioners' existing rights are, so that the jurisdiction in deciding these issues is genuinely incidental to the faculty jurisdiction. The parties opponent do not argue against those submissions. I accept that there is a long-standing practice whereby the ecclesiastical court will determine matters of a temporal nature which are incidental to the main ecclesiastical jurisdiction being exercised. In Phillimore's Ecclesiastical Law, 2nd ed. (1895), vol. 2, p. 1115, the following view is expressed: <sup>\*75</sup>

"In case the principal matter belong to the cognizance of the spiritual court, all matters incidental (though otherwise of a temporal nature) are also cognizable there; and no prohibition will lie, provided they proceed in the trial of such temporal incident, according to the rules of the temporal law . . ."

In relation to the latter part of this quotation I can confirm that the law which has been argued before me and which I shall apply in relation to the rights claimed by the petitioners is the temporal law.

In deciding whether to treat these issues as incidental to the faculty jurisdiction I take the view that I must first be satisfied that this is a case in which I could, if satisfied on the merits, grant the faculty sought. Relevant to that is the question of whether the court has power to grant a faculty for a right of way, or an extension to a right of way, in circumstances where the incumbent, churchwardens and parochial church council do not concur. Such non-concurrence will obviously be a matter of importance in relation to the merits, but does it remove the court's jurisdiction? The petitioners referred me to [In re St. Andrew's, North Weald Bassett \[1987\] 1 W.L.R. 1503](#) a decision of Cameron Q.C., Ch. There a secular parish council petitioned for a faculty for a licence to pass and repass over a churchyard for the purpose of access to a proposed cemetery. The petition was opposed by the incumbent, churchwardens and parochial church council. Cameron Ch. discussed, at p. 1506, the implications of the opposition by these persons and bodies. She referred to [Walter v. Mountague and Lamprell \(1836\) 1 Curt. 253](#) where Lushington Ch. said, at p. 260:

"I think the consent of the rector is necessary by reason of his common law right; but I do not say whether or not, if the rector be called upon to show cause, and he obstinately opposes the faculty, the court may grant it. That point I consider it is not necessary to decide."

Cameron Ch. concluded that Lushington Ch. had left the point open. She then referred to [St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd. \[1896\] P. 95](#) where the question of overriding the opposition of the rector did not arise but Tristram Q.C., Ch. made some general observations about churchyards and the position of the incumbent. He said, at pp. 101-102:



"churchyards are by the law placed under the protection and control of the ecclesiastical courts and the freehold of the churchyard is in the rector, the fee being in abeyance; but the freehold is vested in him for the use (in so far as may be required) of the parishioners. Subject to that use, he is entitled to receive the profits arising from the churchyard; but he cannot by law make any appropriation of the soil of the churchyard. Such appropriation can only be made for limited purposes by a faculty issued from the ecclesiastical court."

Tristram Ch.'s judgment was upheld on appeal to the Court of Arches where Lord Penzance, Dean of the Arches, in no way demurred from anything that the chancellor had said. Cameron Ch. then referred to *In re St. Paul's, Covent Garden [1974] Fam. 1*, 4 where Newsom Q.C., Ch. \*76 referred to the above-quoted passage from *St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd. [1896] P. 95* and said that as churchyards were under the protection and control of the consistory court he took the view that he had jurisdiction to grant a faculty which would override the views of an incumbent should it be right to do so. He said, at p. 5:

"No doubt if the company were to petition me without the incumbent or parochial church council approving, I might very well refuse the faculty. I should not do so because I had no power to grant it but upon the merits."

I am prepared to follow the reasoning in the three cases to which I have referred and I consider that I have jurisdiction, if I consider it right to do so on the merits, to grant a faculty for a more extensive pedestrian access than that to which the church bodies are willing to agree. This arises from the fact that, as a result of consecration of the churchyard, the fee is in abeyance and the right to deal with the fee, including the right to grant a right of way, is vested in the ordinary on whose behalf the consistory court may act. Having concluded that I do have jurisdiction in an appropriate case to grant a faculty, I am able also to conclude that if some issue is genuinely ancillary to the question whether or not such faculty should be granted I have jurisdiction to decide such issue.

A further example of the consistory court deciding issues as ancillary to the faculty jurisdiction is *In re St. Mary of Charity, Faversham [1986] Fam. 143*, a decision of Judge Newey Q.C., Com. Gen. There the petition was for the sale of a flagon so that the proceeds could be used to carry out urgent repairs to the church. Appearance was entered by several bodies some of which contended that the parish did not own the flagon and also that the commissary court had no jurisdiction to determine their ownership. The Commissary General held that an ecclesiastical court does have jurisdiction to determine ownership of chattels when it is essential to do so in order to decide whether to grant a faculty in respect of the chattels. As already indicated, I conclude that I have jurisdiction on the basis that these issues are ancillary to my faculty jurisdiction.

Mr. Douglas on behalf of the petitioners urged on me, as a further basis for my taking jurisdiction over these issues, the fact that the petitioners' case, that they are entitled to pedestrian access with or without trolleys and for the benefit of licensees, is based, inter alia, on the doctrine of prescription by lost modern grant and that it is inherent in that doctrine, when applied to a way over a churchyard, that the grant of a faculty at some time in the past must be presumed. He then said that it would be necessary for the court to construe that faculty, even though no document exists and the doctrine assumes that it has been lost, and he argued that this exercise of construction is one for the ecclesiastical court and not the secular court. He referred to the *St. Gabriel, Fenchurch Street case [1896] P. 95* as an example of a chancellor taking jurisdiction to construe a previous faculty (in that case one granted by himself). As I have decided to accept jurisdiction on a different basis, it is not necessary for me to decide whether I would have \*77 jurisdiction to decide issues as to existing rights of way and their scope because of the presumed existence of a faculty, and I therefore leave that question open.

In relation to the existence, nature and scope of any existing right of pedestrian way I have to decide three questions. (a) Is user as of right proved by the evidence, so as to establish a prescribed right either at common law or under the doctrine of lost modern grant? (b) What is the scope of the right and in particular does it extend to use of the way by licensees, for example, customers, suppliers, representatives of companies wishing to do business with the petitioners, other persons having business dealings with the petitioners and friends or relatives of members of the petitioners' staff wishing to speak to members of staff or to leave items for them as a matter of convenience? (c) Does any such right amount in law to an easement or to a licence, and if it is a licence is it determinable by any of the church bodies concerned either at will or on any particular grounds, or is it



determinable only by the consistory court? This third question is largely a question of law whereas the first two questions are largely questions of fact and depend on the evidence given at the hearing and contained in documents and correspondence placed before me. [The chancellor reviewed the evidence and concluded:] A pedestrian way, both with and without trolleys, has been exercised over this churchyard for very many years. It has been exercised since well before 1935 and I conclude for at least the last 100 years. The age of each of the buildings known to have stood around the churchyard was not established but some of them have been there for at least 100 years and it seems to me undeniable that the occupiers of the buildings around the churchyard have had a pedestrian access to Coney Street. I find that it has not been restricted to any particular route across the churchyard. I further find that it has been exercised as of right, that is to say *nec vi, nec clam, nec precario*. In particular correspondence in 1949 seems to establish user as of right. I think that the user has been for the benefit of the petitioners and their predecessors in title as fee simple owners of the printing works buildings and I am satisfied that the use was never furtive or secret but was entirely open. I find that the use was of a kind and quality capable of giving rise to a right by way of prescription. The period of user as of right required under the [Prescription Act 1832 \(2 & 3 Will. 4, c. 71\), section 2](#), is 20 years next before the commencement of the proceedings and I am satisfied that such use has taken place for a considerably longer period than 20 years prior to the commencement of the faculty proceedings. Because of the legal principles to which I have already referred as to the right to grant a right of way being in the ordinary and not in the incumbent (as freeholder for the time being) or any other body or person, I conclude that the appropriate form of prescription in relation to the present case is that under the doctrine of lost modern grant (including a presumed faculty) rather than by use from time immemorial. I am therefore satisfied that a right of way on foot, both with and without trolleys, over the whole of the churchyard from Coney Street at one end to the printing works at the other has been established. *\*78 How extensive is the right?*

Does it extend only to the petitioners and their servants or does it also extend to licensees? There is substantial evidence that the right of way was exercised by and for licensees as well as servants of the company. The 1949 correspondence does not indicate that, in the view of the feoffees, the right of way was not available to licensees. The inherent probabilities point to the right of way being for licensees as well as the company and its servants. It would be very difficult to operate a business from these printing works without being able to receive calls there from customers, suppliers and other persons having a business interest since geographically there is no realistic access to the premises otherwise than through the churchyard. The large sign "Herald Printers" which was clearly visible from the street would in my view indicate to customers and suppliers that they could cross the yard to reach those premises. When an almshouse building on the east side of the churchyard was conveyed to the petitioners in 1950 the feoffees included a right of way from the entrance to the almshouses across the churchyard to the street and I think it is plain that such right of way must have included a right in the occupiers in the almshouses to receive visits from licensees including such people as their friends, relatives, tradespeople and the doctor. It was conceded by Mr. Bullimore on behalf of the parties opponent that the pedestrian right of way for the almshouses must have included, and did include, a right in respect of licensees. If that is the case in relation to the almshouses it is difficult to see why it should not be the case also in relation to the commercial premises since there are powerful practical reasons in both cases for the right being required for licensees although the classes of people requiring to come to the premises would clearly vary as between residential property and commercial property. Thus far there would appear to be substantial evidence to support the petitioners' case on this point.

However, it is necessary to consider with some care the wording and inferences to be drawn from the 1967 deed between Canon Porter and the petitioners. Mr. Bullimore, on behalf of the parties opponent, argued that this deed evidences a more limited right of way, not extending to licensees, and he said that the petitioners could not go behind what they agreed to in 1967. The deed is dated 4 October 1967 and it is clear from the correspondence that it resulted from a great deal of prior discussion. The original draft had to be considered and amended before its terms were agreeable on both sides. Mr. Bullimore points to clause 2 of the recital which says that one of the purposes of the agreement is to "remove any doubts or uncertainties which may exist as to the rights of the company over St. Martin's churchyard." I agree with him that it follows that the intention of the agreement was to record accurately the extent of the existing right. This is dealt with in clause 2 of the main part of the agreement which reads:

"The parties desire to record that for many years past the company and its servants have enjoyed and shall continue at all times hereafter to enjoy a right of way on foot and with laden or unladen trolleys over St. Martin's churchyard to and from Coney Street to and from the company's printing works shown coloured red on the plan."



\*79 The parties opponent say that clause 2 defines the right of pedestrian access as being for "the company and its servants" only. It is argued that if it had been understood that the right was also for the benefit of licensees this would have been stated because of the degree of care which was being used in drawing up the wording of this document as a record of the existing position. [The chancellor referred to correspondence leading up to the 1967 deed, and continued:] The essential contention of Mr. Douglas was that the word "company" should be construed as meaning the enterprise or business of the petitioners, so that it would include all pedestrian use of the churchyard connected with that enterprise or business. He supported this interpretation by referring to the word "enjoyed" and argued that the phrase "for many years past the company has enjoyed and shall continue at all times hereafter to enjoy" indicates that the company was to benefit from the right of way and it is to be inferred that such benefit included a right for its licensees to visit its premises. This seems to me to be a powerful argument.

Mr. Douglas referred me to a passage in *Gale on Easements*, 15th ed. (1986), p. 292, where it is said, "the maxim that a grant must be construed most strongly against a grantor must be applied," and there is reference to *Wood v. Saunders (1875) 10 Ch.App. 582*. While that is a passage relating to a grant rather than, as in the present case, the recital of an existing situation, it seems to me that the same principles of construction apply. The passage in *Gale* continues:

"In particular, in construing a grant the court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used."

These references seem to me to support the petitioners' case.

Mr. Douglas then drew my attention to clause 3 of the deed which confers the right for vehicles of a laden weight not exceeding 15 tons to be brought onto the churchyard for the purpose of bringing in or taking out of the petitioners' premises any equipment apparatus or machinery. He argued that it must in common sense have been envisaged that on occasions such vehicles would belong not to the petitioners themselves but to some other company or individual who agreed to take away machinery no longer required at the premises or who was supplying new machinery. It is highly improbable that all new equipment apparatus and machinery would be transported on the company's own vehicles. On that basis it is significant that the express wording of this clause, if narrowly construed, would limit the company in such a way that the vehicles of any other company or person could not come onto the churchyard. That points towards a wide interpretation of the word "company," similar to that for which Mr. Douglas contended in relation to the preceding clause, that is to say that the word "company" means the enterprise or business activity of the petitioners. Perhaps an alternative way of arriving at the same result is to say that if permission is given to a company to exercise a right over a churchyard this will be construed as including licensees unless the contrary is stated. Here there was clearly an opportunity to \*80 say that the company's rights did not include its visitors but that was not stated.

I find the petitioners' arguments compelling and I think that there is some judicial authority in support of them. In *Gale on Easements*, 15 ed., p. 307, reference is made to *Hammond v. Prentice Brothers Ltd. [1920] 1 Ch. 201*, 216, where Eve J. said:

"After all the grant is appurtenant to the dominant tenement, and in my opinion in the absence of special circumstances ought to be so construed as to secure to the grantee all that is necessary for the reasonable enjoyment of the dominant tenement . . ."

*Gale* continues, at p. 307: "Words in a grant mentioning certain persons as entitled to use, e.g. tenants, visitors, and the like, are generally to be regarded as illustrative, and not as restrictive." Both counsel referred me to *Baxendale v. North Lambeth Liberal and Radical Club Ltd. [1902] 2 Ch. 427* where it was held that the grant, contained in a lease, of full right "for the lessee, his executors, administrators, and assigns, undertenants and servants" at all times and for all purposes connected with the use and enjoyment of the premises, to use a way, extended to members and honorary members of, and all other persons going lawfully to and from, a workmen's club afterwards established on the premises. Swinfen Eady J. said, at p. 429, that it could not be doubted that, in the ordinary case of a grant of a right of way to a house and premises which could only be used as a private



dwelling house, the right would extend not only to the grantee, but to members of his family, his servants, visitors, guests and tradespeople, even though none of those persons was expressly mentioned in the grant; and that the necessary or reasonable user of the club premises as a club required that there should be liberty of passing over the way in question for the persons and vehicles shown to have used it. It seems to me that in effect Swinfen Eady J. was construing the word "lessee" as including the lessee's family, visitors, guests and tradespeople going lawfully to his premises. The petitioners in the present case asked me to construe the word "company" in a similar way.

There are two cases referred to in *Gale on Easements*, at pp. 307-308, where the court was more reluctant to put a wide interpretation on documents creating rights of way. In *Thornton v. Little (1907) 97 L.T. 24* a right of way was granted so as to be annexed to premises then used as a school to the grantee, her administrators and assigns, and her and their "tenants, visitors, and servants." Kekewich J. seemed inclined to regard the enumeration of permitted persons as exhaustive but he did hold that he could interpret the words in the light of the circumstances and therefore the word "visitors" included pupils. In *Keith v. Twentieth Century Club Ltd. (1904) 73 L.J.Ch. 545* the right to use a London square garden was held not to apply to the residents of a club when the house for the benefit of which the right had been granted was converted into a residential club. Buckley J. declined to extend the words of grant, "heirs executors administrators and assigns and his and their lessees and sub-lessees or tenants (being occupiers for the time being [of the house]), and for his and their families and friends," to residents of the \*81 club. It seems to me that this case turned to a considerable degree on the fact that the dwelling house was no longer being used in the way envisaged at the time of the grant and that the language of the grant, particularly the part about use by families and friends, was no longer apt to deal with the new situation of a residential club. This is an illustration of the words of the deed being construed in the light of the circumstances.

Applying that principle in the present case, and particularly having regard to *Baxendale v. North Lambeth Liberal and Radical Club Ltd. [1902] 2 Ch. 427*, I consider that the decided cases support the petitioners' contention that I should construe the word "company" widely so as to cover the company's licensees having a lawful business interest in coming to the premises. I therefore reach the conclusion that the right of pedestrian way was in fact exercised by the petitioners throughout the period not only by themselves and their servants but also by and for their licensees having a legitimate business interest in coming to their premises.

### Easement or licence

The remaining question is what is the legal status of the pedestrian right. Mr. Douglas has argued that it is an easement but Mr. Bullimore says that it is a licence. I have already made some reference to the effects of consecration and the putting into abeyance of the fee. In Halsbury's Laws of England, 4th ed., vol. 14, p. 571, para. 1073, there appears the statement:

"When consecrated a church or churchyard ceases to be the property of the donor, who, by dedicating his property to God, voluntarily sacrifices it for the attainment of sacred objects. Thereafter, in strictness only the authority of an Act of Parliament or Measure of the Church Assembly or General Synod can divest it of its sacred character, and a faculty should not be granted for applying it to secular purposes. Deviations from the strict rule are, however, frequently allowed . . ."

The authority cited is *Hilcoat v. Archbishops of Canterbury and York (1850) 10 C.B. 327*, 347. Halsbury says, at p. 573, para. 1074:

"It is not possible to alienate consecrated land or buildings completely from sacred uses and to appropriate them permanently for secular uses without the authority of an Act of Parliament or a Measure of the Church Assembly or General Synod. . . . Except in the pursuance of [such powers], it is not lawful to sell, lease or otherwise dispose of any church (or part of it) or the site (or part of it) of any church or any consecrated land belonging or annexed to a church . . ."

There are a few exceptions to this principle, for example in the road widening cases to which I have already referred. In *St. Gabriel, Fenchurch Street v. City of London Real Property Co. Ltd. [1896] P. 95* a pedestrian right of





way was granted in the form of a licence for 80 years and it was assumed by all parties and by the chancellor that it was not appropriate to grant an easement.

In *In re St. Peter's, Bushey Heath [1971] 1 W.L.R. 357* the petitioners, the incumbent and churchwardens, petitioned for a faculty to authorise them to enter into an agreement for the granting of a right of way across <sup>\*82</sup> part of the unconsecrated curtilage of the parish church. Newsom Q.C., Ch. granted a faculty authorising the user, subject to conditions, for 99 years. Originally the petitioners had asked for a more extensive right, not limited to 99 years. The chancellor said, at pp. 359-360:

"[Counsel for the petitioners] also conceded, and in my judgment correctly, that it is impossible to create a legal estate in consecrated land, save under the authority of an Act of Parliament or a Measure . . ."

He referred to *St. Mary Abbots, Kensington (Vicar and Churchwardens) v. St. Mary Abbots, Kensington (Inhabitants)* (1873) Trist. 17. Newsom Ch. in granting a faculty for a licence directed that the legal estate in the land should remain in the incumbent. My conclusion is that a full legal easement of way could not have been acquired in the present case. I have previously indicated my view that the case falls to be considered under the doctrine of prescription by lost modern grant, there being a presumption of the grant of a faculty at some time. I consider that as a matter of law such a faculty could not have conferred an easement, but it could have conferred a licence of indefinite duration. Mr. Douglas did not concede this but he agreed that in practical terms an indefinite licence would have the same effect as an easement and he was disposed to refer to such a licence as a "quasi-easement" for that reason. He did refer me to the [Prescription Act 1832, section 2](#), in support of his primary contention that there can be an easement of way over consecrated land and I must refer to that section. The relevant parts read:

"no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement . . . to be enjoyed or derived upon, over, or from any land or water of our said Lord the King . . . or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of 20 years . . ."

It is argued that, since this section speaks of "any way or other easement . . . over . . . the property of any ecclesiastical . . . person," it must be implying that an easement of way can exist over ecclesiastical property. I do not believe that is a necessary interpretation of this section because I think that the reference to ecclesiastical property is clearly wide enough to include land which is not consecrated and in respect of which an easement can therefore be acquired. I do not read the section as intending to alter the rule of law about consecrated land which clearly existed in and prior to 1832 whereby an easement over consecrated land cannot be created. In those circumstances the lost faculty which is to be presumed because of the user as of right to which I have already referred must be deemed to be a faculty for a licence and not an easement. <sup>\*83</sup> *Terms of the licence*

Mr. Bullimore agreed that the licence for a pedestrian way was of indefinite duration and was not terminable by the parties opponent. I agree with that concession. However, just as the acquisition of the licence is deemed to have been by faculty, the fee and control of the land being in the ordinary, so the licence can be terminated by faculty if the ordinary, acting through the consistory court, is put on notice that the licence is being abused and if the consistory court considers that the licence should be terminated. The procedure would involve an application for a further faculty to terminate the existing licence. I find therefore that the licence which is in existence is one which is terminable only by a further faculty application. It extends to persons having a lawful business interest in attending the petitioners' premises and it also extends to such people as friends and relatives of members of staff who may be allowed by the petitioners to come to the premises from time to time to bring messages and the like.

In relation to the question whether the quality of the petitioners' use of the right of way, in so far as it related to licensees, was "as of right" Mr. Bullimore urged me to take the view that the use by licensees had been secret. He said that it would not have been possible for anyone on behalf of the church authorities to know whether a particular person walking across the churchyard was a member of the petitioner company or one of its servants, or contrariwise was a licensee. That may be so in practice, though I think that the church authorities could have



called for a list of employees and members of the company so as to be able to identify them and distinguish them from licensees if they had wished to do so, and that clearly did not occur. But be that as it may I do not think the test of "secrecy" is whether the church authorities could in practice distinguish between servants and other people, but it is a question of whether there was any lack of openness or concealment being practised by or on behalf of the petitioners. I am satisfied that there was not and that the petitioners allowed their customers, suppliers and other visitors to come to them openly across the churchyard. The presence of the large sign facing towards the road seems to me to make that clear because, if there had been any intention of secrecy, it would have been most unwise to display that sign in such an obvious manner and over such a long period of time. I have reached the conclusion that the 1967 agreement should be construed on the basis that the word "company" is wide enough to include licensees. Mr. Bullimore did suggest to me at the end of his submissions that the agreement might amount to an estoppel by deed. That argument cannot arise in the light of my construction of the relevant clause.

Having reached a conclusion that the right of way is to be used by persons having a legitimate business interest to come to the premises, I conclude also that if there are circumstances in which the petitioners genuinely appoint an agent for the purposes of carrying out some part of their business, so that that person needs to come to the premises on foot, he becomes a licensee within the class of persons who has a business interest to come to the premises. To that extent therefore agents are within \*84 the class of person covered by the right of way. An agent not connected with the petitioners' business would in my view be outside the class.

Having reached these conclusions in relation to the existing right of pedestrian way it clearly becomes unnecessary for me to consider the petitioners' application that, in the absence of such a right, I should grant a faculty to provide it. [The chancellor dealt with the necessary modifications to the gate, consequent on his findings as to access; directed that, in view of the proposal to develop the site occupied by the petitioners, the present proceedings should be kept alive by the faculties and orders granted being made until further order; referred to the possibility of a major retail development on the site, and continued:]

### Future of the site

My reason for declining to deal with future aspects at this stage is not any procedural problem in relation to the petition and citation, but is a question of jurisdiction. I do not consider that I have jurisdiction to make rulings about the scope of rights of way of a basically secular nature unless to do so is necessarily ancillary to an application for a faculty of a kind which it would be possible for me to grant. In relation to the development proposals it is possible that when the proposals are clear a faculty application could be made asking the court to grant a faculty for an extension of the existing right of way so that it covers the extended class of licensees (both in quality and quantity) which the petitioners will say should be allowed to use the churchyard. I think it might well be a matter necessarily ancillary to such an application for me to decide at that stage whether this increased class of visitors is or is not within the existing pedestrian right of way. I am satisfied however that at the present time any adjudication as to whether the existing right of way extends to a large number of customers visiting a retail outlet, and members of the public window-shopping, could not be necessarily ancillary to any faculty application which I could at present consider. I could not consider a faculty application relating either to a development for retail business or a development for the division of the existing premises into a number of light industrial businesses until particulars of the proposals are clear. I cannot consider matters ancillary to such a faculty application until the faculty application itself is properly constituted.

It is clear that if a stage is reached where those issues have to be decided there will be a great deal more information which will be needed by the court. There will need to be evidence as to the number of customers and members of the public likely to be wanting to use the churchyard and this will depend to a substantial extent on what other access there may be to the proposed redeveloped premises. If there is no other main access to those premises one could envisage a situation where the present 50 or 60 pedestrians using this yard to get to the printing works might increase to many hundreds per day. The question would then arise whether such use could or could not fall within the existing right. As far as non-employees are concerned the existing right has related to a relatively small number of customers, suppliers and others having a business interest to come to the premises. The vast increase in numbers of customers might be outside the existing use. Also there might well be a change in the quality of the use as well as a change in the quantity of it, because the \*85 people coming into the churchyard would not only be customers but would also be people who simply wanted to walk round looking in shop windows, or perhaps entering the shops without intending to buy, and they would thereby be more in the category of ordinary members of the public than the category of customers. It would be a use considerably wider than the existing one where all the licensees are persons having a business interest in going to the petitioners'



premises and are not going to those premises as tourists or window-shoppers or for some other non-business purpose.

It would also be necessary to have information as to the extent of any nuisance caused in other retail areas of the City of York by noise from shops, bad behaviour by the public and/or people such as buskers and street vendors. It has to be borne in mind that this site is in an extremely busy area in the centre of York and in the summer months in particular vast numbers of people visit the city. The situation in the Coppergate Centre, though no doubt different in detail, might provide some indication of how the public would use a new retail outlet on the printing works site. It would then be necessary for considerable thought to be given to the question of safeguards for the church and as to how the use of the churchyard could be controlled and monitored. It would have to be borne in mind that the churchwardens and the parochial church council both have legal responsibilities in respect of the churchyard. The question of making good any damage in the churchyard caused by customers or members of the public would have to be considered. Again there would be a question of who should maintain insurance against the risk of people using the churchyard being injured.

The question of whether as a matter of law the existing right for customers to use the churchyard could extend to a very much larger number of customers as a result of the development may well turn out to be complex. Prior to my informing Mr. Douglas that I felt unable to proceed into this area (and his agreement that I should not do so) he referred me to certain authorities and Mr. Bullimore also did so. For the record it may be of value to list some of these. I was referred to *Jackson on Easements* (1978), pp. 148 and 149, in relation to whether an increase in user if very great can of itself amount to excessive user. It is possible that a change in quantity might be so vast as to amount to a change in quality: see *Woodhouse & Co. Ltd. v. Kirkland (Derby) Ltd.* [1970] 1 W.L.R. 1185. I was also referred in this context to *Keith v. Twentieth Century Club Ltd.*, 73 L.J. Ch. 545 where the right to use the garden in the square was held not to apply to the residents of a club following the conversion of the house. Plainly these are difficult questions and I have indicated the way in which they might come within my jurisdiction if the issue raised by them is necessarily ancillary to a faculty application which I would in turn have jurisdiction to grant. [The chancellor concluded by directing that the petitioners should pay the court costs and two-thirds of the costs of the parties opponent.]

## Representation

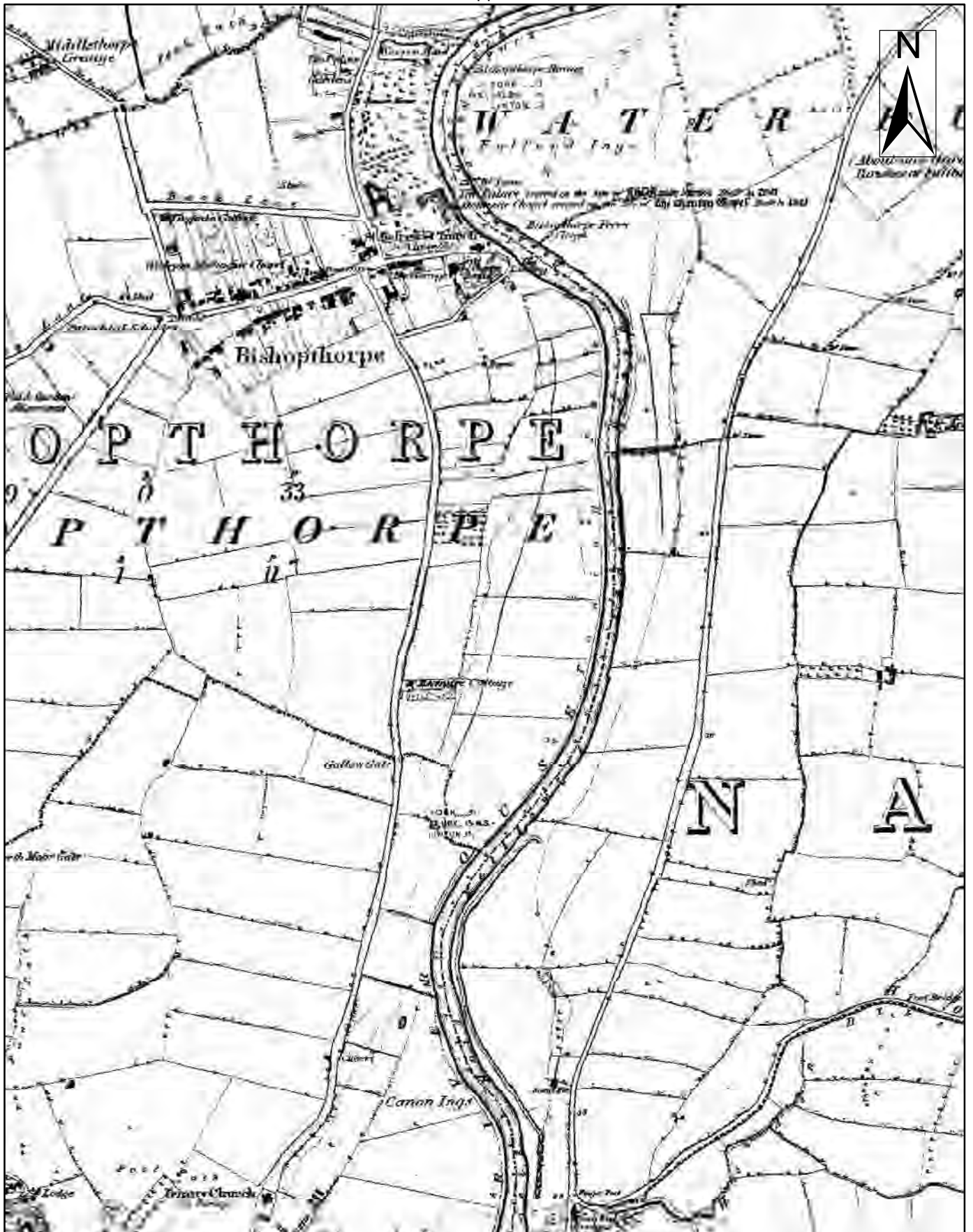
Solicitors: Lee Bolton & Lee ; Harland & Co., York .

*Orders accordingly. (C. N.)*

## Footnotes

- 1 Ecclesiastical Jurisdiction Measure 1963, s. 6(1) : see post, p. 73E-F.





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Telephone: 01904 551550

## County Series 6 inches to 1 mile 1851

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## County Series 6 inches to 1 mile 1893

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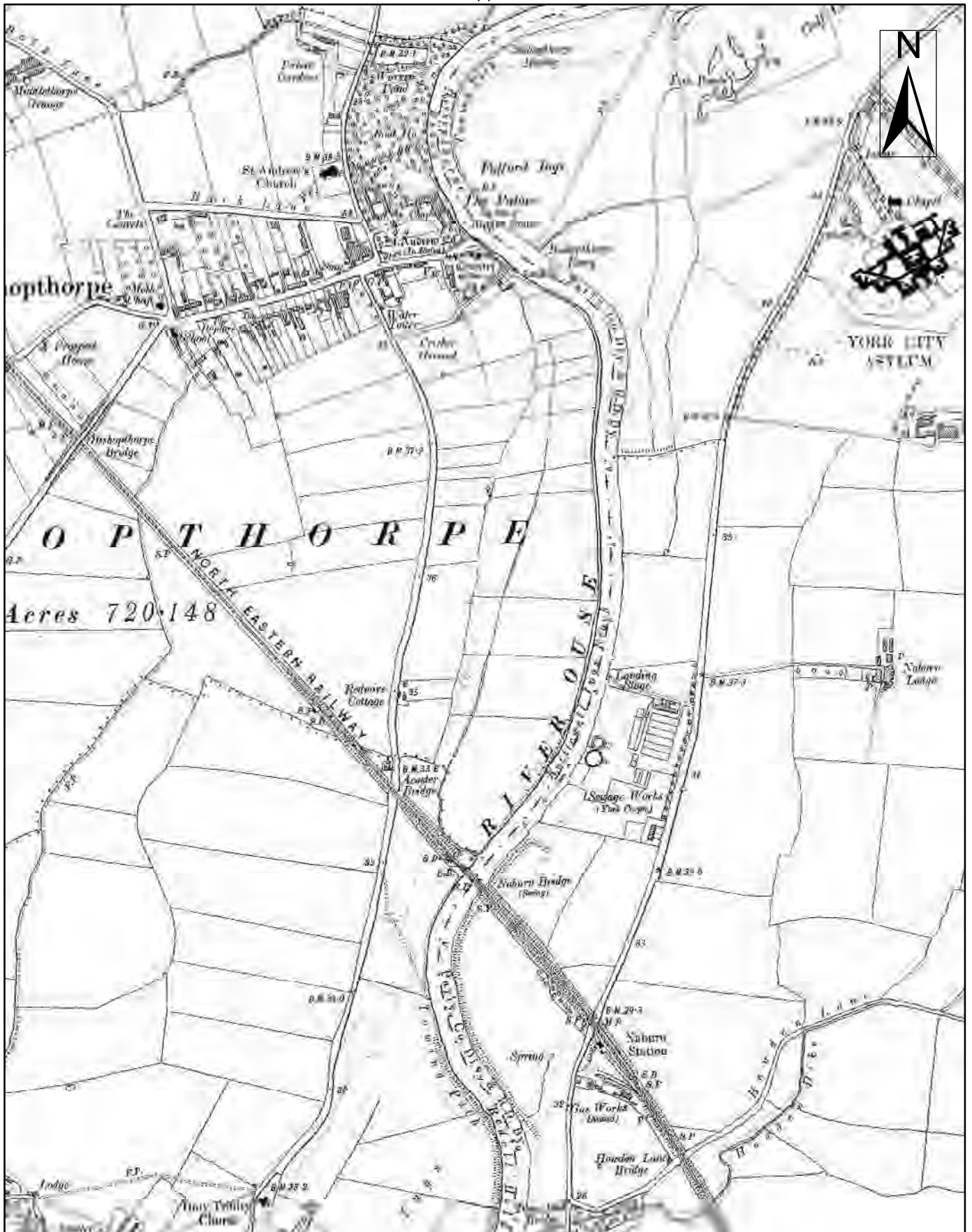
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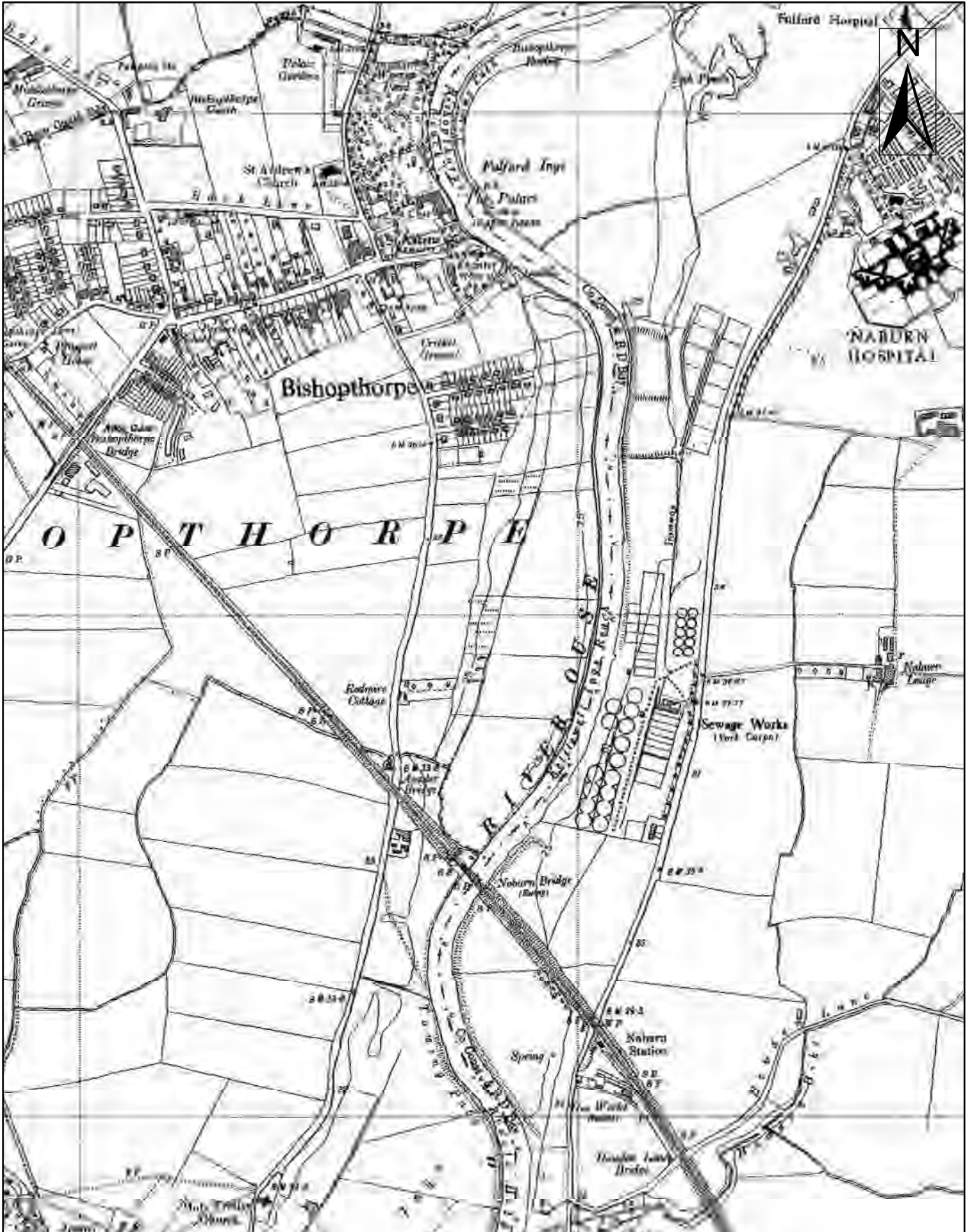
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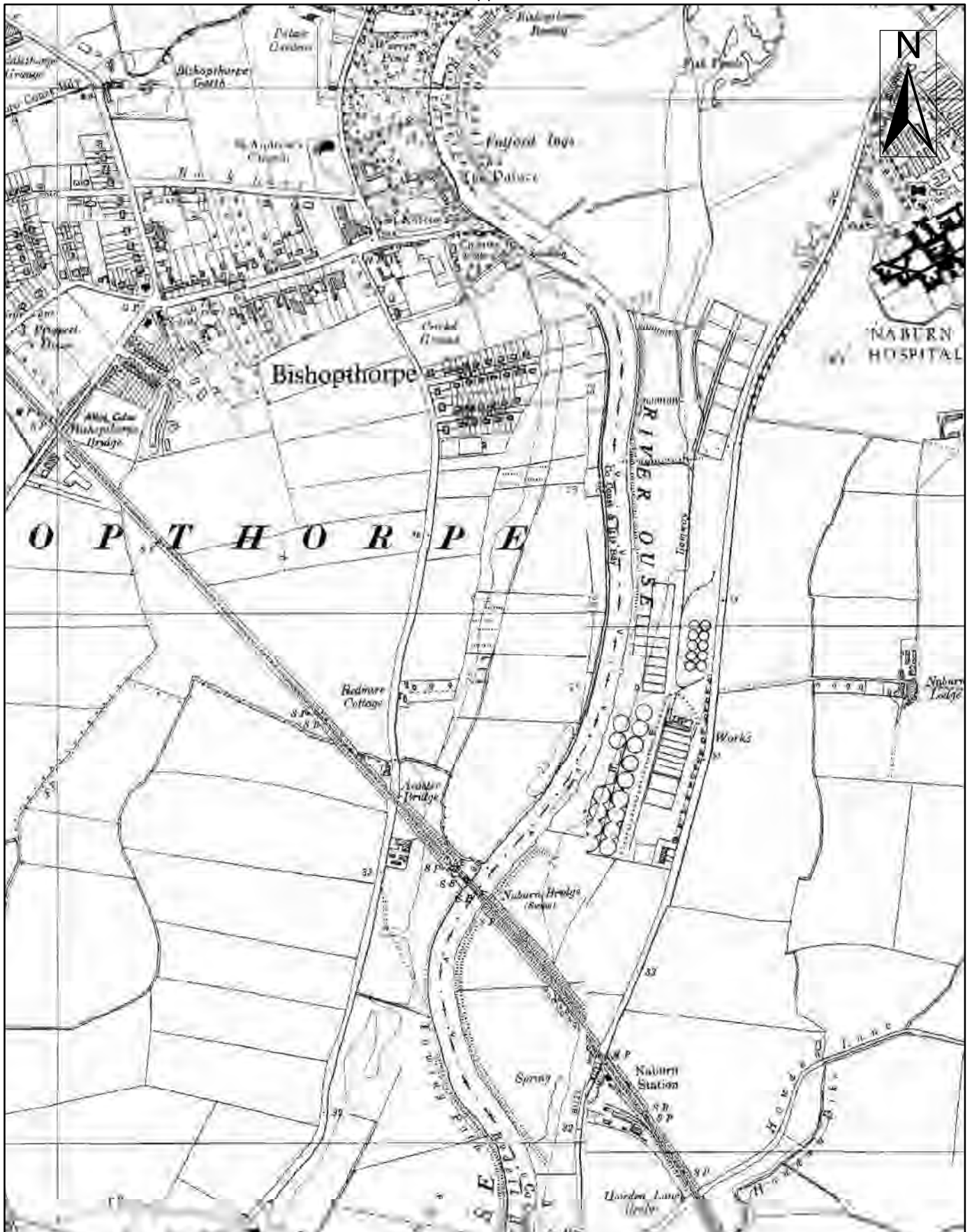
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## National Grid Series 1:10000 1958

Scale 1:10,000

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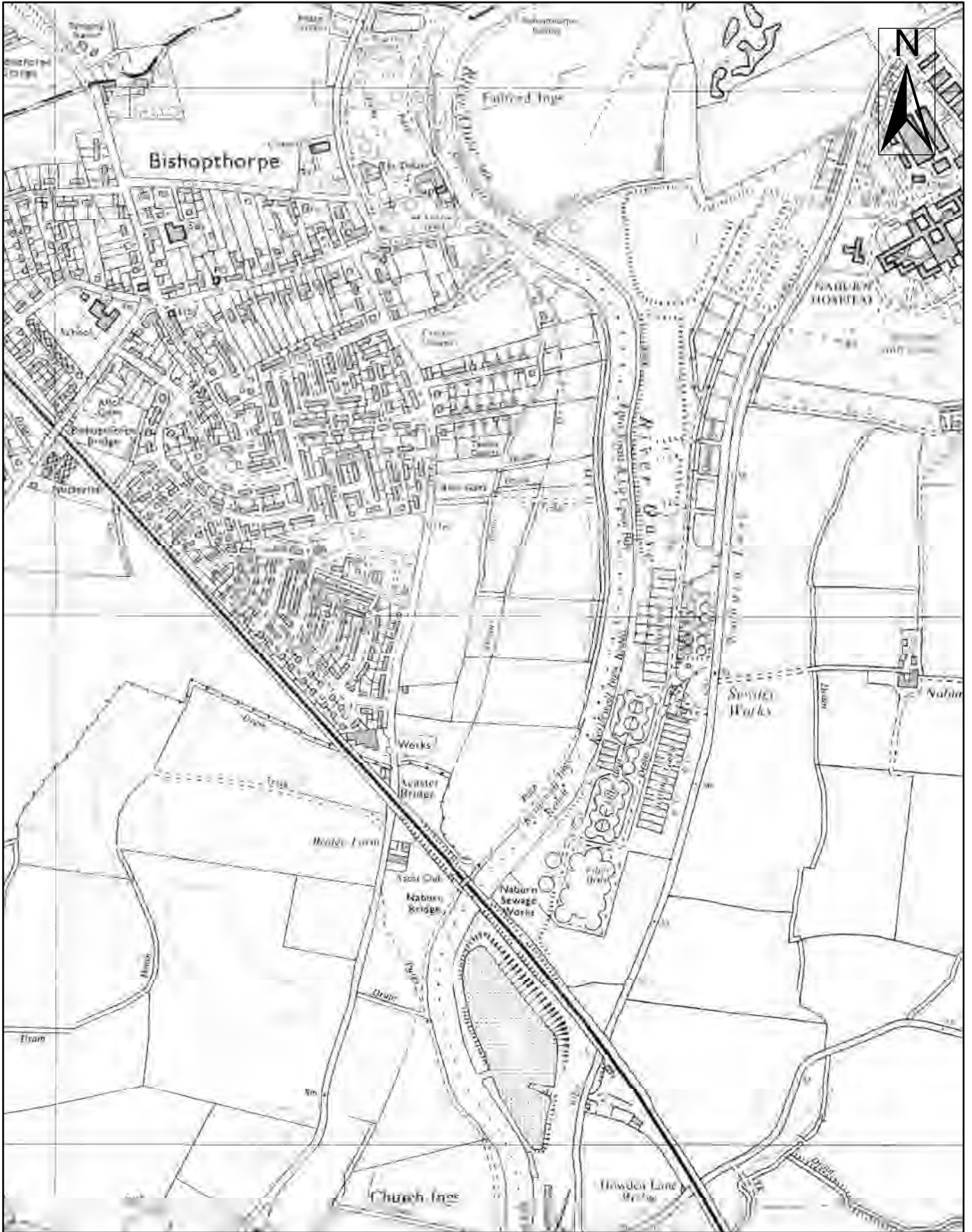
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## National Grid Series 1:10000 1982

Scale 1:10,000

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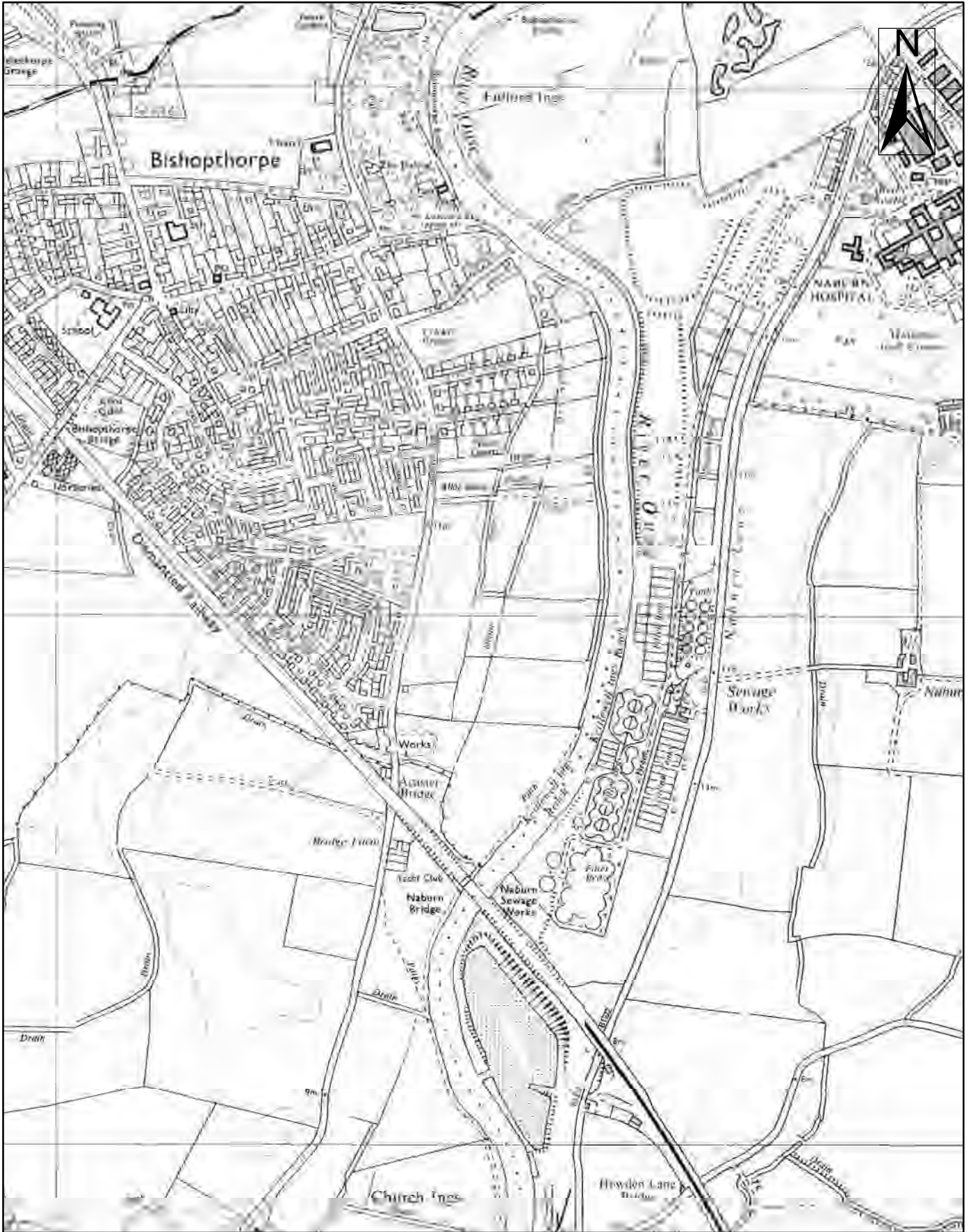
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## National Grid Series 1:10000 1985

Scale 1:10,000

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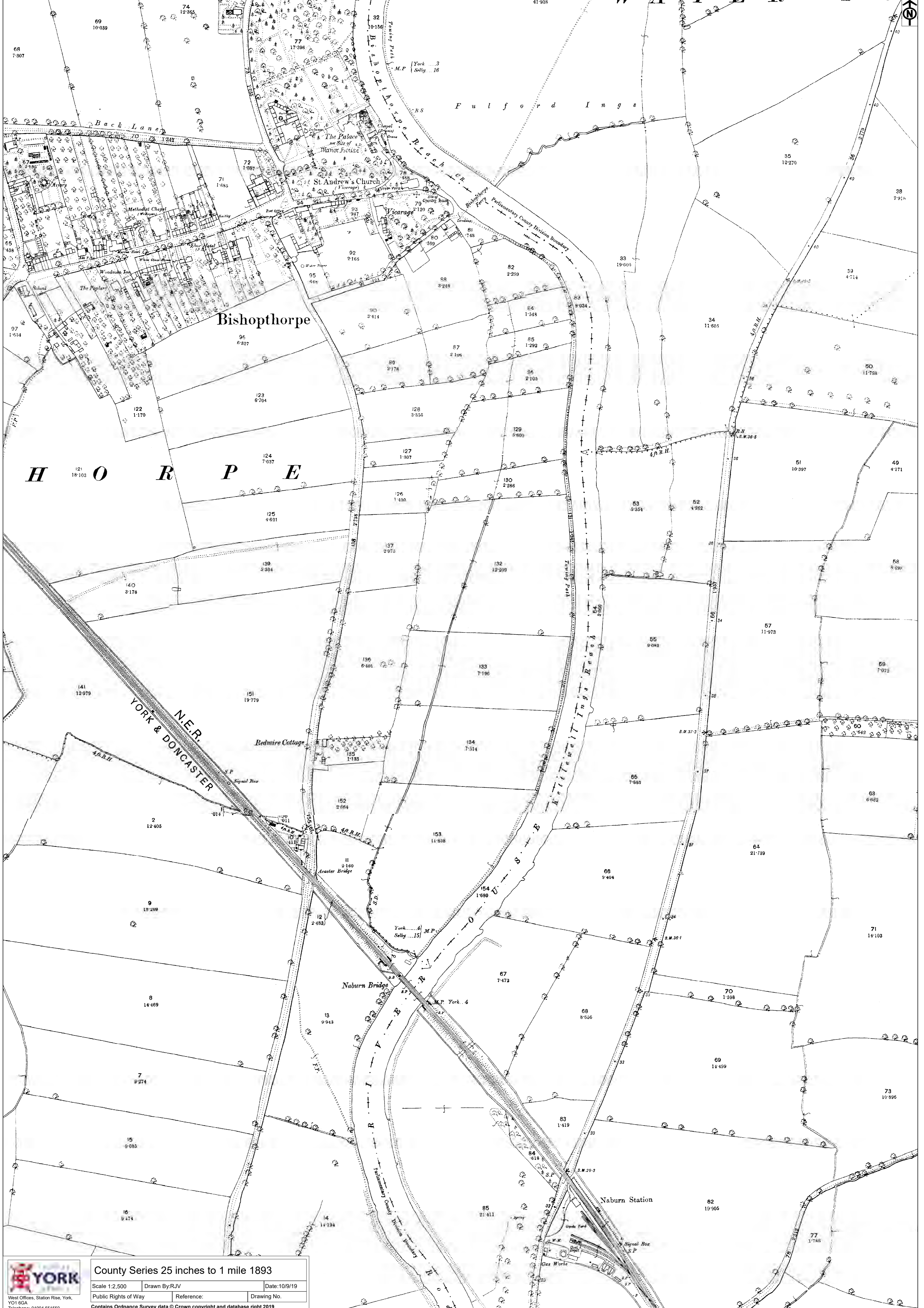
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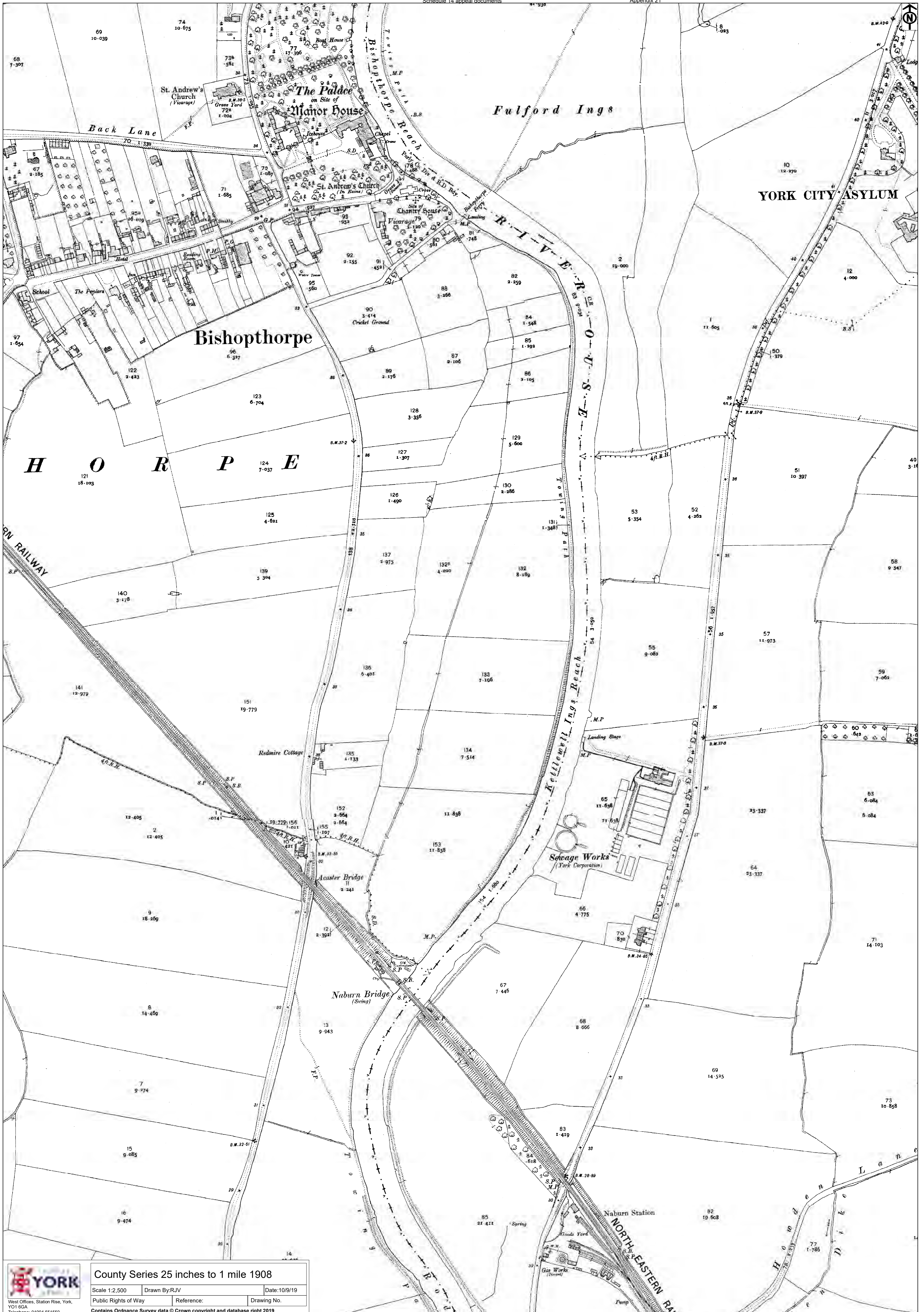
**YORK**

County Series 25 inches to 1 mile 1893

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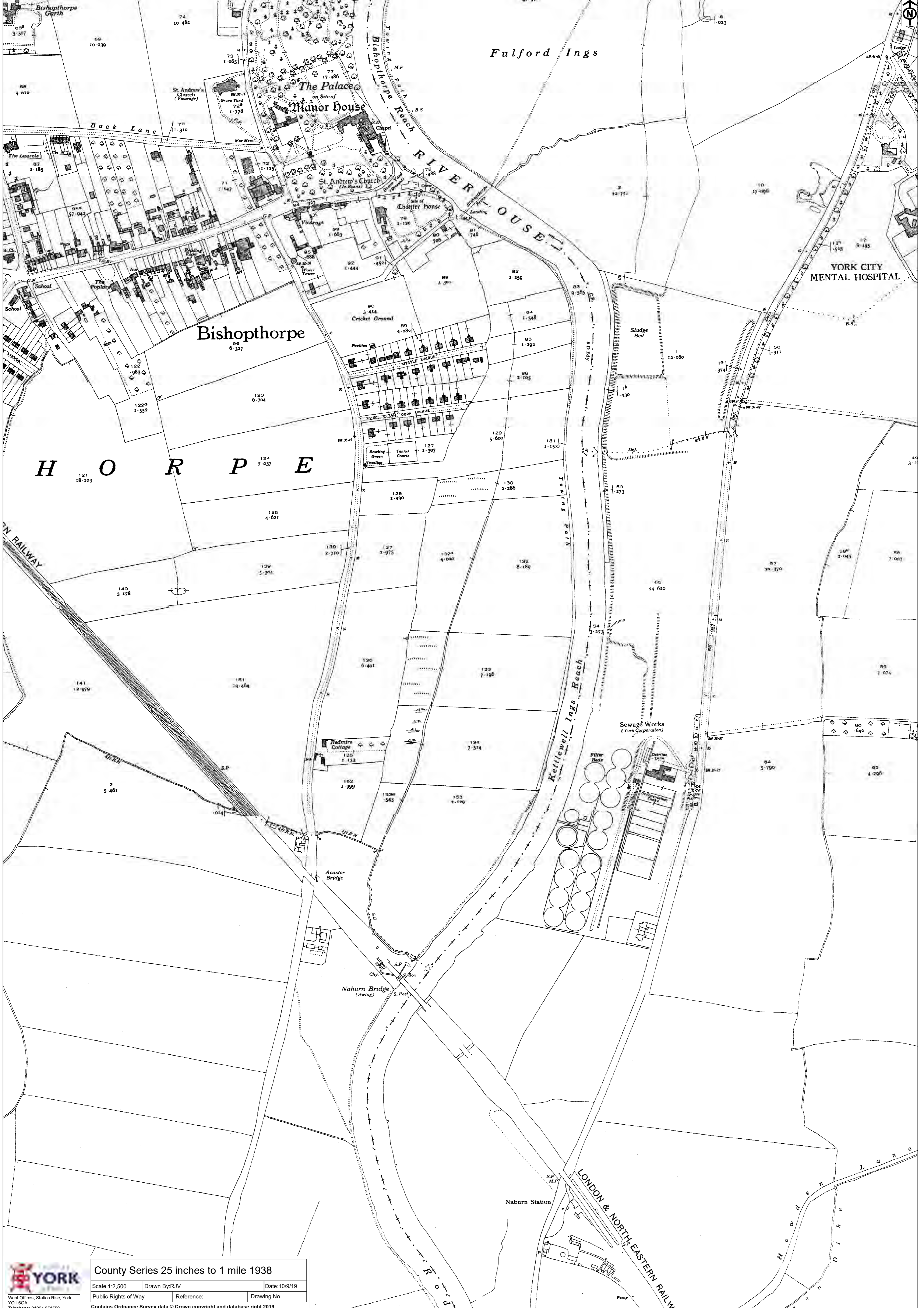


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**County Series 25 inches to 1 mile 1908**

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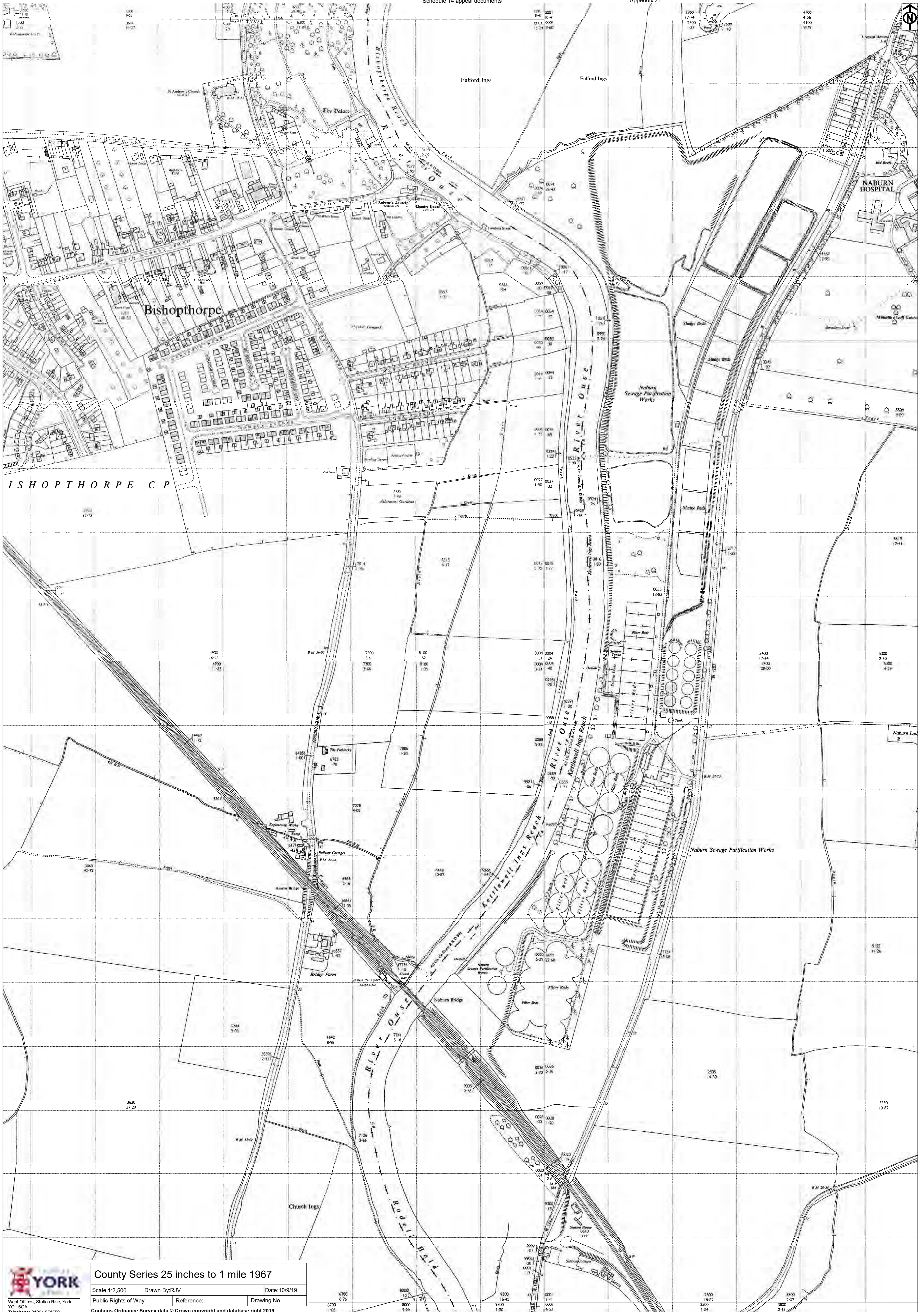


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County Series 25 inches to 1 mile 1938

Scale 1:2,500	Drawn By:RJV	Date:10/9/19
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BISHOPTHORPE CP

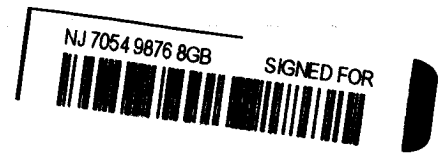
**YORK**  
 West Offices, Station Rise, York, YO1 6GA  
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**County Series 25 inches to 1 mile 1967**

Scale 1:2,500	Drawn By: RJV	Date: 10/9/19
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**From:** [REDACTED]  
**Sent:** 03 July 2020 15:54  
**To:** R [REDACTED]  
**Subject:** DMMO Chantry Lane To Ferry Lane Bishopthorpe



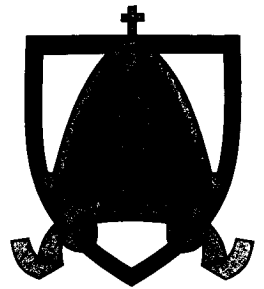
Dear [REDACTED]

Please find attached a further document to support our objection to the footpath between Chantry Lane and Ferry Lane being omitted from the riverside footpath to Acaster Malbis.

I have requested our clerk to forward a signed copy to you, by post, on Bishopthorpe Parish Council headed notepaper.

Kind regards,

[REDACTED]  
[REDACTED]  
[REDACTED]



# Bishopthorpe Parish Council

Chairman: [REDACTED]

[REDACTED]

The Village Hall  
40 Main Street  
Bishopthorpe, York  
YO23 2RB

Tel: [REDACTED]

Email: [REDACTED]

## **DEFINITIVE MAP MODIFICATION ORDER APPLICATION TO RECORD A PUBLIC FOOTPATH BETWEEN CHANTRY LANE BISHOPTHORPE AND ACASTER MALBIS 3**

### **ADDITIONAL SUBMISSION BY BISHOPTHORPE PARISH COUNCIL**

#### **INTRODUCTION**

1. Applications were made by Bishopthorpe Parish Council (**the Parish Council**) to North Yorkshire County Council and/or City of York Council (**CYC**) in 1994, 2004 and 2006 to make a Definitive Map Modification Order (**DMMO**) in respect of the route from Chantry Lane, Bishopthorpe, to Ferry Lane, Bishopthorpe and beyond.
2. This submission relates only to the section from Chantry Lane to Ferry Lane, shown on the map that accompanied CYC's report and minutes (**the Route Map**) as A to B. The Route Map is reproduced below:



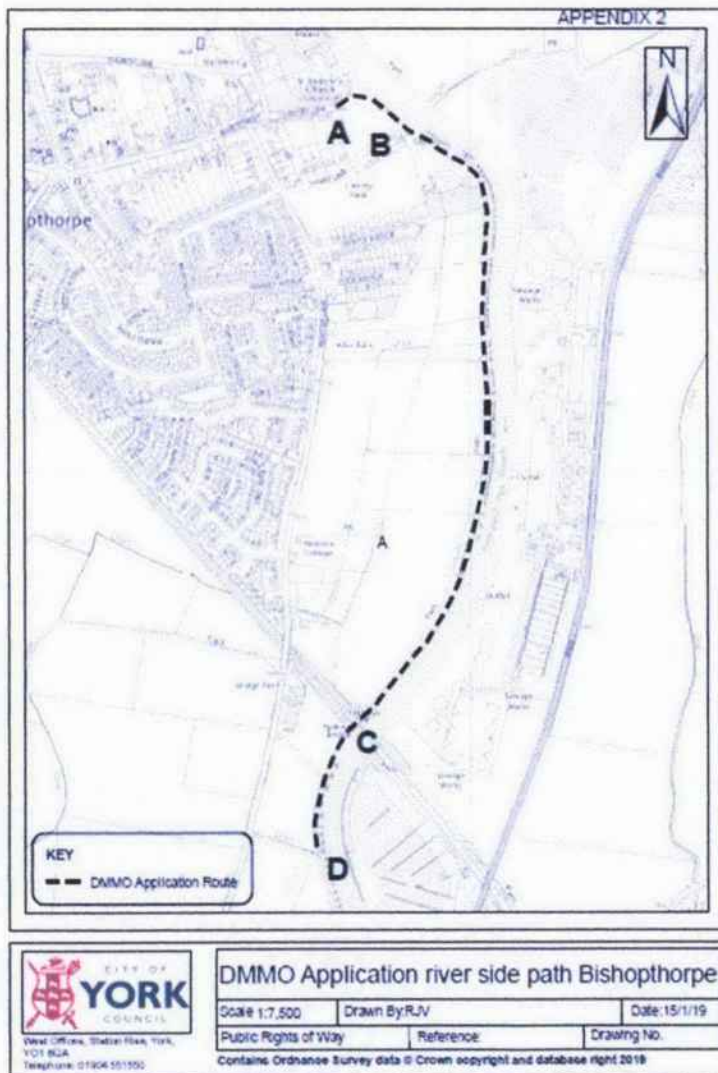


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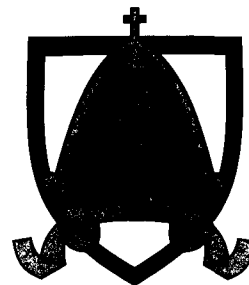
[Redacted text]

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[Redacted text]



3. The 1994 and 2004 applications differed in that the former related only to the route A to B to C and the latter to the route A to B to C to D.
4. The section A to B (Chantry Lane to Ferry Lane) runs through the churchyard of the former St Andrew's Church. The church has not been used since the 19<sup>th</sup>



# Bishopthorpe Parish Council

Chairman: [REDACTED]

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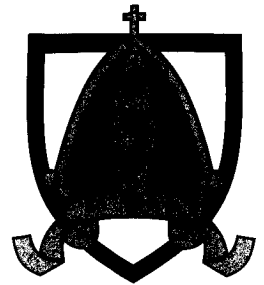
[REDACTED]

Century. Most of the building was demolished in 1899. A new church was built elsewhere in the village and is still in regular use. The façade of the former St Andrew's Church is still standing, surrounded by a grassed churchyard. The River Ouse runs on the other side of the footpath A to B.

5. Our understanding is that the churchyard ceased to be used regularly for burials after the "great flood" of 1892 (which apparently washed many bodies away from the graves) and that, since then, the graveyard has been used only on a very few occasions, for burials in old family graves (up to the 1920s) or for the interment of ashes. [REDACTED] (former Vicar of Bishopthorpe) wrote a *History of the Parish and Manor-House of Bishopthorpe*, published in 1905. He commented there (page 29) that:

*The main village drain was made in 1828, under the direction of [REDACTED] bearing the larger share of the cost. It is unfortunate that it should have been taken through the churchyard, as it prevented a large part of it from being used.*

6. The church façade and graveyard nevertheless remain as a prominent feature at the end of Chantry Lane, alongside the grounds of the Archbishop's Palace and the river.
7. The land itself was transferred by the Church Commissioners for England to its current owner, St Andrew's Trust Bishopthorpe, by two transfers dated 24<sup>th</sup> February 1999 (after the end of the "relevant period" mentioned in paragraph 18 below).
8. By Executive Member decision on 25 July 2019 York City Council (CYC) resolved:
  - 8.1. To approve 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 to the minutes (the Route Map) as a public footpath; and
  - 8.2. To reject the 2006 application because it was not "duly made" and (it appears) because "it relates only to the consecrated land (A-B)".



# Bishopthorpe Parish Council

Chairman: [REDACTED]

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9. The reference in CYC's minutes to consecrated land is made only in respect of the (rejected) 2006 application but the Parish Council's understanding is that these two resolutions should be read together, with the effect that the DMMO that has been made excludes the section A to B because that section crosses consecrated land.

10. The Parish Council has previously objected to the path from Chantry Lane Bishopthorpe to Ferry Lane Bishopthorpe (A to B) being excluded on this ground (that it is consecrated land).

11. In doing so the Parish Council said that it is debatable whether the path is, or ever has been, consecrated land but the Parish Council also quoted the following extract (the opening paragraph) of an Opinion of the Legal Advisory Commission to the General Synod dated October 2016 (**the LAC Opinion**):

*The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated a highway under section 31 of the Highways Act 1980.*

12. A copy of the LAC Opinion is available on the Church of England's website at:

[https://www.churchofengland.org/sites/default/files/2017-12/churchyards -  
\\_highways oct 2016 .pdf](https://www.churchofengland.org/sites/default/files/2017-12/churchyards_-_highways_oct_2016.pdf)

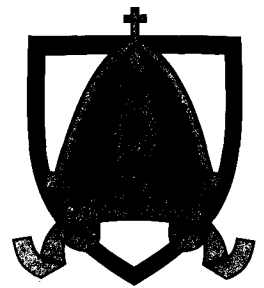
13. The purpose of this statement is to add comment to support the Parish Council's objection.

## Further supporting comments

14. The issue of whether the land crossed by the path is, or ever has been, consecrated land is unresolved, though the Parish Council understands informally from the Church of England that at least part of the route A to B shown on the Route Map may not be consecrated land. That is immaterial to the central point of this submission however, which is that there is no reason in law why a DMMO should not be made to record a public footpath over consecrated land.

# Bishopthorpe Parish Council

Chairman: [REDACTED]



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15. The rationale for our assertion is set out at length in the LAC Opinion. We feel it appropriate however to comment upon the reasons given by CYC in the report (dated 15 July 2019) of the Corporate Director of Economy and Place to the Decision Session – Executive Member for Transport on 25 July 2019 (**the Officer's Report**). The map at appendix 2 of the Officer's Report is the Route Map referred to above.

16. Section 16 of the Officer's Report says, as to the option of including the length A to B (Chantry Lane to Ferry Lane):

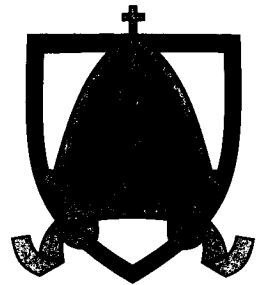
*This is not recommended because the evidence before the council shows that the land between A and B is consecrated and public rights of way cannot be established over consecrated ground. Therefore the requirements of section 31(1) of the Highways Act 1980 do not apply to the section of the application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

17. We believe that that statement is wrong in law.

18. Section 31(1) of the Highways Act 1980 says that:

*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.*

19. It would appear from the Officer's Report (see paragraphs 24 and 28 in particular) that there is sufficient evidence to satisfy the requirements of actual enjoyment by the public as of right and without interruption for a full period of 20 years, and that CYC was satisfied that there was nothing that would constitute "*sufficient evidence that there was no intention during that period to dedicate it*". For these purposes we note that the relevant period is 1974 to 1994, though the evidence submitted (51 evidence forms) alleges uninterrupted use between 1930 and



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2001. We are accordingly only addressing the issue of consecrated land in this submission.

20. This point is addressed in paragraphs 21 to 34 of the Officer's Report.

21. Paragraph 33 of the Officer's Report places reliance on two cases in support of its argument that, "*once land is consecrated it ...cannot give rise to a public right of way at common law.*", being the cases of St Martin Le Grand, York (1988) (relating to a private easement) and Oakley v Boston (1976) (access over glebe land).

22. We do not think that St Martin Le Grand, York supports that argument. We do not think that Oakley v Boston is relevant to the present case. Specifically:

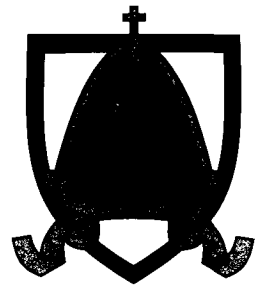
#### 22.1. St Martin Le Grand

In paragraph 33 of the Officer's Report it is stated that, in St Martin Le Grand, "*existence of a lost grant made by the church could not be presumed*". That is not our reading of the judgement in St Martin Le Grand.

In St Martin Le Grand the court held that a pedestrian right of way across the (consecrated) churchyard had been exercised as of right by the occupiers of the buildings around the churchyard for at least the previous hundred years and "*that it was to be presumed that such right had been conferred by way of lost faculty*".

The issue in St Martin Le Grand was as to the nature of the right of way – was it a permanent easement or one which could be terminated? It was on this point that the lack of a "faculty" (ecclesiastical licence) was relevant. That issue however is of no direct significance to our case, as St Martin Le Grand concerned a private easement and not one which (as in our case) is subject to the deemed dedication principles of the Highways Act 1980.

Paragraph 17 of the LAC Opinion explains further why the decision in St Martin Le Grand is not applicable to the question of whether a public right of way can be created across a consecrated churchyard, distinguishing



# Bishopthorpe Parish Council

Chairman: [REDACTED]

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between Section 2 of the Prescription Act 1832 (which was relevant to that case) and Section 31(1) of the Highways Act 1980 (which is relevant to ours).

## 22.2. Oakley v Boston

The case of *Oakley v Boston*, [1976] Q.B. 270 relates to a private easement over unconsecrated glebe land (and was decided specifically by reference to the provisions of the Ecclesiastical Leasing Acts 1842 and 1858 insofar as they related to glebe land).

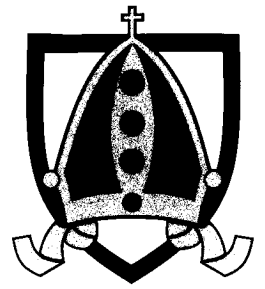
We would question the relevance of this case to our case, which relates to a *public right of way over consecrated land*. *Oakley v Boston* is not mentioned in the judgment in *St Mary's Longdon* (2011) (see paragraph 23 below), or in the *Widford Order Decision* (2013) (see paragraph 26 below), or in the *LAC Opinion* (2016) (or for that matter in the judgement in *St Martin Le Grand* (1988) (see paragraph 22.1 above).

23. Of direct relevance (but not mentioned in the Officer's Report) is the case of *St Mary's Longdon* (2011) 13 Ecc LJ 370, a decision of the Consistory Court of the Diocese of Worcester as to a footpath through the churchyard of *St Mary's Church, Longdon*. In that case the court said that:

*... if there exists a strip of land over a churchyard that is used just as though it were a footpath, the right of the public to use it to cross the churchyard should be presumed to have come into existence at some stage as a result of the due process of law.*

adding (our emphasis):

***... there is no reason in principle why there should not be a public right of way on foot across a churchyard, notwithstanding the effect of consecration. Such a right could have come into existence prior to the land in question being consecrated – either by specific grant or presumed dedication at common law. Alternatively, it could have come into existence following the consecration, again either by virtue of an actual dedication or by***



# Bishopthorpe Parish Council

Chairman: [REDACTED]

[REDACTED]  
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***presumed dedication***, authorised in either case by the authority of a faculty – even though, in the latter case, that is almost certain to be a legal fiction.

24. St Mary's Longdon expressly acknowledges the concept of presumed dedication, being the "legal fiction" on which Section 31(1) of the Highways Act 1980 is built. It enshrines the principle that, by enacting Section 31(1) in this way, parliament was saying that continuous user of 20 years or more, as of right and without interruption, would be deemed to constitute the dedication of the way/path, whether or not it was actually dedicated, whether or not the owner was empowered to dedicate it and whether or not some other licence, consent or permission (such as a faculty) was required.

25. That principle is well explained the LAC Opinion. In particular:

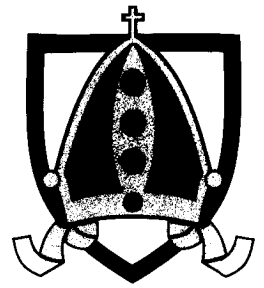
25.1. Section 13 of the LAC Opinion says:

*... the way becomes a highway by operation of law. As Scott LJ said in Jones v Bates [1938] 2 All ER 237 at 246, "The change of the law brought about by statute is that, upon proof of such user for the requisite period, the conclusion of dedication follows as a presumption juris et de jure, instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway."*

25.2. Sections 15 to 21 of the LAC Opinion set out the legislative history of what is now Section 31(1) of the Highways Act 1980. Earlier versions of that section had distinguished between two situations, one of which required 20 years' continuous use with the proviso that there had to be a person in possession of the land who could dedicate the way/path. The other required 40 years' use with no such proviso. The two provisions were later merged into what became section 31(1) of the Highways Act 1980 *with no such proviso*. This was a clear recognition that parliament intended that Section 31(1) would not depend upon there being a person in possession of the land who was capable of dedicating the way/path (such as an incumbent of a

# Bishopthorpe Parish Council

Chairman: [REDACTED]



[REDACTED]  
[REDACTED]  
40 Main Street  
Bishopthorpe, York  
YO23 2RB  
[REDACTED]

church, who would require a faculty in order validly to grant a permanent easement, such as a right of way).

26. Further evidence of the acceptance of the position can be found in the Order Decision dated: 24 May 2013 under reference Ref: FPS/M1900/7/66/M (Inspector [REDACTED], relating to a path passing through the churchyard of St John the Baptist's Church, Widford (**the Widford case**). In that case, the Inspector reviewed the legal precedents and concluded that:

*... if evidence supports a claim for deemed dedication under Section 31 of the 1980 Act, the legal precedents suggest that the claim can be accepted*

and made a DMMO accordingly.

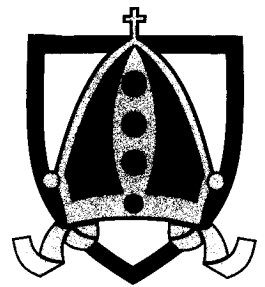
27. Having established that the authorities demonstrate that a public footpath may be created over consecrated land, the LAC Opinion (paragraphs 30 to 34) suggest that Section 31(8) *may* also be relevant. Section 31(8) says:

*Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.*

In that respect:

- 27.1. It is arguable whether the churchyard in this case was held "for public or statutory purposes" during the relevant period. Such an expression might more readily be used to describe a central government body or local authority undertaking statutory functions for the benefit of the general public.
- 27.2. The LAC Opinion (paragraph 31) nevertheless acknowledges the possibility that an incumbent in possession of a churchyard may be "in possession of such land for public purposes", as does the Inspector in the Widford case.
- 27.3. As the Inspector in the Widford case puts it (in paragraph 31 of his Order Decision):





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40 Main Street  
Bishophthorpe, York  
YO23 2RB

*However, notwithstanding whether it applies to the Church of England, if Section 31(8) is to be relevant, it must be demonstrable that the specific public right of way claimed is incompatible with the purposes for which the land over which it passes is held. Section 31(8) does not to my mind provide a blanket exemption. If a body falls within its scope, it still has to show that the particular right of way from which it seeks exemption from deemed dedication would be incompatible with its public or statutory purposes.*

27.4. Paragraphs 32 – 34 of the LAC Opinion say:

*The test is a pragmatic one, to be applied on the facts of the particular case.*

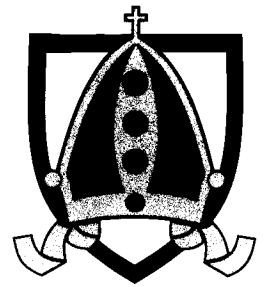
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*Where a claimed footpath has been used by the public for more than for more than 20 years, there are likely to be (for both statutory undertakers and churches) evidential problems in proving such incompatibility, whether one looks to what was foreseeable at the start or end of the 20 year period.*

...

*There could, however, be cases where continued use of the path by the public might impede further burials, or the proper functioning of the church and/or the churchyard. Even where the churchyard was closed by Order in Council, so that the public purpose of burial of bodies will have ceased and the existence of the highway could not be said to be inconsistent with future such burials, the footpath might be inconsistent with the future interment of ashes (which is permissible in a closed churchyard). The position is each case will need to be assessed on its own facts.*

27.5. We submit that there is nothing in the present circumstances that would make the use of the footpath incompatible with the functioning of the churchyard. The church has been closed since the 1890s and the building (except for its façade) was demolished then. Burials ceased in the 1920s. As noted in paragraph 5, a significant part of the graveyard was unusable since



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the main village drain was laid through it in 1828. Many of the gravestones have been removed from their original positions, leaving wide spaces between the relatively few that remain, allowing for free passage through the churchyard. This case could be readily distinguished from one where, for example, a public footpath might interfere with the ongoing use of a churchyard for burials.

28. In summary therefore the Parish Council submits that:

28.1. Section 31(1) of the Highways Act 1980 does apply to consecrated land;

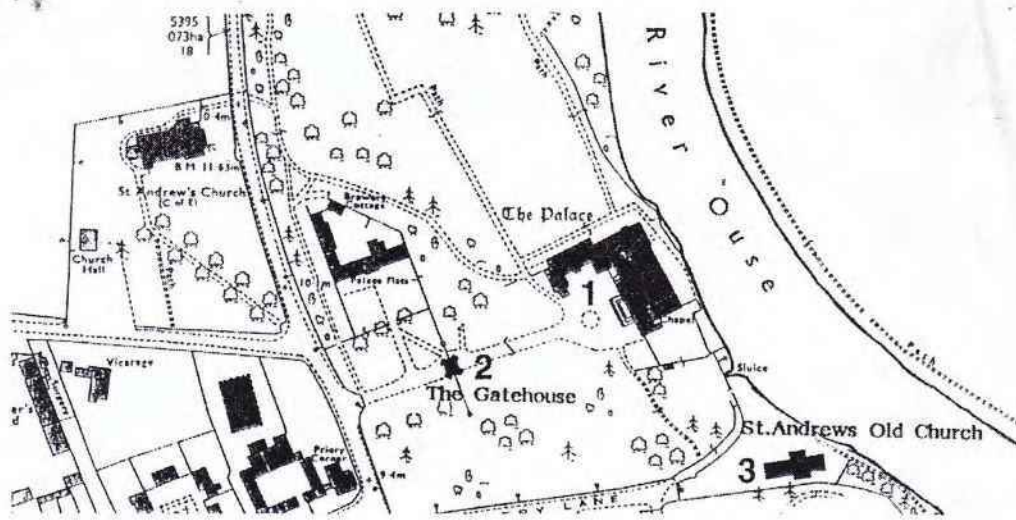
28.2. Accordingly, CYC was wrong to exclude from the DMMO the section of footpath from Chantry Lane to Ferry Lane (A to B on the Route Map) for the reason given (because "it relates only to the consecrated land (A-B)");

28.3. The evidence overwhelmingly supports the requirement of actual enjoyment by the public as of right and without interruption for a full period of 20 years, and there is no evidence of a lack of intention during that period to dedicate the path; and

28.4. If Section 31(8) does apply (which is arguable) then, in the circumstances of this case, the existence of a public footpath through the churchyard highway would not be incompatible with the purpose for which the land is or was held at the relevant time.

  
 - Bishopthorpe Parish Council

06 July 2020



#### The St. Andrew's Trust Project

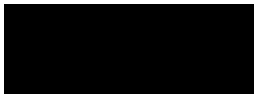
Encouraged by English Heritage, the St. Andrew's Trust was formed in 1996 as a local 'trust of last resort' to:

- conserve the riverbank in order to protect St. Andrew's churchyard and its monuments and to safeguard the riverside walk along this beautiful stretch of Bishopthorpe Reach.
- protect the ancient character and atmosphere of the site and further enhance its natural beauty in association with the Countryside section of the City Council.
- preserve and restore the church façade as a dramatic centre piece of the whole project.



Supported by the  
**Heritage Lottery Fund**

**BISHOPTHORPE PARISH COUNCIL**




48, Main Street  
Bishopthorpe  
York  
YO23 2RB

22 October 1999

The Secretary  
St Andrew's Trust,  
C/O Stable Yard,  
Chantry Lane,  
Bishopthorpe,

Dear Sir,

**Bishopthorpe Parish Council Pledge**

Following the meeting with  a donation to the trust was discussed at a recent meeting of the Parish Council.

It was agreed that subject to the following conditions a pledge of £2,000 would be made.

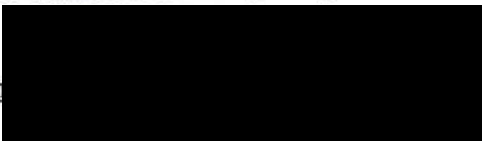
- 1) The pledge of £2,000 is subject to the rest of the shortfall being raised to complete the project as planned.
- 2) Permanent access to the <sup>by a SW</sup> footpath leading from Chantry lane to the Church Commissioners land between the Old Churchyard and Ferry Lane must be maintained.
- 3) Public access to the churchyard site must be maintained during the hours of daylight.

I enclose a copy of this letter for your signature and return acknowledging the above

Yours faithfully



These conditions are accepted by St Andrews Trust



Signature

Date

5 Nov. 1999

For official use:

**APPEAL FORM**

**Rights of Way Section**  
**The Planning Inspectorate**  
**3A Eagle**  
**Temple Quay House**  
**2 The Square**  
**Temple Quay**  
**Bristol**  
**BS1 6PN**

**WILDLIFE AND COUNTRYSIDE ACT 1981, SECTION 53 AND SCHEDULE 14**  
**Appeal to the Secretary of State Secretary of State for Environment, Food and Rural Affairs**  
**under paragraph 4 (1)**

1. Name: Bishopthorpe Parish Council	
2. Address: Village Hall, 40 Main Street, Bishopthorpe, York  Postcode: YO23 2RB Daytime telephone: [REDACTED] Email: bpcclerk@aol.com	
3. Name of surveying authority: City of York Council	
4. Title of definitive map: The Council of the City of York (Part of the former No 2 Area of the County of the West Riding of Yorkshire) Definitive Map and Statement	
5. Description of the way: Footpath between Chantry Lane and Ferry Lane, Bishopthorpe (extending to Acaster Malbis)	
6. Date and reference of application to surveying authority: 22 February 1994 (1994 02 Bishopthorpe); 12 May 2004 (2005 05 Bishopthorpe)	7. Date of service of notice of decision: 9 July 2021

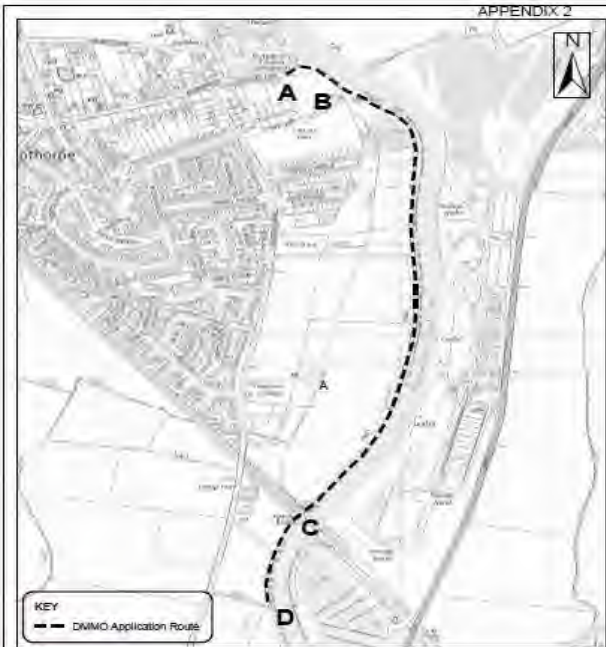
**Grounds of appeal:** *please note that your appeal cannot be considered if you have not submitted grounds of appeal :*

**Summary**

We believe that the reason given by City of York Council (CYC) to reject our applications (because they relate to land that is consecrated) is flawed, that the precedents on which they based their reasoning (set out in their Officer’s Report) are not applicable to the current situation and that there is ample other authority on which CYC could and should have relied to satisfy itself that a way over consecrated land can, after 20 years use by the public as of right, be deemed to have been dedicated a highway under section 31 of the Highways Act 1980.

**Detailed reasoning**

1. Applications were made by Bishopthorpe Parish Council (**the Parish Council**) to North Yorkshire County Council and/or City of York Council (**CYC**) in 1994 and 2004 to make a Definitive Map Modification Order (**DMMO**) in respect of the route from Chantry Lane, Bishopthorpe, to Ferry Lane, Bishopthorpe and beyond.
2. This appeal relates only to the section from Chantry Lane to Ferry Lane, shown on the map that accompanied CYC’s report and minutes (**the Route Map**) as A to B, which CYC refer to as “the section through St Andrew’s Church” in their letter of 9 July 2021, notifying us of their decision (**the Notification Letter**). The Route Map is reproduced below:



 <p><b>CITY OF YORK</b> COUNCIL</p> <p>West Offices, Station Road, York, YO1 1BA Telephone: 01904 551500</p>	<b>DMMO Application river side path Bishopthorpe</b>		
	Scale 1:7,500	Drawn By: R/JV	Date: 15/1/19
Public Rights of Way	Reference:	Drawing No:	
<small>Contains Ordnance Survey data © Crown copyright and database right 2018</small>			

See continuation sheet

**(please continue on separate sheet(s) if necessary)**

I enclose 2 separate copies of:

the application made to the surveying authority

the notices associated with the application\*

*\*It is evident from the application forms that notices were served in 1994 and 2004 but neither Bishopthorpe Parish Council nor City of York Council have copies on file after this lapse of time*

a map showing the alleged right(s) of way

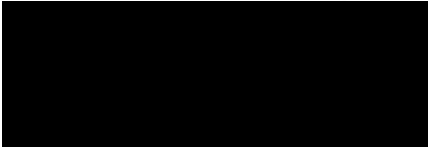
the authority's decision letter

other relevant supporting documentation:

(a) General Synod Legal Advisory Commission - Public rights of way over land forming part of a churchyard

(b) Index of documents submitted

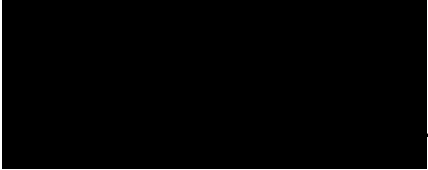
I understand that a copy of this appeal and supporting papers may be made available for public inspection.

Signed  .....Date ..31 July 2021

Chairman – Bishopthorpe Parish Council

### **Certification**

**I served notice of this appeal on the surveying authority on: 30 July 2021**

Signed  .....Date .....30 July 2021..

Chairman – Bishopthorpe Parish Council

**Note: Your appeal will be invalid if you fail to correctly serve notice of your appeal on the surveying authority within the 28 day deadline.**

### **How we use your information**

The Planning Inspectorate takes its data protection responsibilities for the information you provide us with very seriously. To find out more about how we use and manage your personal data, please go to our [privacy notice](#)

Please provide an index of the documents submitted with this form and ensure your documents are clearly labelled.

## Continuation sheet

### Grounds of appeal, continued

3. The 1994 and 2004 applications differed in that the former related only to the route A to B to C and the latter to the route A to B to C to D.
4. The section A to B (Chantry Lane to Ferry Lane) runs through the churchyard of the former St Andrew's Church. We believe that the history of its use is relevant to this appeal. The church has not been used since the 19<sup>th</sup> Century. Most of the building was demolished in 1899. A new church was built elsewhere in the village and is still in regular use. The façade of the former St Andrew's Church is still standing, surrounded by a grassed churchyard. The River Ouse runs on the other side of the footpath A to B.
5. Our understanding is that the churchyard ceased to be used regularly for burials after the "great flood" of 1892 (which apparently washed many bodies away from the graves) and that, since then, the graveyard has been used only on a very few occasions, for burials in old family graves (up to the 1920s) or for the interment of ashes. John R Keble MA (former Vicar of Bishopthorpe) wrote a *History of the Parish and Manor-House of Bishopthorpe*, published in 1905. He commented there (page 29) that:

*The main village drain was made in 1828, under the direction of Mr Raisin, Archbishop Harcourt bearing the larger share of the cost. It is unfortunate that it should have been taken through the churchyard, as it prevented a large part of it from being used.*
6. The church façade and graveyard nevertheless remain as a prominent feature at the end of Chantry Lane, alongside the grounds of the Archbishop's Palace and the river.
7. The land itself was transferred by the Church Commissioners for England to its current owner, St Andrew's Trust Bishopthorpe, by two transfers dated 24<sup>th</sup> February 1999 (after the end of the "relevant period" mentioned in paragraph 16 below).
8. We were informed by CYC on 9 July 2021 (in the Notification Letter) that the executive member decided to exclude from the order the section through St Andrew's Church (section A to B on the Route Map) "*because it relates to land that is consecrated*".
9. The Parish Council believes that the decision of CYC is wrong and that there is no reason in law or otherwise why a right of way cannot be established over consecrated land in such circumstances.
10. In support of that argument, we would refer you to the following extract (the opening paragraph) of an Opinion of the Legal Advisory Commission to the General Synod dated October 2016 (**the General Synod LAC paper**):

*The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated a highway under section 31 of the Highways Act 1980.*

11. A copy of the General Synod LAC paper is included within the documents submitted with this appeal. It is also available on the Church of England's website at:

[https://www.churchofengland.org/sites/default/files/2017-12/churchyards\\_-\\_highways\\_oct\\_2016\\_.pdf](https://www.churchofengland.org/sites/default/files/2017-12/churchyards_-_highways_oct_2016_.pdf)



12. We have also considered the reasons given by CYC in the report (dated 15 July 2019) of the Corporate Director of Economy and Place to the Decision Session – Executive Member for Transport on 25 July 2019 (**the Officer’s Report**). The map at appendix 2 of the Officer’s Report is the Route Map referred to above.

13. Section 16 of the Officer’s Report says, as to the option of including the length A to B (Chantry Lane to Ferry Lane):

*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.*

14. We believe that that statement is wrong in law.

15. Section 31(1) of the Highways Act 1980 says that:

*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.*

16. It would appear from the Officer’s Report (see paragraphs 24 and 28 in particular) that there is sufficient evidence to satisfy the requirements of actual enjoyment by the public as of right and without interruption for a full period of 20 years, and that CYC was satisfied that there was nothing that would constitute “*sufficient evidence that there was no intention during that period to dedicate it*”. For these purposes we note that the relevant period is 1974 to 1994, though the evidence submitted (51 evidence forms) alleges uninterrupted use between 1930 and 2001. We are accordingly only addressing the issue of consecrated land in this submission.

17. This point is addressed in paragraphs 21 to 34 of the Officer’s Report.

18. Paragraph 33 of the Officer’s Report places reliance on two cases in support of its argument that, “*once land is consecrated it ...cannot give rise to a public right of way at common law.*”, being the cases of *St Martin Le Grand, York* (1988) (relating to a private easement) and *Oakley v Boston* (1976) (access over glebe land).

19. We do not think that *St Martin Le Grand, York* supports that argument. We do not think that *Oakley v Boston* is relevant to the present case. Specifically:

19.1. St Martin Le Grand

In paragraph 33 of the Officer’s Report, it is stated that, in *St Martin Le Grand*, “*existence of a lost grant made by the church could not be presumed*”. That is not our reading of the judgement in *St Martin Le Grand*.

In *St Martin Le Grand* the court held that a pedestrian right of way across the (consecrated) churchyard had been exercised as of right by the occupiers of the buildings around the churchyard for at least the previous hundred years and “*that it was to be presumed that such right had been conferred by way of lost faculty*”.

The issue in St Martin Le Grand was as to the nature of the right of way – was it a permanent easement or one which could be terminated? It was on this point that the lack of a “faculty” (ecclesiastical licence) was relevant. That issue however is of no direct significance to our case, as St Martin Le Grand concerned a private easement and not one which (as in our case) is subject to the deemed dedication principles of the Highways Act 1980, as to the creation of a public right of way enjoyed by the public.

Paragraph 17 of the General Synod LAC paper explains further why the decision in St Martin Le Grand is not applicable to the question of whether a public right of way can be created across a consecrated churchyard, distinguishing between Section 2 of the Prescription Act 1832 (which was relevant to that case) and Section 31(1) of the Highways Act 1980 (which is relevant to ours).

## 19.2. Oakley v Boston

The case of *Oakley v Boston*, [1976] Q.B. 270 relates to a *private* easement over *unconsecrated* glebe land (and was decided specifically by reference to the provisions of the Ecclesiastical Leasing Acts 1842 and 1858 insofar as they related to glebe land).

We would question the relevance of this case to our case, which relates to a *public* right of way over *consecrated* land. *Oakley v Boston* is not mentioned in the judgment in *St Mary’s Longdon* (2011) (see paragraph 20 below), or in the *Widford Order Decision* (2013) (see paragraph 23 below), or in the General Synod LAC paper (2016) (or for that matter in the judgement in *St Martin Le Grand* (1988) (see paragraph 19.1 above).

20. Of direct relevance (but not mentioned in the Officer’s Report) is the case of *St Mary’s Longdon* (2011) 13 Ecc LJ 370, a decision of the Consistory Court of the Diocese of Worcester as to a footpath through the churchyard of St Mary’s Church, Longdon. In that case the court said that:

*... if there exists a strip of land over a churchyard that is used just as though it were a footpath, the right of the public to use it to cross the churchyard should be presumed to have come into existence at some stage as a result of the due process of law.*

adding (our emphasis):

*... **there is no reason in principle why there should not be a public right of way on foot across a churchyard, notwithstanding the effect of consecration.** Such a right could have come into existence prior to the land in question being consecrated – either by specific grant or presumed dedication at common law. Alternatively, it could have come into existence following the consecration, again either by virtue of an actual dedication **or by presumed dedication**, authorised in either case by the authority of a faculty – even though, in the latter case, that is almost certain to be a legal fiction.*

21. *St Mary’s Longdon* expressly acknowledges the concept of presumed dedication, being the “legal fiction” on which Section 31(1) of the Highways Act 1980 is built. It enshrines the principle that, by enacting Section 31(1) in this way, parliament was saying that continuous user of 20 years or more, as of right and without interruption, would be deemed to constitute the dedication of the way/path, whether or not it was actually dedicated, whether or not the owner was empowered to dedicate it and whether or not some other licence, consent or permission (such as a faculty) was required.

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*... the way becomes a highway by operation of law. As Scott LJ said in Jones v Bates [1938] 2 All ER 237 at 246, "The change of the law brought about by statute is that, upon proof of such user for the requisite period, the conclusion of dedication follows as a presumption juris et de jure, instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway."*

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23. Further evidence of the acceptance of the position can be found in the Order Decision dated: 24 May 2013 under reference Ref: FPS/M1900/7/66/M (Inspector Mr Roger Pritchard), relating to a path passing through the churchyard of St John the Baptist's Church, Widford **(the Widford case)**. In that case, the Inspector reviewed the legal precedents and concluded that:

*... if evidence supports a claim for deemed dedication under Section 31 of the 1980 Act, the legal precedents suggest that the claim can be accepted*

and made a DMMO accordingly.

24. Having established that the authorities demonstrate that a public footpath may be created over consecrated land, the General Synod LAC paper (paragraphs 30 to 34) suggest that Section 31(8) *may* also be relevant. We feel it appropriate for completeness therefore also to comment on that in the context of the current appeal. Section 31(8) says:

*Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.*

In that respect:

24.1. It is arguable whether the churchyard in this case was held "for public or statutory purposes" during the relevant period. Such an expression might more readily be used to describe a central government body or local authority undertaking statutory functions for the benefit of the general public.

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*The test is a pragmatic one, to be applied on the facts of the particular case.*

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*Where a claimed footpath has been used by the public for more than for more than 20 years, there are likely to be (for both statutory undertakers and churches) evidential problems in proving such incompatibility, whether one looks to what was foreseeable at the start or end of the 20 year period.*

...

*There could, however, be cases where continued use of the path by the public might impede further burials, or the proper functioning of the church and/or the churchyard. Even where the churchyard was closed by Order in Council, so that the public purpose of burial of bodies will have ceased and the existence of the highway could not be said to be inconsistent with future such burials, the footpath might be inconsistent with the future interment of ashes (which is permissible in a closed churchyard). The position in each case will need to be assessed on its own facts.*

24.5. We submit that there is nothing in the present circumstances that would make the use of the footpath incompatible with the functioning of the churchyard. The church has been closed since the 1890s and the building (except for its façade) was demolished then. Burials ceased in the 1920s. As noted in paragraph Our understanding is that the churchyard ceased to be used regularly for burials after the “great flood” of 1892 (which apparently washed many bodies away from the graves) and that, since then, the graveyard has been used only on a very few occasions, for burials in old family graves (up to the 1920s) or for the interment of ashes. John R Keble MA (former Vicar of Bishopthorpe) wrote a *History of the Parish and Manor-House of Bishopthorpe*, published in 1905. He commented there (page 29) that: a significant part of the graveyard was unusable since the main village drain was laid through it in 1828. Many of the gravestones have been removed from their original positions, leaving wide spaces between the relatively few that remain, allowing for free passage through the churchyard. This case could be readily distinguished from one where, for example, a public footpath might interfere with the ongoing use of a churchyard for burials.

25. In conclusion therefore the Parish Council submits that:

25.1. Section 31(1) of the Highways Act 1980 does apply to consecrated land in the same way as to other land, so that a way over consecrated land may be deemed to have been dedicated pursuant to that section;

25.2. Accordingly, CYC was wrong to reject the section of footpath through St Andrew’s Church (A to B on the Route Map) for the reason given (“because it relates to land that is consecrated”);

25.3. The evidence overwhelmingly supports the requirement of actual enjoyment by the public as of right and without interruption for a full period of 20 years, and there is no evidence of a lack of intention during that period to dedicate the path; and

25.4. If Section 31(8) does apply (which is arguable) then, in the circumstances of this case, the existence of a public footpath through the churchyard highway would not be incompatible with the purpose for which the land is or was held at the relevant time.

**WILDLIFE AND COUNTRYSIDE ACT 1981, SECTION 53 AND SCHEDULE 14  
Appeal to the Secretary of State Secretary of State for Environment, Food  
and Rural Affairs under paragraph 4 (1)**

s

**Bishopthorpe Parish Council**

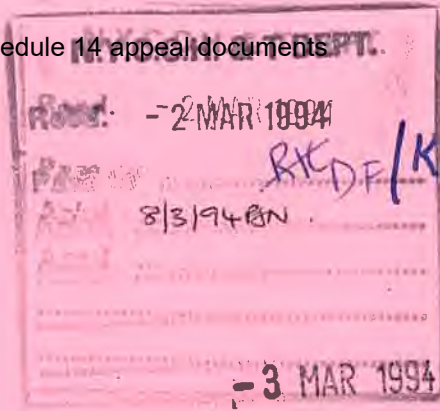
**The Council of the City of York (Part of the former No 2 Area of the County  
of the West Riding of Yorkshire) Definitive Map and Statement**

**Footpath between Chantry Lane and Ferry Lane, Bishopthorpe (extending  
to Acaster Malbis)**

**INDEX OF DOCUMENTS SUBMITTED**

1. 1994 Application – application form dated 22 February 1994
2. 2004 Application – application form dated 2 May 2004
3. Map - Map showing alleged right of way (2005 05 Bishopthorpe)
4. Decision letter – letter from City of York Council dated 9 July 2021
5. General Synod LAC paper - paper published by General Synod Legal Advisory Commission on Public rights of way over land forming part of a churchyard

72/8/15(R)



FORM W.C.A.5

**FORM OF APPLICATION FOR A MODIFICATION ORDER**

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**The Wildlife and Countryside  
(Definitive Maps and Statements)  
Regulations 1983 (Schedule 7)**

**DEFINITIVE MAP AND STATEMENT**  
**DISTRICT OF** SELBY  
**PARISH OF** BISHOPTHORPE

I/We (name of applicant) BISHOPTHORPE PARISH COUNCIL  
Of (address of applicant) 41 RAMSEY AVENUE, BISHOPTHORPE, YORK YO2 1SQ.

hereby apply for an order under Section 53 of the Wildlife and Countryside Act 1981 modifying the Definitive Map and Statement by

1. Deleting the \*(footpath) (bridleway) (by-way open to all traffic)  
shown as number  
from  
to
2. Adding the \*(footpath) (bridleway) (by-way open to all traffic)  
from The Old Churchyard, Bishopthorpe  
to Naburn Swing Bridge
3. \*(Upgrading) (downgrading) to a \*(footpath) (bridleway) (by-way open to all traffic) the \*(footpath) (bridleway) (by-way open to all traffic)  
shown as number  
from  
to

Continued over . . . . .

\*Please delete as appropriate

4. \*(Varying) (adding to) the particulars relating to the \*(footpath) (bridleway) (by-way open to all traffic)

shown as number

from

to

by providing that

I/We attach a map and copies of the following documentary evidence (including statements of witnesses) in support of this application:-

**List of Documents provided**

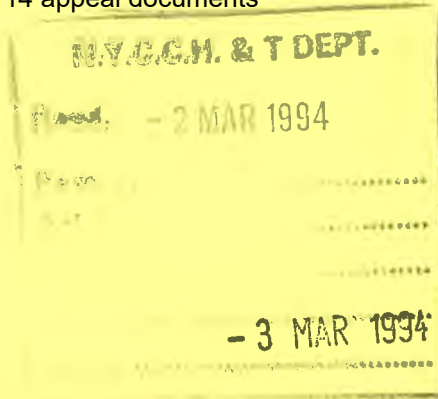
- 10 - Public Rights of Way evidence form.
- 1 - Map showing pathway.
- 1 - Form W.C.A.7

Dated . . . February 22nd . . . . . 19 94 . . .

Signed *Alan S. Loggins*  
Parish Council Clerk.

\*Please delete as appropriate





FORM W.C.A.7

**FORM OF CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR A MODIFICATION ORDER**

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**The Wildlife and Countryside  
(Definitive Maps and Statements)  
Regulations 1983**

**DEFINITIVE MAP AND STATEMENT**

**DISTRICT OF** SELBY  
**PARISH OF** BISHOPTHORPE

I/We (name of applicant) BISHOPTHORPE PARISH COUNCIL

Of (address of applicant) 41 RAMSEY AVENUE, BISHOPTHORPE, YORK YO2 1SQ

hereby certify that the requirements of paragraph 2 of Schedule 14 to the Wildlife and Countryside Act 1981 have been complied with. (Paragraph 2 is printed on the reverse of this form).

**Details of Modification**

Claimed - New public right of way.

**List of Owners and Occupiers Notified**

BISHOPTHORPE PARISH COUNCIL  
BISHOPTHORPE FEOFFEEES  
A BLACKER (BLACKER BROS)  
BRITISH RAIL

Dated.....February 22nd.....19 94.

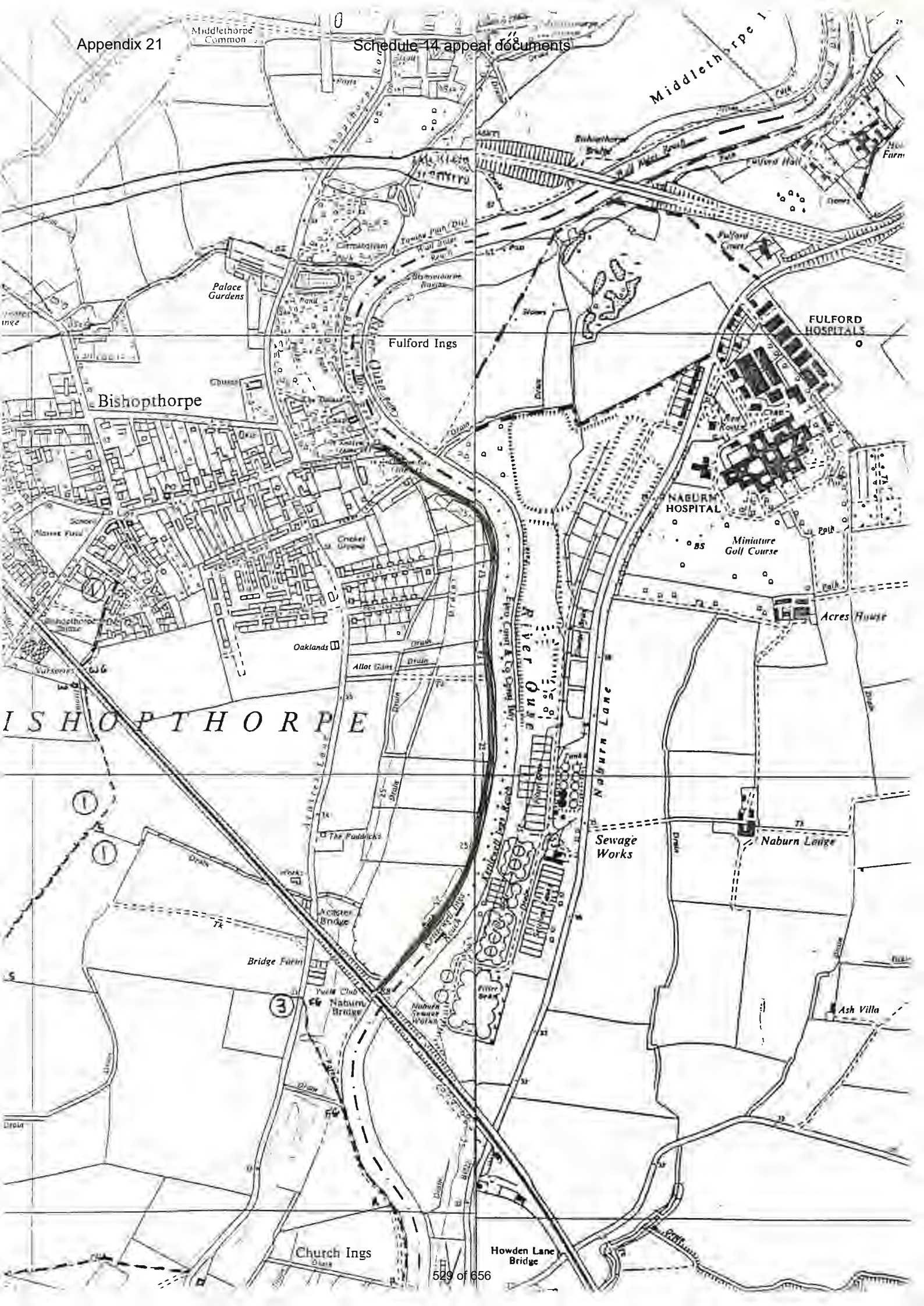
Signed... *Alan S Rogos* ...  
Parish Council Clerk.

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**Schedule 14**

**Paragraph 2**

2. (1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates.
- (2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description "owner" or "occupier" of the land (describing it) and by affixing it to some conspicuous object or objects on the land.
- (3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.
- (4) Every notice or certificate under this paragraph shall be in the prescribed form.



Middlethorpe Common

Middlethorpe 1

Palace Gardens

Fulford Ings

FULFORD HOSPITALS

Bishopthorpe

NABURN HOSPITAL

Miniature Golf Course

Acres House

BISHOPTHORPE

Oaklands

Allot Gals

Naburn Lane

Sewage Works

Naburn Lodge

Bridge Farm

Naburn Bridge

Ash Villa

Church Ings

Howden Lane Bridge



## **FORM OF APPLICATION FOR A MODIFICATION ORDER**

**WILDLIFE & COUNTRYSIDE ACT 1981**  
**The Wildlife and Countryside**  
**(Definitive Maps and Statements)**  
**Regulations 1983 (Schedule 7)**

### **DEFINITIVE MAP AND STATEMENT**

**WITHIN THE CITY OF YORK COUNCIL BOUNDARY**

**IN THE PARISH OF** {Insert Name of Parish} **BISHOPTHORPE**

To: City of York Council

of: Director of Environment and Development Services.  
 9 St Leonard's Place  
 York YO1 2ET  
 F.A.O. The Public Rights of Way Officer

I / We\* {Name of Applicant} **BISHOPTHORPE PARISH COUNCIL**

Of {Address of Applicant} **% 48 MAIN STREET, BISHOPTHORPE**

hereby apply for an Order under Section 53 of the Wildlife and Countryside Act 1981  
 modifying the Definitive Map and Statement by

1. Deleting the \*{footpath} {bridleway} {by-way open to all traffic}

shown as number

from

to

2. Adding the \*{footpath} {bridleway} {by-way open to all traffic}

from **CHANNY LANE, BISHOPTHORPE.**

to **ACASTER MARLB PUBLIC FOOTPATH No 3.**

3. **{Upgrading} {Downgrading} to a {footpath} {bridleway} {by-way open to all traffic}**  
the **{footpath} {bridleway} {by-way open to all traffic}**

shown as number

from

to

4. **{Varying} {Adding to} the particulars relating to the {footpath} {bridleway} {by-way open to all traffic}**

shown as number

from

to

by providing that

and shown on the map annexed hereto.

I / We\* attach copies of the following documentary evidence (including statements of witnesses) in support of this application:-

**List of Documents Provided**

See file (Paula Dunn).

Dated 12<sup>th</sup> MAY 2004 Signed 

\*Please delete as appropriate



## **FORM OF CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR A MODIFICATION ORDER**

### **WILDLIFE & COUNTRYSIDE ACT 1981**

**The Wildlife and Countryside  
(Definitive Maps and Statements)  
Regulations 1983 (Schedule 9)**

### **DEFINITIVE MAP AND STATEMENT**

### **WITHIN THE CITY OF YORK COUNCIL BOUNDARY**

**IN THE PARISH OF** {Insert Name of Parish} *BISHOPTHORPE*

To: City of York Council

of: Director of Environment and Development Services  
9 St Leonard's Place  
York YO1 2ET  
F.A.O. The Public Rights of Way Officer

I / We {Name of Applicant} *BISHOPTHORPE PARISH COUNCIL*

Of {Address of Applicant} *40 48 MAIN STREET, BISHOPTHORPE*

hereby certify that the requirements of paragraph 2 of schedule 14 to the Wildlife and Countryside Act 1981 have been complied with. {Paragraph 2 is printed on the reverse of this form}.

#### Details of Modification

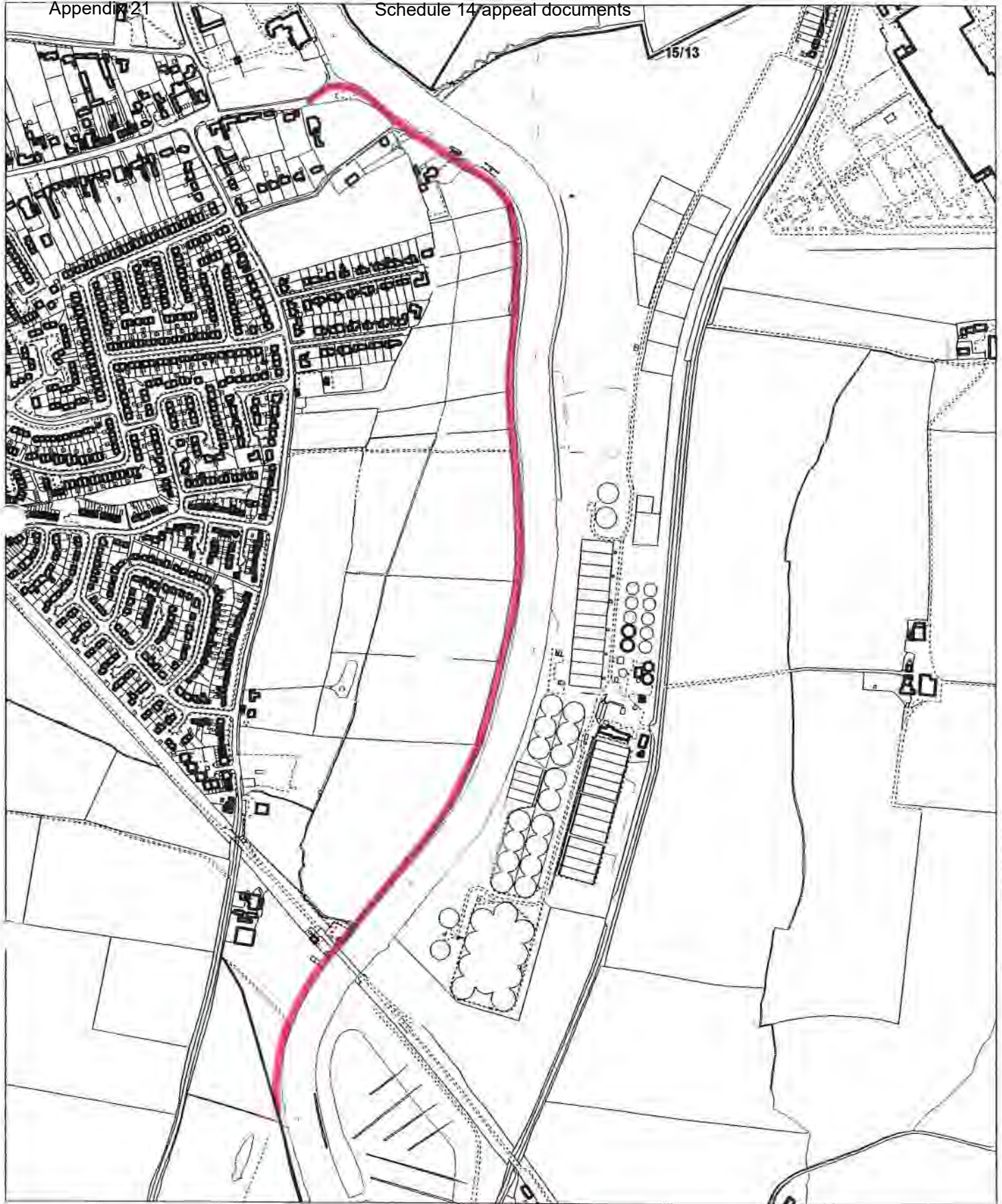
*ADDING THE FOOTPATH FROM CHANTEY LANG, BISHOPTHORPE TO  
ACASTER MARBIS PUBLIC FOOTPATH NO 3.*

List of Owners and Occupiers Notified (including addresses and date notice was served)  
(Continue on separate sheet ,if required)

Dated *12<sup>th</sup> May* ..... *2004* Signed *[Signature]* .....

**WILDLIFE AND COUNTRYSIDE ACT 1981****Schedule 14****Paragraph 2**

2. {1} Subject to sub-paragraph {2}, the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates.
- {2} If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or addresses of an owner or occupier of any land to which this application relates, the authority may direct that the notice required to be served on him by sub-paragraph {1} may be served by addressing it to him by the description "owner" or "occupier" of the land {describing it} and by affixing it to some conspicuous object or objects on the land.
- {3} When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.
- {4} Every notice or certificate under this paragraph shall be in the prescribed form.



**Claimed path**

Scale 1:7500

Drawn By:

Date: 25 May 2004

Originating Group:

Project:

Drawing No.

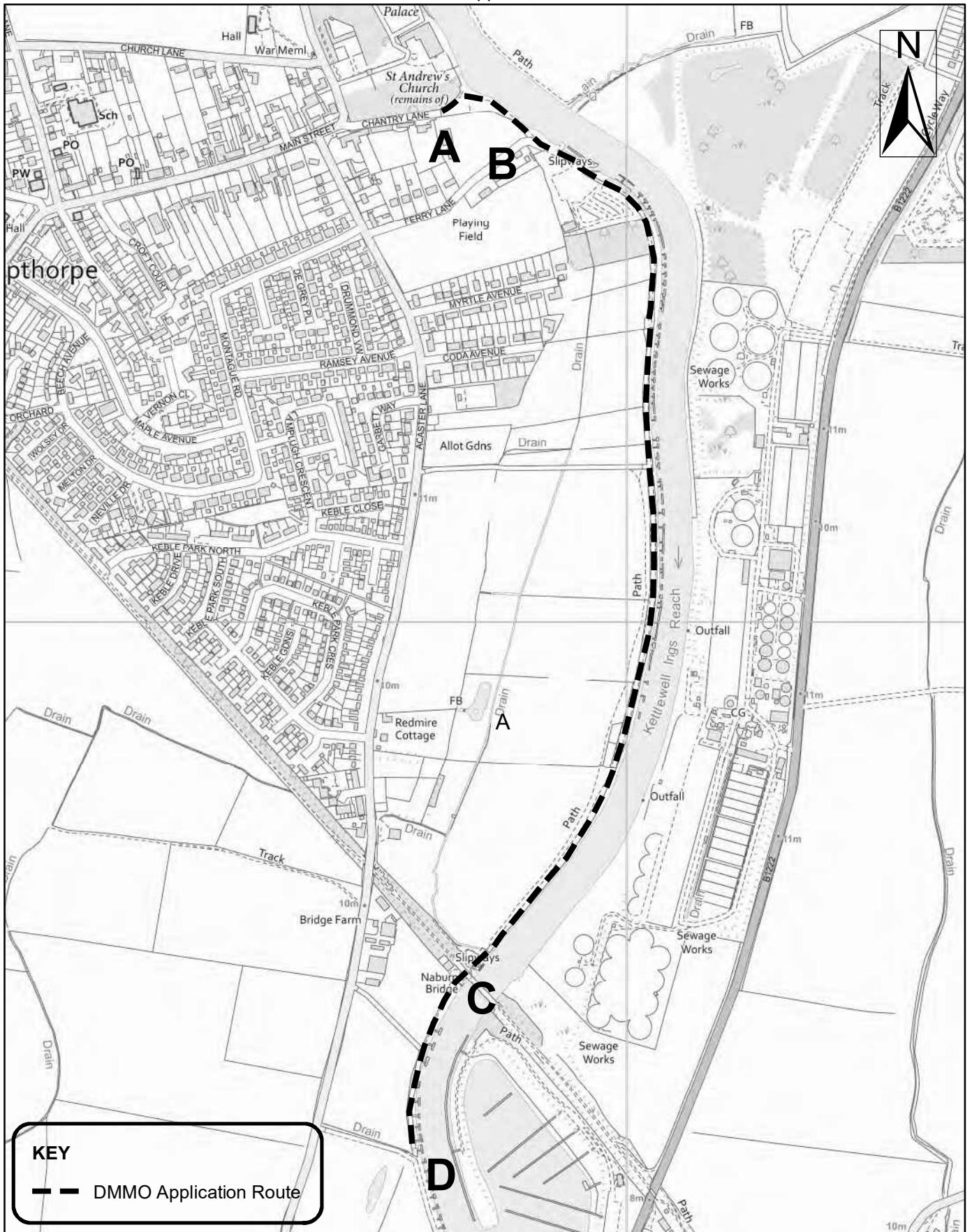
Public Rights of Way



9 St. Leonards Place, York, YO1 2ET  
Telephone: 01904 613161

Produced from the 1993 Ordnance Survey 1:250 mapping with the permission of the Controller of Her Majesty's Stationary Office  
© Crown Copyright. Unauthorised reproduction infringes Crown Copyright and may lead to prosecution or civil proceedings  
York Cit





West Offices, Station Rise, York,  
 YO1 6GA  
 Telephone: 01904 551550

## DMMO Application river side path Bishopthorpe

Scale 1:7,500

Drawn By:RJV

Date:15/1/19

Public Rights of Way

Reference:

Drawing No.

Contains Ordnance Survey data © Crown copyright and database right 2019



Bishopthorpe Parish Council  
 3 Appleton Court  
 Bishopthorpe  
 York  
 YO23 2RY

Directorate of Economy and Place

West Offices  
 Station Rise  
 YORK  
 YO1 6GA

Tel: 01904 551550  
 Email: [rightsofway@york.gov.uk](mailto:rightsofway@york.gov.uk)

9 July 2021

Dear Mrs Godfrey,

**Public Rights of Way – Section 53 Wildlife and Countryside Act 1989 – Applications to record a public footpath from Chantry Lane, Bishopthorpe to Ferry Lane, Bishopthorpe.**

In 1994 and 2004 the parish council made an application under the Wildlife and Countryside Act 1981 to have a footpath recorded on the definitive map and statement. As you know these applications were considered by the Executive Member for Transport at the decision session held on Thursday 25 July 2019.

The executive member decided to make an order in respect of both of these applications but excluding the section through St Andrew's Church. As set out in the report to the executive member this section was rejected because it relates to land that is consecrated. Consecrated land is set apart from ordinary land and it is not possible, at common law, to establish a public right of way over it through use. A fuller explanation can be found in the report presented to the executive member.

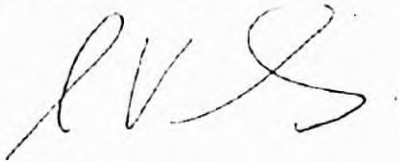
As a consequence of the reason set out above please accept this letter as your formal notice that the City of York Council is rejecting the part of the applications relating to the section of the claimed route running through St. Andrew's.

As applicant you have a right to appeal this decision to the secretary of state within **28 days** of the date of this letter. In order to appeal you need to write to the Planning Inspectorate at the following address:

The Planning Inspectorate RoW team  
 3A Eagle  
 Temple Quay House  
 2 The Square  
 Temple Quay  
 Bristol  
 BS1 6PN

Please advise them that part of your application has been rejected by the council. You must also state the reason we have rejected your application. In addition you must send a copy of your appeal letter to us at the address at the top of this letter. Alternatively you can find an appeal form and further advice on the Planning Inspectorate's website at <https://www.gov.uk/appeal-right-of-way-decision/how-to-appeal> . If you need copies of any of the documents please get in touch with me and I will happily send them to you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'RV' followed by a stylized flourish.

Russell Varley  
Definitive Map Officer

## GENERAL SYNOD

### LEGAL ADVISORY COMMISSION

#### Public rights of way over land forming part of a churchyard

1. The Commission has been asked whether it is possible for a public right of way across a churchyard to be created. The Commission is of the opinion that land forming part of a churchyard can, after 20 years use by the public as of right, be deemed to have been dedicated as a highway under section 31 of the Highways Act 1980, but that this will not always be the case.
2. **The first part of this opinion (paragraphs [4] to [36]) sets out how, as a matter of law, a highway may come into existence.** It is necessarily of a technical nature and is intended primarily for legal practitioners and others who are familiar with legal concepts.
3. **The second part (paragraphs [37] to [44]) is concerned with the practical steps that may be available to an incumbent and parochial church council should they wish to prevent a public right of way arising.**

#### PART 1: THE LEGAL BASIS FOR A HIGHWAY

##### Dedication as a highway at common law

4. As a matter of law, a highway is a way over which there exists a public right of passage. A public footpath is a highway, as is a bridleway or a way for vehicles.
5. At common law, a highway can arise in either of two ways:
  - (i) express dedication by the owner of the land in question as a highway, or
  - (ii) inferred dedication based on the fact of public user over a period of time (which need not be of any particular length) coupled with conduct on the part of the landowner such as to indicate that his intention was to dedicate the land in question as a highway.
6. At common law, only a fee simple owner (a person who owns land outright) can dedicate land as a highway because dedication is by nature dedication in *perpetuity*; a person with only a limited interest cannot act so as to bind land in perpetuity. So, at common law, a tenant for life could not expressly dedicate land as a highway; nor could it be inferred that he had done so.
7. Benefice and church property – including any churchyard – is vested in the incumbent in his corporate capacity. In that sense the incumbent is the ‘owner’ of the churchyard. But the incumbent is not an outright owner. An incumbent’s interest is less than that of a fee simple owner; the fee in respect of benefice and church property is permanently in abeyance.<sup>1</sup> An incumbent’s position is equivalent to that of a tenant for life.<sup>2</sup> An incumbent, therefore, does not have the legal capacity necessary to dedicate as a highway land forming part of a churchyard and it cannot be inferred that he has done so.

8. The position at common law, therefore, is that a right of way cannot be created over a churchyard. In a 2013 Inspector's decision letter concerning a proposed addition to the Definitive Map of a footpath over a churchyard, a claim of inferred dedication at common law was rejected.<sup>3</sup> See, too, section 68(2) of the Mission and Pastoral Measure 2011 which provides (subject to exceptions that are not material here), "it shall not be lawful to sell, lease or otherwise dispose of ... any consecrated land belonging to or annexed to a church ...".
9. It is, however, possible for a faculty to authorise the use by a highway authority of part of a churchyard as if it were a highway (or part of a highway). This, it is suggested, was the rationale for the Consistory Court of London holding in *Vicar and One of the Churchwardens of St Botolph without Aldgate v Parishioners of the Same* [1892] P 161 that that the Court had jurisdiction to authorize by faculty the appropriation of a portion of the churchyard required for a proposed widening of the adjacent street.<sup>4</sup> The power of the consistory court to grant a faculty "authorising a suitable use" of land belonging to or annexed to a church is expressly preserved by section 68(15) of the Mission and Pastoral Measure 2011.

### **Presumed dedication under the Highways Act 1980**

10. Section 31 of the Highways Act 1980 provides for dedication of land as a highway to be presumed in certain circumstances. A copy of section 31 is annexed to this Opinion.
11. The facts that have to be made out in order to establish the presumption are that "a way over any land ... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years". "As of right" has its usual legal meaning – namely that the use in question has not been by force, has not been clandestine, and has not been with the permission of the owner (*nec vi, nec clam, nec precario*).<sup>5</sup>
12. Under section 31(1), provided the requisite facts are made out, "the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period of 20 years to dedicate it."
13. There is therefore no need to infer a dedication by an owner: the way becomes a highway by operation of law. As Scott LJ said in *Jones v Bates* [1938] 2 All ER 237 at 246, "The change of the law brought about by statute is that, upon proof of such user for the requisite period, the conclusion of dedication follows as a presumption *juris et de jure*, instead of as an inference of fact to be drawn by the tribunal of fact. The phrase of the Act 'shall be deemed to have been dedicated' is merely an historical periphrasis for saying that the way thereupon by operation of law becomes a highway."
14. Dedication arises by virtue of the operation of the subsection: there is no requirement that the person in possession of the land in question has *power* to dedicate it. That this is the correct construction appears to be supported by a number of considerations.

*Legislative history of section 31*

15. First there is the legislative history of what is now section 31 of the 1980 Act. Its legislative predecessor, section 1 of the Rights of Way Act 1932, set out two bases upon which a statutory presumption of dedication would arise. The first required 20 years' uninterrupted user, with the proviso that the presumption would be defeated if "*during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such a way.*" It is therefore clear that under the 1932 Act, a mere 20 years' uninterrupted user could not have resulted in a highway being established across a churchyard (or indeed over land subject to a strict settlement).
16. However, section 1 of the 1932 Act also provided a second basis whereby dedication would be deemed to have occurred. This required 40 years' uninterrupted user. If such user were made out, then a conclusive presumption of dedication arose irrespective of whether there was a person with capacity to dedicate.
17. A comparison may be made with section 2 of the Prescription Act 1832 and the two periods of user there. It was held in *Re St Martin Le Grand, York* [1990] Fam 63, that the provisions of the 1832 Act would not give rise to an easement over a churchyard. But section 2 of the 1832 Act is readily distinguishable from the relevant provisions in the 1932 and 1980 Acts. Section 2 of the 1832 Act prevents the defeat of a "claim which may be lawfully made at the Common Law etc. to any Way or other Easement" where the requisite period of user can be shown. The restriction to a "claim which may be lawfully made at the Common Law" would exclude an easement of way over a churchyard, as no such easement could be granted at common law. But the relevant provisions of neither the 1932 nor the 1980 Acts are restricted in this way to claims that can be made at common law. The decision in *St Martin Le Grand* is therefore not applicable to the present question.
18. Taking the legislative history of section 1 of the Highways Act 1980 further, its predecessor, section 1 of the Rights of Way Act 1932, was amended by the National Parks and Countryside Act 1949. The second of the two bases giving rise to a presumption of dedication (i.e. 40 years' user) was entirely repealed. The first basis (20 years' user) was amended so as to remove the proviso that a way would not be deemed to have been dedicated if "*during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such a way*".
19. This followed a recommendation from the Hobson Report that the statutory machinery for establishing rights of way should be simplified. The relevant part of the report stated,
 

*"We recommend that after 20 years' use of a way by the public 'as of right and without interruption', that way shall be deemed in all cases to have been dedicated as a highway. This will cover entailed estates and would do away with the existing requirement that in such cases proof of 40 years' public use must be adduced."* (Cmnd 7208, para. 56).

Introducing the 1949 Act, the Minister said,

*“...in future there is a presumption of dedication of a right of way after 20 years user in all cases”* (Hansard HC Deb, vol 463, ser 5, col 1485).

20. The result of the amendments made to section 1 of the 1932 Act was that 20 years' public user as a highway was of itself enough to give rise to the statutory presumption of dedication, irrespective of whether a fee simple owner had been in possession of the land throughout that period.
21. Section 31(1) of the Highways Act 1980 is essentially a re-enactment of section 1 of the 1932 Act as so amended. That being so, one would expect its effect to be the same as its predecessor: namely that 20 year's uninterrupted user (absent positive evidence of there being no intention to dedicate) will give rise to a statutory presumption of dedication in all cases, irrespective of the legal capacity of the person in possession.

*Provision for land in possession of tenant for life*

22. Secondly, the specific provision made in section 33 of the 1980 Act in relation to land in the possession of a tenant for life casts light on the statutory intention behind section 31(1). It gives those with interests in remainder or reversion a statutory right to bring claims in trespass to prevent the acquisition of a public right of way over land as if they were in possession. Were it the case that the statutory presumption of dedication in section 31(1) only applied where there was a person with legal capacity to dedicate at common law (which a tenant for life generally lacks), then there would have been no need for section 33 (Protection of rights of reversioners).
23. The position therefore is that the (non)existence of a fee simple owner has no bearing on the question of whether section 31(1) is capable of applying. If that is so, then section 31(1) is in principle capable of applying in the case of land forming part of a churchyard vested in an incumbent (even though, at common law, he would not have the capacity to dedicate such land as a highway). In the 2013 Inspector's decision letter referred to in para 3 above, this was accepted to be the position.<sup>6</sup>
24. If that is so, one needs to consider whether any of the other provisions of section 31 have the effect of excluding land forming part of a churchyard from the statutory presumption of dedication after public use for 20 years.

*Exclusionary provisions*

25. Section 31(1) expressly excludes from its operation “a way of such character that use of it by the public could not give rise at common law to any presumption of dedication”.
26. It is suggested in *Newsom*<sup>7</sup> that a path across land forming part of a churchyard would be excluded from the operation of section 31(1) by these words because, at common law, a presumption of dedication could not arise in respect of the way in question given the lack of legal capacity on the part of the owner of the land and

because dedication would be inconsistent with the sacred uses on which the land was held. But it does not seem that the exclusionary words in section 31(1) do in fact have that effect.

27. In *Attorney- General v Brotherton* [1992] AC 425, the House of Lords held that the equivalent provisions of the 1932 Act are concerned with the *physical* nature of the way in question; so that, for example, the statutory presumption of dedication could not arise in respect of a navigable river. The subsection is not concerned with the legal nature of the way but with whether its physical character is such that use of it by the public could give rise at common law to any presumption of dedication.<sup>8</sup>
28. Turning to subsection (7) of section 31, it is true that it provides a definition of “owner” for the purposes of the foregoing provisions of the section and that “owner” is defined as “the person who is for the time being entitled to dispose of the fee simple in the land”. An incumbent of a benefice would not, therefore, be within the meaning of “owner” for the purposes of the earlier provisions of the section<sup>9</sup>; and the wording of subsection (7) suggests that the parliamentary draftsman did not have in mind the particular position of incumbents.
29. But that does not take one very far. The provision of section 31 which operates so as to turn a way into a highway – subsection (1) – makes no reference to any owner. Where the requisite period of user is established (and unless there is sufficient evidence that there was no intention during the period to dedicate it), the way is simply deemed to have been dedicated as a highway. There does not even need to be a known owner.<sup>10</sup> The definition of “owner” in subsection (7) is not material for the purpose of the operation of subsection (1).
30. Finally, consideration needs to be given to subsection (8):

“Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”

As expressed in the 2013 Inspector’s decision letter referred to above,

*“subsection (8) provides a means whereby a specific class of landowner can defeat a claim for deemed dedication if they can demonstrate that the claimed right of way would be incompatible with the public or statutory purposes for which they hold the land over which it would pass”*.<sup>11</sup>

31. An incumbent in whom a churchyard is vested is a corporation in possession of land. Given that all who are resident in a parish have a right of burial in the churchyard of that parish and, more broadly, all consecrated land is held for sacred purposes and for the benefit of the parishioners at large, there would seem to be a good case of saying that an incumbent is in possession of such land for public purposes.
32. However, even assuming that subsection (8) applies to Church of England churchyards, this will only be relevant *“if the existence of a highway would be*



*incompatible with those public or statutory purposes*". The test is a pragmatic one, to be applied on the facts of the particular case. As explained in the case of a railway undertaking, "...a public highway could not be dedicated if at the relevant time it was reasonably foreseeable that such dedication was incompatible with the object of the statutory undertaker".<sup>12</sup>

33. Where a claimed footpath has been used by the public for more than for more than 20 years, there are likely to be (for both statutory undertakers and churches) evidential problems in proving such incompatibility, whether one looks to what was foreseeable at the start or end of the 20 year period. On the facts of the Inspector's decision letter referred to above, it was "*not convincingly demonstrated to the Inspector that the public walking along the claimed path through Widford churchyard is incompatible with the purposes for which that land is held*", so that the claim of deemed dedication under section 31 of the Highways Act 1980 was upheld.<sup>13</sup>
34. There could, however, be cases where continued use of the path by the public might impede further burials, or the proper functioning of the church and/or the churchyard. Even where the churchyard was closed by Order in Council, so that the public purpose of burial of bodies will have ceased and the existence of the highway could not be said to be inconsistent with future such burials, the footpath might be inconsistent with the future interment of ashes (which is permissible in a closed churchyard). The position in each case will need to be assessed on its own facts.

### *Conclusion*

35. The conclusion therefore is that land forming part of a churchyard can after 20 years use by the public as of right be deemed to have been dedicated as a highway under section 31 of the Highways Act 1980, but that this will not always be the case: it will depend on the facts of the particular case.

### **Ancient paths**

36. Where a public footpath or other highway existed over land before that land was consecrated as a churchyard, that highway will have continued in existence in spite of the fact that the land had become a churchyard. There may be a number of such ancient paths in existence.

## **PART 2: PRACTICAL GUIDANCE TO INCUMBENTS AND PCCs**

### **The definitive map**

37. If a footpath across a churchyard is already shown on the definitive map kept by the local authority under section 53 of the Wildlife and Countryside Act 1981, it is suggested that only in the rarest cases would it be sensible for the incumbent and parochial church council to challenge this. Where it is proposed to seek a modification of the definitive map, the incumbent and PCC should obtain legal advice before proceeding.

### Steps incumbents and PCCs might take to prevent the deemed dedication of highways arising

38. Some parishes may understandably wish to resist the acquisition by the public of a right of passage across the churchyard.<sup>14</sup> Of course if the path has already become a public footpath by use for 20 or more years, there may be nothing that can now be done to safeguard the position, and the taking of steps may positively encourage users to apply for a public path to be registered.
39. There are, however, three steps which parishes should consider taking, each of which should have the effect of preventing a public right of way being acquired.
40. Total prevention of access for a period of time each year should have the effect of preventing a public right of way arising. That is because it would amount to bringing the public's right to use the path 'into question' for the purposes of section 31(2) of the Highways Act 1980. Where there are gates, this can readily be done by the closure of all gates once a year.<sup>15</sup>
41. Putting up clear notices to the effect that use of the path by the public is permitted by the incumbent and PCC, but that such permission may be withdrawn at any time, would probably suffice to make the user permissive, and thus not "*as of right*", the latter being a requirement under subsection (1) of section 31.<sup>16</sup>
42. Putting up of clear notices prohibiting entry (save for access to the church) would also probably negative use "*as of right*" under subsection (1)<sup>17</sup>, although such a prohibitive notice can be expected to annoy users of the path, and could be counter-productive.
43. The effectiveness of putting up permissive or prohibitory notices to protect churchyards has not been tested in the courts.<sup>18</sup>

### Other cases

44. Finally, there will be some parishes where the establishment of a public footpath through a churchyard is not seen as problematic. Indeed benefits may be perceived through securing highway authority funding for the maintenance of such a path.

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<sup>1</sup> Co Lit 341a: "the fee simple is in abeyance, as Littleton saith". See also *Re St Gabriel's, Fenchurch Street* [1896] P 96 per Tristram Ch at 101-102: "churchyards are by the law placed under the protection and control of the Ecclesiastical Courts and the freehold of the churchyard is in the rector, the fee being in abeyance; but the freehold is vested in him for the use (in so far as may be required) of the parishioners. Subject to that use, he is entitled to receive the profits arising from the churchyard; but he cannot by law make any appropriation of the soil of the churchyard. Such appropriation can only be made for limited purposes by a faculty issued from the Ecclesiastical Court." See also *Re St Paul's, Covent Garden* [1974] Fam 1, 4 and *Re Tonbridge School Chapel (No. 2)* [1993] 2 All ER 339, 342.

<sup>2</sup> Co Lit 341a: "... a parson or vicar, for the benefit of the church or his successor, is in some cases esteemed in law to have fee simple qualified; but to doe any thing to the prejudice of his successor in many cases, the law adjudgeth him to have in effect but an estate for life". In *Barker v. Richardson* (1821) 4 B & Ald 579 it was held that a presumption of a grant of an easement - in that case, an easement of light - could not be made because the grant, if it had been made, would have been made by a rector who was described as "a mere tenant for life" and who had no power to make such grant. Abbott C.J. said, at p. 582: "Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

The reform of the law relating to real property brought about by the Law of Property Act 1925 has not changed the essential position in that regard. Before the 1925 Act came into force, it was possible for an interest less than a fee simple to exist as a legal estate. Under section 1 of the 1925 Act, that ceased to be the case and all estates, interests and charges in or over land other than an estate in fee simple absolute in possession, or a term of years absolute, took effect as equitable interests. The effect of the 1925 Act was to turn the incumbent's estate into an equitable interest; the Act did not have the effect of enlarging the incumbent's estate so that it became a fee simple. See *Re St Paul's, Covent Garden* [1974] Fam 1 at 4E, per Newsom Ch.

<sup>3</sup> Ref: *FPS/M1900/7/66/M*, 24 May 2013, para 19 (concerning the churchyard of St John the Baptist, Widford, Hertfordshire). In paras 15-18 the Inspector referred to, and purported to limit the application of, dicta contained in *In re St Mary's, Longdon* (2011) 13 Ecc LJ 370, Worcester Consistory Court.

<sup>4</sup> Per Tristram Ch at 169, referring to an earlier decision of his: "I therefore ordered the boundary fence of the churchyard to be placed back, and granted, by faculty, to the local authorities the use of a strip of the churchyard outside the new boundary fence for a public footpath, so long as it might be required for the public use; and in case of its not being so required, I ordered that it should revert to the use of the church.

I found, on inquiry in the registry, that my predecessor had granted one faculty of the kind; and, since the granting of the Kensington faculty, it has been the uniform practice of this Court, upon a proper case being made out by evidence, to grant by faculty to the local authorities the use of strips of the churchyard for enlarging adjoining thoroughfares upon similar terms, and this practice has been followed in several other Diocesan Courts."

For more recent decisions see *In re St. John's, Chelsea* [1962] 1WLR 706; *In re St. Mary the Virgin, Woodkirk* [1969] 1WLR 1867.

<sup>5</sup> *Jones v Bates* at 245.

<sup>6</sup> At para 23.

<sup>7</sup> GH Newsom & GL Newsom, *Faculty Jurisdiction of the Church of England*, London 1993, p. 151-2.

<sup>8</sup> In his speech, Lord Oliver said, "I cannot, for instance, think that any reader of Alfred Lord Tennyson would have regarded the Lady of Shalott, as she floated down to Camelot through the noises of the night, as exercising a right of way over the subjacent soil."

<sup>9</sup> Given the absence of such an "owner", it is not possible to use the procedure for depositing a map under section 31(6) of the Highways Act 1980 in order to negative an intention to create a right of way over a churchyard.

<sup>10</sup> "... the Act has got rid of all the trouble and difficulty inherent in the task of inducing the tribunal of fact to give a solemn finding of an act of dedication at some past date, which was, as a rule, wholly imaginary, and often by an imaginary owner", per Scott LJ in *Jones v Bates* at 246.

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<sup>11</sup> At para 27.

<sup>12</sup> *British Transport Commission v Westmorland County Council* [1958] AC 126, at 152 and 156.

<sup>13</sup> At para 33 and 46.

<sup>14</sup> Sub-sections (3) to (6) of the Highways Act 1980 provide means by which the owner or reversioner may take steps to prevent the accrual of public rights over land. But “owner” bears the meaning given in subsection (7): the person who is entitled to dispose of the fee simple. In the case of a churchyard vested in an incumbent there is no such person, so that sub-sections (3), (5) and (6) have no application; nor is the incumbent’s interest that of “a tenant for a term of years, or from year to year”, nor is he (or anyone else) “a person for the time being entitled in reversion to the land”, so that sub-section (4) similarly has no application (perhaps another indication that the draftsman did not have in mind the position of churches).

<sup>15</sup> “Occasional closure to all comers” was instanced as a way of defeating a claim to use “as of right” by Lord Walker in *R (Beresford) v City of Sunderland* [2003] UKHL 60 ; [2004] 1 AC 889, para 83. The annual closure of gates was specifically mentioned by Lord Hoffmann and Lord Neuberger in *R (Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28; [2008] 1 AC 221 paras 37 and 89.

<sup>16</sup> See the observations of Lord Walker in *Beresford*, above, para 72

<sup>17</sup> See *Winterburn & anor v Bennett & anor* [2016] EWCA Civ 482

<sup>18</sup> There is a counter-argument, to the effect that since sub-sections 31(3) to (5) make express provision for owners and reversioners to post or give notice “that the way is not dedicated as a highway”, such notice cannot be given in other ways. It is considered unlikely, that such a counter-argument would succeed before an Inspector or the courts. As to sub-section (6), it is the “owner” of land who may deposit a map and statement with the appropriate council such as to amount to sufficient evidence to negative an intention to dedicate. That sub-section is incapable of being resorted to in respect of churchyards, and it is unlikely that notice given to the appropriate council other than under sub-section (6) would be regarded as sufficiently drawn to the attention of users to prevent deemed dedication of a public footpath.

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## Highways Act 1980

### 31 Dedication of way as highway presumed after public use for 20 years

(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 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.

(1A) Subsection (1)–

(a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but

(b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.

(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 erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land . . . , and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, . . . declarations in valid form made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time--

(i) within the relevant number of years from the date of the deposit, or

(ii) within the relevant number of years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(6A) Where the land is in England—

(a) a map deposited under subsection (6)(a) and a statement deposited under subsection (6)(b) must be in the prescribed form,

(b) a declaration is in valid form for the purposes of subsection (6) if it is in the prescribed form, and

- 
- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 20 years.
- (6B) Where the land is in Wales—
- (a) a map deposited under subsection (6)(a) must be on a scale of not less than 6 inches to 1 mile,
- (b) a declaration is in valid form for the purposes of subsection (6) if it is a statutory declaration, and
- (c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 10 years.
- (6C) Where, under subsection (6), an owner of land in England deposits a map and statement or lodges a declaration, the appropriate council must take the prescribed steps in relation to the map and statement or (as the case may be) the declaration and do so in the prescribed manner and within the prescribed period (if any).
- (7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5), (6), (6C) and (13) "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsections (6), (6C) and (13)) is situated or, where the way or land is situated in the City, the Common Council.
- (7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.
- (7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.
- (9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.
- (10) Nothing in this section or section 32 below affects section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement), . . .
- (10A) Nothing in subsection (1A) affects the obligations of the highway authority, or of any other person, as respects the maintenance of a way.
- (11) For the purposes of this section "land" includes land covered with water.
- (12) For the purposes of subsection (1A) "mechanically propelled vehicle" does not include a vehicle falling within section 189(1)(c) of the Road Traffic Act 1988 (electrically assisted pedal cycle).

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- (13) The Secretary of State may make regulations for the purposes of the application of subsection (6) to land in England which make provision—
- (a) for a statement or declaration required for the purposes of subsection (6) to be combined with a statement required for the purposes of section 15A of the Commons Act 2006;
  - (b) as to the fees payable in relation to the depositing of a map and statement or the lodging of a declaration (including provision for a fee payable under the regulations to be determined by the appropriate council).
- (14) For the purposes of the application of this section to land in England "prescribed" means prescribed in regulations made by the Secretary of State.
- (15) Regulations under this section made by the Secretary of State may make—
- (a) such transitional or saving provision as the Secretary of State considers appropriate;
  - (b) different provision for different purposes or areas.

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 24 April 2019 09:58  
**To:** [REDACTED]  
**Subject:** Re: 2004 Application

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

You mean when Archbishop Walter de Grey bought the land for his new archiepiscopal manor from St. Andrew's Priory in York in 1226. It already had the Priory's church and churchyard on it at that date (hence the persistent local dedication to its patron saint). As the Priory was founded in around 1100 AD you can push consecration back another 200 years with some justification if you wish but 800 will do for sure.

Sorry to be pedantic but St. Andrew's Church was not founded in the 13th century but in the early 12th. Not that your Executive Member will really care either way when he or she eventually materialises. But we do have to be accurate in any public reference to our heritage site even to the smallest detail.

Regards,  
[REDACTED]

**Sent:** Tuesday, April 23, 2019 1:49 PM  
**To:** [REDACTED]  
**Subject:** RE: 2004 Application

Dear [REDACTED]

Please accept my apologies, I clicked the send button by mistake. Here is my reply in full.

Thank you very much for the clarification. I have rewritten the relevant paragraph of my report as follows:

“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.

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 the three applications (the route shown running between A and B) has been consecrated ground approximately 800 years.”

I think this accurately reflects your email and our previous discussions. I know there is evidence to indicate that the church is much older but for the buildings on the land affected by the applications the earliest date I can find is 13<sup>th</sup> century.



The applications will be going before the Executive Member for Transport and Planning once we have one of them after the elections. I will be in touch to let you know the date of the executive member session once it is available.

Kind regards

[REDACTED]

[REDACTED]

[REDACTED]

**City of York Council** | Rights of Way/Transport Service  
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**From:** [REDACTED]  
**Sent:** 22 April 2019 13:52  
**To:** [REDACTED]  
**Subject:** Re: 2004 Application

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear [REDACTED]

Thank you for your e-mail. No, the trust did not purchase our heritage site. It was given to us by the land-owners, the Church Commissioners, in 1998 with certain conditions. I think you are referring to something else, the Pastoral Measure that declared it to be redundant as a Church –owned site so that it could be transferred, legally, to us as a secular body. We are not aware that any ‘de-consecration rites’ were performed there in 1997. We just don’t know but we doubt it because of the conditions imposed by the Commissioners on our acquisition. As I have explained before these were that we can only use it as “a place of quiet contemplation and reflection”, that the local Church can continue to use it for religious services from time to time (as happened yesterday for example for its Easter Sunrise Service) and that internments may continue there under Church of England rites under certain exceptional circumstances, and that the Diocese of York be informed of any changes we may wish to make to it so that a need for its Faculty consent might be considered in advance. It knows of course that a carpet of human remains is just under its grassed surface including those of several Archbishops of York. So the local Parochial Church Council and Diocese continues to act as if our heritage site is consecrated and we have no reason to doubt them or wish to change our relationships with them. In short, we have no evidence for a rite of de-consecration having taken place in 1997 or at any time. Nor has the local vicar, [REDACTED]. What we do have is the Order in Council that declared the church building to be redundant early in 1998 to enable it and its ‘curtilage’ i.e.the mass grave of its old burial ground to then be transferred to our freehold ownership and management soon afterwards. I trust this is clear enough but do come back if not.

Regards

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, April 16, 2019 11:44 AM  
**To:** [REDACTED]  
**Subject:** RE: 2004 Application

Dear [REDACTED]

I hope you are well. I am finalising my report for the executive member about the DMMO applications. Please could you confirm a couple of details for me?

The St Andrew's Trust purchased the land off the church in 1998, is that correct? The church performed the rite/act of de-consecration about 1 year before the sale meaning it took place in 1997. Is that also right?

Many thanks

[REDACTED]

[REDACTED]

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 18 February 2019 17:14  
**To:** [REDACTED]  
**Subject:** Re: 2004 Application

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear [REDACTED] I can't see your council being willing to assume responsibility for potentially fatal incidents like this.

Regards [REDACTED]

**From:** [REDACTED]  
**Sent:** Thursday, December 13, 2018 4:26 PM  
**To:** [REDACTED]  
**Subject:** RE: 2004 Application

Dear [REDACTED]

Thank you for your time yesterday and for the insight into both the history of the area and our shared name. Most interesting.

With regard to the various maps submitted with the applications, as far as I can tell from the file, the maps are as per the files I sent through and attach here for your convenience. Under the Wildlife and Countryside Act 1981 there is a requirement that the application map must not be at a scale smaller than 1:25000. The maps supplied with the 1994 and 2004 applications appear to be extracts from Ordnance Survey 1:10000 maps available at the time. The map supplied with the 2006 application was produced by an electronic mapping/GI (geographic information) system. The applicant has then drawn the route in what appears to be black marker or felt tip. This means that no map to the scale I supplied you with yesterday has ever been part of an application. But there is no requirement for such a detailed map used.

What I do have for you are three extracts from the Ordnance Survey 25 inch maps from the late 19<sup>th</sup> century and early 20<sup>th</sup> century. These show the network of paths to which you referred. I thought they might be of interest and add further detail to the history of the site. I have produced these using our GIS but the maps themselves are scans of the original paper versions.

Kind regards

[REDACTED]

[REDACTED]  
[REDACTED]

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**From:** [REDACTED]  
**Sent:** 13 December 2018 14:54  
**To:** [REDACTED]  
**Subject:** Re: 2004 Application

This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear [REDACTED] the site plan you handed me yesterday to go with the 1994 claim was drawn the day before. Have you a copy of the one actually submitted with the application ?

Regards

[REDACTED]

**From:** [REDACTED]  
**Sent:** Tuesday, December 11, 2018 2:31 PM  
**To:** <mailto:info@standrewstrust.co.uk>  
**Subject:** 2004 Application

Dear [REDACTED]

Please accept my apologies. The redacted copy of the 2004 application I sent you earlier did not contain the correct map. The copy attached has the correct map included that was submitted with the application.

Kind regards

[REDACTED]  
[REDACTED]

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# NORTH YORKSHIRE COUNTY COUNCIL

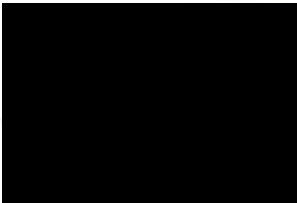
## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, Mrs, Miss, Ms <span style="background-color: black; color: black;">████████</span></p> <p>Christian Names: <span style="background-color: black; color: black;">████████████████</span></p> <p>Age, or if over 21, state over 21: OVER 21</p>
2	<p>Address: <span style="background-color: black; color: black;">██</span></p>
3	<p>Occupation: RETIRED</p>
4	<p>Name or route of path: RIVERSIDE PATH</p>
5	<p>National Grid References (ends of path), or other means of identification: OLD CHURCH YARD TO SWING BRIDGE</p>
6	<p>Parish: BISHOPTHORPE</p>
7	<p>District: SELBY</p>
*8	<p>Type of path: Footpath/<del>Bridleway/Byway</del> open to all traffic</p>
*9	<p>Do you regard the path as public (SEE NOTE 2): YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<input checked="" type="radio"/> No</p>
11	<p>Width of path: 2 ft to 8 ft</p>
12	<p>How long have you known the path: 30 YEARS</p>
13	<p>Over what period have you used the path on foot, <del>horseback or by motor vehicle</del>, (state which): AS ABOVE</p>
14	<p>How often over the period have you used the path: AS ABOVE</p>
15	<p>For what purpose did you use the path: LEISURE WALKING</p>
16	<p>Have you ever been prevented from or challenged when using the path: NO</p>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;">2 STILES</p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date .15.02.94 .....

Signature  .....

Signature of person taking Statement ..  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

### Public Rights of Way - User Evidence Form

Surname: * Mr <del>X</del> Mrs. Miss. Ms. <i>[Redacted]</i>		
Christian Name (s): <i>[Redacted]</i>		
Age: (If over 21, you may insert "Over 21") <i>OVER 21</i>		
Address: <i>[Redacted]</i>		
Occupation: <i>PENSIONER.</i>		
Name or route of Path: <i>CHERRY LANE - OLD CHURCHYARD - BOTTOM FERRY LANE.</i>		
National Grid References, at each end of the path, or other means of identifying the route: <i>Cherry Lane through Old Churchyard along river bank to Ferry Lane</i>		
Parish of: <i>BOIS D'ATHORPE.</i>		
Type of Path: *Footpath / Bridleway / Byway Open to All Traffic		
Do you regard the route to be a Public Right of Way? * Yes / <del>NO</del>		
Is the path well defined? *Yes / <del>NO</del> <i>HAS VERY WELL DEFINED.</i> If "Yes" How?		
Width of path (If defined): <i>APPROX. 3YDS.</i>		
How many years have you known of the existence of this path? <i>35 YEARS.</i>		
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) <i>35 YEARS 1966-2001.</i>		
Have you used the path: i) on foot? *Yes / <del>NO</del> ii) on horseback? * Yes / No iii) by motor vehicle? * Yes / No iv) by cycle? * Yes / No		
How often did you / do you use the path? (e.g.: weekly; monthly; occasionally) <i>WEEKLY.</i>		
For what purpose did you / do you use the path? (e.g.: work, pleasure, recreation, to get to shops) <i>PLEASURE &amp; RECREATION</i>		
Have you ever been prevented from, or challenged when, using the path? * Yes / No If "Yes" please give details		
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <i>STILE DOWN STREAM END OPENING ON TO BOTTOM OF FERRY LANE.</i>		

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

THIS PATH, AND RIVER SIDE SURROUNDINGS HAVE BEEN ONE OF BISHOPTHORPE'S MOST PLEASANT AREAS IN THE VILLAGE, ENJOYED BY WALKERS & FISHERMEN, THE TREES MAKING A LOVELY DAPPLED SHADED SPOT FOR THE CASUAL RIVER OBSERVER. SHOULD ALWAYS BE A CORNER OF OUR VILLAGE FOR EVERY ONE TO ENJOY.

\* Delete as appropriate

Signature : .....

Date : .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: <del>Mr, Mrs, Miss, MS</del> [REDACTED] ✓ Christian Names: [REDACTED] Age, or if over 21, state over 21: <i>over 21</i>
2	Address: [REDACTED]
3	Occupation: <i>HOUSEWIFE</i>
4	Name or route of path: <i>RIVERSIDE PATH</i>
5	National Grid References (ends of path) or other means of identification: <i>OLD CHURCH YARD to SWING BRIDGE</i>
6	Parish: <i>BISHOPTHORPE</i>
7	District: <i>SELBY</i>
*8	Type of path: <del>Footpath/Bridleway/Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <i>2ft to 8ft</i>
12	How long have you known the path: <i>over 40 years</i>
13	Over what period have you used the path on foot, horseback or by motor vehicle; (state which): <i>on foot for walks</i>
14	How often over the period have you used the path: <i>regularly</i>
15	For what purpose did you use the path: <i>walking</i>
16	Have you ever been prevented from or challenged when using the path: <i>NO</i>

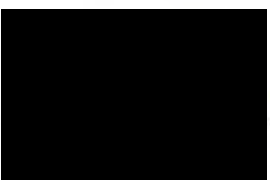
- 3 MAR 1994



17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc. <p style="text-align: center;">2 Stiles</p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ..... 14<sup>th</sup> Feb. 94 .....

Signature ..  .....

Signature of person taking Statement ..  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

Surname: * <del>Mr.</del> <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del>	[REDACTED]
Christian Name (s) :	[REDACTED]
Age: (If over 21, you may insert "Over 21")	OVER 21
Address:	[REDACTED]
Occupation:	HOUSE WIFE
Name or route of Path:	PATH TO FERRY LANE
National Grid References, at each end of the path, or other means of identifying the route :	Chantry Lane through old Church Yard along water bank to Ferry Lane
Parish of:	BISHOP THORPE
Type of Path:	*Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
Is the path well defined ? * <del>Yes</del> / No If "Yes" How?	
Width of path (if defined) :	
How many years have you known of the existence of this path ?	70 PLUS
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	1930 - 2000
Have you used the path:	
i) on foot ?	*Yes / No
ii) on horseback ?	* <del>Yes</del> / No
iii) by motor vehicle ?	* <del>Yes</del> / No
iv) by cycle ?	* <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	WEEKLY
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* <del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	HAND GATES.

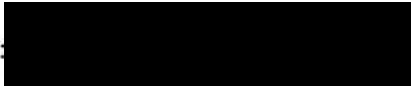
Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature :  .....

Date : 10 - 10 - 2001

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

CITY OF YORK  
DEED  
RECEIVED  
24 SEP 2001

Surname: * Mr. <del>Mr. M...</del>		
Christian Name (s):		
Age: (If over 21, you may insert "Over 21")	over 21	
Address:		
Occupation:	RETIRED	
Name or route of Path:	ALONGSIDE RIVER BETWEEN FERRY LAKE & HANTRY LAKE	
National Grid References, at each end of the path, or other means of identifying the route :	NRK.	
Parish of:	BISHOP TROLE	
Type of Path:	*Footpath / <del>Bridleway / Byway Open to All Traffic</del>	
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>	
Is the path well defined ? *Yes / <del>No</del>	WELL TRODDEN OVER MANY YEARS	
If "Yes" How?		
Width of path (If defined) :	2 FT. IN PARTS WIDER IN OTHER PARTS	
How many years have you known of the existence of this path ?	17 3/4 YRS	
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	16 3/4 YRS. (NOV 83 - AVE. 2000)	
Have you used the path:	IT WAS CLOSED	
i) on foot ?	*Yes / <del>No</del>	
ii) on horseback ?	* Yes / No	
iii) by motor vehicle ?	* Yes / No	
iv) by cycle ?	* Yes / No	
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	3-4 TIMES PER WEEK.	
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE & RECREATION	
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / No	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	1 <del>STILE</del> HAD SIGN ON ENTERING PATH ONLY FROM FERRY LAKE RD	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

ST. ANDREW'S TRUST.

c/o

CHANDRY LANE  
BISHOPSTROP

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

THIS SHORT PATH OF ONLY SAY 60/70 YDS IS ALONGSIDE THE RIVER AND GIVES THE ONLY SIGHT OF BISHOPSTROP PALACE TO LOCALS AND TO THE MANY VISITORS TO THE CAMP SITE AND THE BOATYARD WHO WISH TO WALK INTO YORK AND ∴ AVOID THE TRAFFIC ON FERRY LANE - WHICH DOES NOT HAVE A FOOTPATH.

\* Delete a

Signature .....

Date : 19/9/01

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms.	[REDACTED]								
Christian Name (s) :	[REDACTED]								
Age: (If over 21, you may insert "Over 21")	Over 21								
Address:	54 Acaster Lane BISHOPTHORPE YORK YO23 2SG								
Occupation:	RETIRED TEACHER								
Name or route of Path:	PATH between Chantry Lane and Kewy Lane, Bishopthorpe								
National Grid References, at each end of the path, or other means of identifying the route :									
Parish of:	BISHOPTHORPE								
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic								
Do you regard the route to be a Public Right of Way ?	* Yes <del>No</del>								
Is the path well defined ? *Yes/ <del>No</del> If "Yes" How?	well worn								
Width of path (If defined) :	5 feet								
How many years have you known of the existence of this path ?	<del>24</del> 40 years.								
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	24+ 1976 <del>1976</del> until closed								
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%;">*Yes / <del>No</del></td> </tr> <tr> <td>ii) on horseback ?</td> <td>*Yes / No</td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td>*Yes / No</td> </tr> <tr> <td>iv) by cycle ?</td> <td>*Yes / No</td> </tr> </table>	i) on foot ?	*Yes / <del>No</del>	ii) on horseback ?	*Yes / No	iii) by motor vehicle ?	*Yes / No	iv) by cycle ?	*Yes / No
i) on foot ?	*Yes / <del>No</del>								
ii) on horseback ?	*Yes / No								
iii) by motor vehicle ?	*Yes / No								
iv) by cycle ?	*Yes / No								
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	twice weekly								
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	pleasure								
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	*Yes / No								
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	Hand Gate at South end								

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \*~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

(This path was frequented regularly by old & young residents of Bishopthorpe (and wider areas) as a pleasant relaxing walk, in the evenings, weekends & winter afternoons particularly. It has been missed very much during the last two/three years since the area has been closed.

\* Delete as appropriate

Signature : .....

Date : ..... 3. 10. 01. ....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. <del>Mrs</del> <del>Miss</del> <del>Ms</del>	
Christian Name (s) :	
Age: (If over 21, you may insert "Over 21")	<i>over 21</i>
Address:	
Occupation:	<i>Retired Chartered Quantity Surveyor</i>
Name or route of Path:	<i>Between Chertony Lane and Ferry Lane Bishopthorpe</i>
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of:	<i>BISHOPTHORPE</i>
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
Is the path well defined ? *Yes / <del>No</del>	
If "Yes" How?	<i>Riverside</i>
Width of path (If defined) :	<i>3 to 5 feet approx</i>
How many years have you known of the existence of this path ?	<i>45</i>
Over what period have you used the path ?	<i>45 years 1955 until closed</i>
<small>(Please specify how many years and dates e.g.: 20 years - 1970 - 1990)</small>	
Have you used the path:	
i) on foot ?	*Yes / No
ii) on horseback ?	* Yes / No
iii) by motor vehicle ?	* Yes / No
iv) by cycle ?	* Yes / No
How often did you / do you use the path ?	<i>from 1977 twice weekly when we</i>
<small>(e.g.: weekly; monthly; occasionally)</small>	<i>Moved to Bishopthorpe before from 1955 to 1976 occasionally</i>
For what purpose did you / do you use the path ?	<i>pleasure</i>
<small>(e.g.: work, pleasure, recreation, to get to shops)</small>	
Have you ever been prevented from, or challenged when, using the path ?	* Yes / <del>No</del>
If "Yes" please give details	<i>since path was closed off by St Andrews Trust</i>
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	
<i>Hand Gate at Ferry Lane end</i>	



Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

*This path is attractive riverside path giving views of the Bishopthorpe Palace and a broad stretch of tree lined river*

\* Delete as appropriate 

Signature : .....

Date : *3 Oct 2001*

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

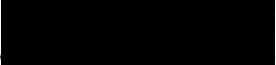
# NORTH YORKSHIRE COUNTY COUNCIL

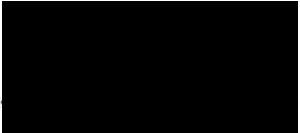
## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: <del>Mr</del> , Mrs, Miss, Ms <span style="background-color: black; color: black;">[REDACTED]</span> <span style="float: right;">x</span> Christian Names: <span style="background-color: black; color: black;">[REDACTED]</span> Age, or if over 21, state over 21: <i>over 21.</i>
2	Address: <span style="background-color: black; color: black;">[REDACTED]</span>
3	Occupation: <i>housewife</i>
4	Name or route of path: <i>RIVERSIDE PATH</i>
5	National Grid References (ends of path), or other means of identification: <i>OLD CHURCHYARD to SWING BRIDGE.</i>
6	Parish: <i>BISHOPTHORPE</i>
7	District: <i>SELBY</i>
*8	Type of path: Footpath/ <del>Bridleway/Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del> <i>Yes.</i>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <i>2ft to 8ft.</i>
12	How long have you known the path: <i>20 years</i>
13	Over what period have you used the path on foot, <del>horseback or by motor vehicle</del> , (state which): <i>20 year.</i>
14	How often over the period have you used the path: <i>regularly.</i>
15	For what purpose did you use the path: <i>recreation.</i>
16	Have you ever been prevented from or challenged when using the path: <i>No</i>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;"><i>2 Stiles</i></p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:  <p style="text-align: center;"><i>wanted as public right of way</i></p>	

Date ..... *14th Feb. 1994* .....

Signature ..  .....


Signature of person taking Statement ..  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

CITY OF YORK  
DEEDS  
REGISTERED  
23 OCT 2001

Surname: * Mr. Mrs. Miss. Ms.		
Christian Name (s) :		
Age: (If over 21, you may insert "Over 21")	<b>59</b>	
Address:		
Occupation:	<b>MUSIC TEACHER</b>	
Name or route of Path:	<b>NOT KNOWN</b>	
National Grid References, at each end of the path, or other means of identifying the route :	<b>ON THE RIVER BANK BETWEEN CHANTRY LANE AND FERRY LANE</b>	
Parish of:	<b>BISHOPTHORPE</b>	
Type of Path:	*Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>	
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>	
Is the path well defined ? *Yes <del>No</del>		
If "Yes" How?	<b>THE EARTH WAS WELL TRODDEN AND HARD. THE VEGETATION, THOUGH LUSH, WAS UNABLE TO GROW ACROSS BECAUSE OF PUBLIC USE.</b>	
Width of path (if defined) :	<b>2 to 3 feet ; variable</b>	
How many years have you known of the existence of this path ?	<b>31 years</b>	
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	<b>29 years 1970 - 1999 (when it was fenced off)</b>	
Have you used the path:		
i) on foot ?	*Yes / <del>No</del>	
ii) on horseback ?	* <del>Yes</del> / No	
iii) by motor vehicle ?	* Yes / No	
iv) by cycle ?	* <del>Yes</del> / No	
How often did you / <del>do you</del> use the path ? (e.g.: weekly; monthly; occasionally)	<b>MONTHLY</b>	
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	<b>TO ENJOY WALKING BY THE RIVER</b>	
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* <del>Yes</del> / No	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.		
<b>OPEN AT CHANTRY LANE END. HAND GATE  AT FERRY LANE END</b>		

Name and Addresses of Owners (and Tenants, if tenanted) if known:

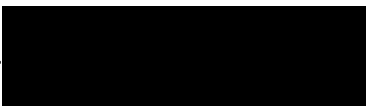
NOT KNOWN

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature :  .....

Date : ..19<sup>th</sup> October 2001

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

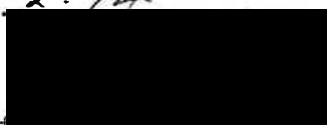
# NORTH YORKSHIRE COUNTY COUNCIL


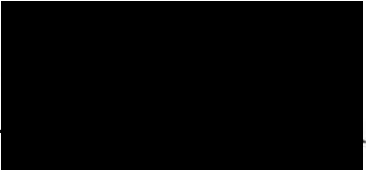
## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, <del>Mrs</del> , <del>Miss</del> , <del>Ms</del> [REDACTED] Christian Names: [REDACTED] Age, or if over 21, state over 21: <i>OVER 21</i>
2	Address: [REDACTED]
3	Occupation: <i>RETIRED</i>
4	Name or route of path: <i>RIVERSIDE PATH</i>
5	National Grid References (ends of path), or other means of identification: <i>OLD CHURCHYARD TO STONE BRIDGE</i>
6	Parish: <i>BISHOPSTHORPE</i>
7	District: <i>SELBY DISTRICT COUNCIL</i>
*8	Type of path: Footpath/ <del>Bridleway</del> / <del>Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <i>2 feet to 8 feet</i>
12	How long have you known the path: <i>45 YEARS</i>
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <i>ON FOOT <del>ALWAYS</del></i>
14	How often over the period have you used the path: <i>AS ABOVE</i>
15	For what purpose did you use the path: <i>WALKING</i>
16	Have you ever been prevented from or challenged when using the path: <i>No</i>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <i>2 STILES</i>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ... *18-2-94*

Signature ..  .....

Signature of  statement  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms.	[REDACTED]		
Christian Name (s) :	[REDACTED]		
Age: (If over 21, you may insert "Over 21")	OVER 21		
Address	[REDACTED]		
Occupation:	RETIRED		
Name or route of Path:	CHANTRY LANE TO FERRY LANE		
National Grid References, at each end of the path, or other means of identifying the route :			
Parish of:	BISHOPTHORPE		
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic		FOOTPATH
Do you regard the route to be a Public Right of Way ?	* Yes / No		YES
Is the path well defined ? *Yes / No If "Yes" How?	IT IS PRESENTLY ALL BLOCKED OFF		
Width of path (if defined) :			
How many years have you known of the existence of this path ?	70 YEARS		
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	1930 to '60s closure.		
Have you used the path:	i) on foot ?	*Yes / No	YES NO NO NO
	ii) on horseback ?	*Yes / No	
	iii) by motor vehicle ?	*Yes / No	
	iv) by cycle ?	*Yes / No	
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	REGULARLY		
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE + RECREATION		
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / No		NO
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.			
FENCE AND GATE AT FERRY LANE END			



Name and Addresses of Owners (and Tenants, if tenanted) if known:


Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

*See enclosed letter.*

\* Delete as appropriate

Signature : .....  .....

Date : *4-10-01* .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

Throughout my lifetime (until recently) Bishopthorpe villagers have enjoyed access to the Oad churchyard and a path through to Terry Lane. I sang in the choir there in the thirties and fished in the river as a schoolboy. In the fifties I had a boat moored down there, for which I paid a mooring fee to Bishopthorpe Parish Council. I am quite willing to be interviewed.



## Public Rights of Way - User Evidence Form

Surname: * <del>Mr.</del> <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del> [REDACTED]														
Christian Name (s): [REDACTED]														
Age: (If over 21, you may insert "Over 21") <span style="margin-left: 100px;">54</span>														
Address: [REDACTED]														
Occupation: <span style="margin-left: 50px;">Housewife</span>														
Name or route of Path:														
National Grid References, at each end of the path, or other means of identifying the route : <span style="margin-left: 20px;">CHANTRY LANE TO FERRY LANE</span>														
Parish of: <span style="margin-left: 20px;">BISHOPTON</span>														
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic													
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>													
Is the path well defined ? *Yes / <del>No</del>	If "Yes" How? <span style="margin-left: 20px;">1 1/2 METRES WELL TRODDEN PATH</span>													
Width of path (if defined) :	<span style="margin-left: 20px;">1 1/2 METRES</span>													
How many years have you known of the existence of this path ?	<span style="margin-left: 100px;">24 YEARS</span>													
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	<span style="margin-left: 20px;">24 YEARS 1977 - 2001</span>													
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%;">*Yes / <del>No</del></td> <td style="width: 40%;"></td> </tr> <tr> <td>ii) on horseback ?</td> <td>*Yes / No</td> <td></td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td>*Yes / No</td> <td></td> </tr> <tr> <td>iv) by cycle ?</td> <td>*Yes / <del>No</del></td> <td><span style="margin-left: 20px;">4 YEARS AGO WITH CHILDREN.</span></td> </tr> </table>		i) on foot ?	*Yes / <del>No</del>		ii) on horseback ?	*Yes / No		iii) by motor vehicle ?	*Yes / No		iv) by cycle ?	*Yes / <del>No</del>	<span style="margin-left: 20px;">4 YEARS AGO WITH CHILDREN.</span>
i) on foot ?	*Yes / <del>No</del>													
ii) on horseback ?	*Yes / No													
iii) by motor vehicle ?	*Yes / No													
iv) by cycle ?	*Yes / <del>No</del>	<span style="margin-left: 20px;">4 YEARS AGO WITH CHILDREN.</span>												
How often <del>did you</del> / do you use the path ? (e.g.: weekly; monthly; occasionally)	<span style="margin-left: 20px;">WEEKLY - 2 TO 3 TIMES PER WEEK</span>													
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	<span style="margin-left: 20px;">PLEASURE / RECREATION DIRECT ROUTE TO RIVER.</span>													
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* <del>Yes</del> / No													
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <span style="margin-left: 20px;">KISSING GATE AT FERRY LANE END OF PATH.</span>														

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

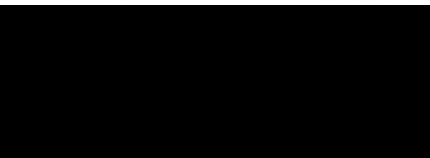
If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

WE HAVE USED THIS PATH SINCE WE CAME TO BISHOPTHORPE AND WORKED AT THE PALACE. THIS PATH HAS ALWAYS BEEN USED BY THE PEOPLE OF BISHOPTHORPE FOR LEISURE AND AS A MEANS OF ACCESS TO THE RIVER, BOATYARD AND RESTAURANT.

\* Delete as

Signature



Date :

9-9-01

Signature of Person

Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: <del>Mr</del> , <del>Mrs</del> , <del>Miss</del> , M		x
	Christian Names:		
	Age, or if over 21, state over 21:	OVER 21.	
2	Address:		
3	Occupation:	RETIRED	
4	Name or route of path:	RIVERSIDE PATH	
5	National Grid References (ends of path), or other means of identification:	OLD CHURCHYARD to SWING BRIDGE.	
6	Parish:	BISHOPTHORPE	
7	District:	SELBY	
*8	Type of path: Footpath/ <del>Bridleway</del> / <del>Byway open to all traffic</del>		
*9	Do you regard the path as public (SEE NOTE 2): YES/NO		
*10	Is the path well defined: Yes/NO		
11	Width of path:	2ft to 8ft.	
12	How long have you known the path:	30 yrs.	
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which):		
14	How often over the period have you used the path:	ALL THE TIME	
15	For what purpose did you use the path:	Walking	
16	Have you ever been prevented from or challenged when using the path:	No.	

17	<p>Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.</p> <p style="text-align: center;">2 Stiles</p>
18	<p>Name of owner(s) or tenant(s), if known:</p>
* 19	<p>Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del>/No</p> <p>If "Yes" give dates and particulars of instructions the owner gave about the path, if any:</p>
<p>Any further information:</p>	

Date .... 14. 7. 2011

Signature .... [Redacted]

Signature of person taking Statement .. [Redacted]

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

Surname: * <del>Mr.</del> Mrs. Miss. Ms.	[REDACTED]
Christian Name (s):	[REDACTED]
Age: (If over 21, you may insert "Over 21")	OVER 21
Address:	[REDACTED]
Occupation:	OCCUPATIONAL THERAPIST
Name or route of Path:	
National Grid References, at each end of the path, or other means of identifying the route:	Clarity Lane through Old Churchyard along riverbank to Ferry Lane
Parish of:	
Type of Path:	*Footpath / <del>Bridleway / Byway Open to All Traffic</del>
Do you regard the route to be a Public Right of Way?	* Yes / <del>No</del>
Is the path well defined? *Yes / <del>No</del> If "Yes" How?	WELL WORN TRACK
Width of path (if defined):	2 feet to 3 feet
How many years have you known of the existence of this path?	12
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	10 yrs 1991 - 2001
Have you used the path:	
i) on foot?	*Yes / <del>No</del>
ii) on horseback?	* <del>YES</del> / <del>No</del>
iii) by motor vehicle?	* <del>YES</del> / <del>No</del>
iv) by cycle?	* <del>YES</del> / <del>No</del>
How often did you / do you use the path? (e.g.: weekly; monthly; occasionally)	WEEKLY
For what purpose did you / do you use the path? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE RECREATION
Have you ever been prevented from, or challenged when, using the path? If "Yes" please give details	* <del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	
KISSING GATE AT FERRY LANE	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

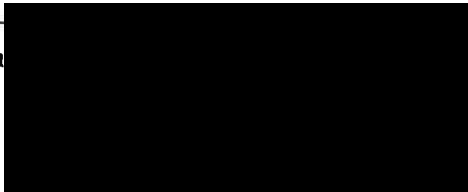
Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \*Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete a

Signature



Date : 22/10/01

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



## Public Rights of Way - User Evidence Form

Surname: * <del>Mr.</del> Mrs. <del>Miss</del> Ms.	[REDACTED]
Christian Name (s):	[REDACTED]
Age: (If over 21, you may insert "Over 21")	over 21
Address:	[REDACTED]
Occupation:	RETIRED
Name or route of Path:	PATH BETWEEN CHANTRY LANE AND FERRY LANE
National Grid References, at each end of the path, or other means of identifying the route:	CHANTRY LANE TO FERRY LANE
Parish of:	BISHOP THORPE
Type of Path:	*Footpath / <del>Bridleway</del> / Byway Open to All Traffic
Do you regard the route to be a Public Right of Way?	* Yes / <del>No</del>
Is the path well defined? *Yes / <del>No</del> If "Yes" How?	it has a hinging gate at the entrance from Ferry Lane
Width of path (if defined):	8 feet (approx)
How many years have you known of the existence of this path?	27 years
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	1974 up to the day it was closed for repair.
Have you used the path:	
i) on foot?	*Yes / <del>No</del> YES
ii) on horseback?	*Yes / No NO
iii) by motor vehicle?	*Yes / No NO
iv) by cycle?	*Yes / No NO
How often did you / do you use the path? (e.g.: weekly; monthly; occasionally)	DAILY
For what purpose did you / do you use the path? (e.g.: work, pleasure, recreation, to get to shops)	WALKING THE DOG
Have you ever been prevented from, or challenged when, using the path? If "Yes" please give details	* <del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	
Danger signs on the arch - which they were going to repair - over 12 months ago - hinging gate at Ferry Lane entrance.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN

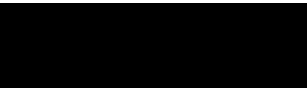
Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

From the said path, the walk can be continued by the river to:  
a) a path on the right called the road to meetings. This has a gate at either end and leads to Acaster Lane.  
b) a second path on the right immediately after the last stile before the iron bridge. This path runs parallel with the cycle path and leads either on to an entrance to the cycle path on the left or back onto Acaster Lane on the right.  
My husband and I have used these paths several times a week over the past 27 years.

\* Delete as appropriate

Signature : .....  .....

Date : 10.9.01.

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. <del>Mrs.</del> <del>Miss.</del> Ms.	[REDACTED]
Christian Name (s) :	[REDACTED]
Age: (If over 21, you may insert "Over 21")	87 YEARS
Address:	[REDACTED]
Occupation:	RETIRED
Name or route of Path:	
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of:	BISHOP THORPE
Type of Path:	*Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
is the path well defined ? <del>Yes</del> / No If "Yes" How?	
Width of path (If defined) :	
How many years have you known of the existence of this path ?	82 YEARS
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	70 YEARS 1931-2001
Have you used the path:	i) on foot ? *Yes / <del>No</del> ii) on horseback ? * <del>Yes</del> / No iii) by motor vehicle ? * <del>Yes</del> / No iv) by cycle ? * <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	OCCASIONALLY
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	<del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs ,Obstructions, etc encountered on the path; or signs about the path or land.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Four diagonal lines indicating redacted information.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Four diagonal lines indicating redacted information.

Any Further Information which you consider to be relevant :

Four diagonal lines indicating redacted information.

\* Delete as appropriate

Signature : [Redacted]

Date : 27<sup>th</sup> Sept 2011

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del>	
Christian Name (s) :	
Age: (If over 21, you may insert "Over 21")	OVER 21
Address:	
Occupation:	RETAIL BUTCHER
Name or route of Path:	
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of:	BISHOP THORPE
Type of Path:	*Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
is the path well defined ? <del>Yes</del> / No If "Yes" How?	
Width of path (if defined) :	
How many years have you known of the existence of this path ?	45 YEARS
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	45 YEARS 1956-2001
Have you used the path:	i) on foot ? *Yes / <del>No</del> ii) on horseback ? * <del>Yes</del> / No iii) by motor vehicle ? <del>Yes</del> / No iv) by cycle ? * <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	OCCASIONALLY
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	<del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

[Redacted area with diagonal lines]

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

[Redacted area with diagonal lines]

Any Further Information which you consider to be relevant :

[Redacted area with diagonal lines]

\* Delete as appropriate

Signature : [Redacted] .....

Date : 27<sup>th</sup> Sept 2001

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

CITY OF YORK  
 DEEDS  
 RECEIVED  
 17 SEP 2001

Surname: Mr Mrs. Miss. Ms [REDACTED]  
 Christian Name (s) : [REDACTED]  
 Age: (If over 21, you may insert "Over 21") OVER 21

[REDACTED]

Occupation: RETIRED

Name or route of Path: CHANTRY LANE TO FERRY LANE

National Grid References, at each end of the path, or other means of identifying the route :

Parish of: BISHOP THORPE

Type of Path: \*Footpath / Bridleway / Byway Open to All Traffic FOOTPATH.

Do you regard the route to be a Public Right of Way ? \* Yes / No YES

Is the path well defined ? \*Yes / No IT IS THROUGH THE OLD CHURCH  
 If "Yes" How? YARD AND BURIAL GROUND.

Width of path (If defined) : 3 METRES.

How many years have you known of the existence of this path ? 35 YEARS PLUS.

Over what period have you used the path ?  
 (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 1965 - 1999.

Have you used the path: i) on foot ? \*Yes / ~~No~~ YES.  
 ii) on horseback ? \*Yes / No  
 iii) by motor vehicle ? \*Yes / No  
 iv) by cycle ? \*Yes / No

How often did you / do you use the path ?  
 (e.g.: weekly; monthly; occasionally) DAILY.

For what purpose did you / do you use the path ?  
 (e.g.: work, pleasure, recreation, to get to shops) RECREATION.

Have you ever been prevented from, or challenged when, using the path ? \* Yes / No  
 If "Yes" please give details NO

Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.  
FENCING AND SIGNS SAYING THE FOOTPATH IS CLOSED FOR RESTORATION OF THE RIVERBANK. WHICH HAVE BEEN THERE FOR OVER A YEAR. HAND GATE AT THE ENTRANCE OF FERRY LANE

Name and Addresses of Owners (and Tenants, if tenanted) if known:

BISHOPTHORPE PARISH COUNCIL

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

NO

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

THIS PATH WAS CLOSED FOR RENOVATION OF THE RIVER BANK, AFTER THE WORK WAS COMPLETED ALL THE MACHINERY WAS REMOVED, AND NO FURTHER WORK ENSUED. THE FOOTPATH WAS NEVER REOPENED AND HAS BEEN CLOSED FOR OVER ONE YEAR.

\* Delete as

Signature : [Redacted]

Date : 13-9-2001

Signature of Person Taking the Statement :

Date :

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



## Public Rights of Way - User Evidence Form

Surname: * <del>Mr.</del> <del>Mrs.</del> <del>Miss</del> <del>Ms.</del>	
Christian Name (s) :	
Age: (If over 21, you may insert "Over 21")	Over 21
Address:	
Occupation:	HOUSEWIFE / CARER
Name or route of Path:	AS BELOW
National Grid References, at each end of the path, or other means of identifying the route :	
CHANTLY LANE THROUGH OLD CHURCH YARD ALONG RIVER BANK TO FERRY LANE	
Parish of:	BISNORTHORPE
Type of Path:	*Footpath / <del>Bridleway / Byway Open to All Traffic</del>
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
Is the path well defined ? *Yes / <del>No</del>	
If "Yes" How?	WELL MARKED EARLY PATH ALONG RIVER BANK
Width of path (If defined) :	NARROW
How many years have you known of the existence of this path ?	50ish
Over what period have you used the path ? <small>(Please specify how many years and dates e.g.: 20 years - 1970 - 1990)</small>	mid 1950's to present time
Have you used the path:	
i) on foot ?	*Yes / <del>No</del>
ii) on horseback ?	* Yes / No
iii) by motor vehicle ?	* Yes / No
iv) by cycle ?	*Yes / No
How often did you / do you use the path ? <small>(e.g.: weekly; monthly; occasionally)</small>	OCCASIONALLY
For what purpose did you / do you use the path ? <small>(e.g.: work, pleasure, recreation, to get to shops)</small>	RECREATION
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* <del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	
ONE STILE NEAR OLD CHURCH ON RIVER BANK	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN

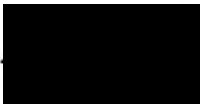
Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

As a child, along with other children of the village, we used to use the path between the old church and ~~the~~ my lane on a regular, ie probably once every 2-3 weeks, for pleasure. We enjoyed the old church building and its history and the walk along the river bank, watching the barges passing. As my husband is now in a wheelchair we can no longer use this, or any other riverside path - which we miss very much.

\* Delete as appropriate

Signature : .....  .....

Date : ..... 14.11.01 .....

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms.	[REDACTED]								
Christian Name (s):	[REDACTED]								
Age: (If over 21, you may insert "Over 21")	OVER 21								
Address:	[REDACTED]								
Occupation:	RETIRED								
Name or route of Path:	FERRY LANE BY RIVER BANK TO CHANTRY LANE								
National Grid References, at each end of the path, or other means of identifying the route:	Chantry Lane through old churchyard along riverbank to Ferry Lane								
Parish of:	BISHOPSTROPHE								
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic								
Do you regard the route to be a Public Right of Way?	* Yes / <del>No</del>								
is the path well defined? *Yes / <del>No</del> If "Yes" How?	BY PASSAGE OF FEET								
Width of path (if defined):	APPROX 6 FT								
How many years have you known of the existence of this path?	36								
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	36 YEARS 1965 - 2001								
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot?</td> <td style="width: 30%;">*Yes / <del>No</del></td> </tr> <tr> <td>ii) on horseback?</td> <td>*Yes / <del>No</del></td> </tr> <tr> <td>iii) by motor vehicle?</td> <td>*Yes / <del>No</del></td> </tr> <tr> <td>iv) by cycle?</td> <td>*Yes / <del>No</del></td> </tr> </table>	i) on foot?	*Yes / <del>No</del>	ii) on horseback?	*Yes / <del>No</del>	iii) by motor vehicle?	*Yes / <del>No</del>	iv) by cycle?	*Yes / <del>No</del>
i) on foot?	*Yes / <del>No</del>								
ii) on horseback?	*Yes / <del>No</del>								
iii) by motor vehicle?	*Yes / <del>No</del>								
iv) by cycle?	*Yes / <del>No</del>								
How often did you / do you use the path? (e.g.: weekly; monthly; occasionally)	MONTHLY APPROX								
For what purpose did you / do you use the path? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE + RECREATION								
Have you ever been prevented from, or challenged when, using the path? If "Yes" please give details	*Yes / <del>No</del> NO								
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	KISSING CROSS FERRY LANE END OF PATH								

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Not known

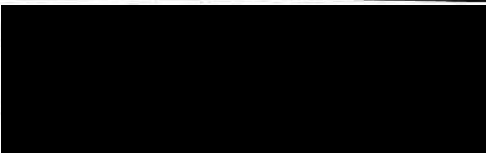
Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \*Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : .....



Date : 3 Oct 2001

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms.	[REDACTED]								
Christian Name (s) :	[REDACTED]								
Age: (If over 21, you may insert "Over 21")	42								
Address:	[REDACTED]								
Occupation:	MUSICIAN								
Name or route of Path:									
National Grid References, at each end of the path, or other means of identifying the route :	Chantry Lane through old churchyard along westbank to Ferry Lane								
Parish of:									
Type of Path:	*Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>								
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>								
Is the path well defined ? *Yes / <del>No</del> If "Yes" How?	Well worn track								
Width of path (if defined) :	2 feet to 3 feet variable								
How many years have you known of the existence of this path ?	12								
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	10 yrs 1991 - 2001								
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%;">*Yes / <del>No</del></td> </tr> <tr> <td>ii) on horseback ?</td> <td>*Yes / No</td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td>*Yes / No</td> </tr> <tr> <td>iv) by cycle ?</td> <td>*Yes / No</td> </tr> </table>	i) on foot ?	*Yes / <del>No</del>	ii) on horseback ?	*Yes / No	iii) by motor vehicle ?	*Yes / No	iv) by cycle ?	*Yes / No
i) on foot ?	*Yes / <del>No</del>								
ii) on horseback ?	*Yes / No								
iii) by motor vehicle ?	*Yes / No								
iv) by cycle ?	*Yes / No								
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	weekly								
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	pleasure, recreation								
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* <del>Yes</del> / No								
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.									
kissing gate at Ferry Lane entrance									

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \*~~Yes~~/ No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete a 

Signature .....

Date : 22/10/01 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms. [REDACTED]	
Christian Name (s) : [REDACTED]	
Age: (If over 21, you may insert "Over 21") 53	
Address: [REDACTED]	
Occupation:	
Name or route of Path: FERRY LANE TO CHANTRY LANE	
National Grid References, at each end of the path, or other means of identifying the route : CHANTRY LANE TO FERRY LANE.	
Parish of: BISHOPTHORPE	
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic
Do you regard the route to be a Public Right of Way ?	* Yes / No
Is the path well defined ? *Yes / No	BORDERED BY FENCE & RIVER BANK PATH WORN BETWEEN BUSHES.
Width of path (If defined) :	1 metre sometimes less.
How many years have you known of the existence of this path ?	ALL MY LIFE (I grew up nearby)
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	JAN 1975 - present.
Have you used the path:	
i) on foot ?	*Yes / No
ii) on horseback ?	* Yes / No
iii) by motor vehicle ?	* Yes / No
iv) by cycle ?	* Yes / No IN EARLY YEARS
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	2-3 TIMES PER WEEK.
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	ESSENTIAL CONNECTION BETWEEN RIVER PATH & VILLAGE.
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. AT FERRY LANE END A KISSING GATE.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : [Redacted]

Date : 5/9/01

Signature of Person Taking the Statement : [Redacted]

Date : H.S. ASOVE

PLEASE NOTE

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
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- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



RFA  
Appendix 21  
Type 44  
RC  
NRN

CITY OF YORK  
DEEDS  
RECEIVED  
- 1 OCT 2001

3880

### Public Rights of Way - User Evidence Form

Surname: \* Mr. Mrs. ~~Miss. Ms.~~ [REDACTED]

Christian Name (s): [REDACTED]

Age: (If over 21, you may insert "Over 21") BOTH OVER 21.

Address: [REDACTED]

Occupation: PERSONNEL MANAGER / RETIRED FAMILY NURSE <sup>PLANNING</sup>

Name or route of Path: CONNECTING CHANTRY LANE WITH FERRY LANE

National Grid References, at each end of the path, or other means of identifying the route :

Parish of: BISHOP TROLE

Type of Path: FOOT PATH \*Footpath / Bridleway / Byway Open to All Traffic

Do you regard the route to be a Public Right of Way?  Yes / No

Is the path well defined?  Yes / No  
If "Yes" How?

Width of path (if defined) :

How many years have you known of the existence of this path? 31 YRS -

Over what period have you used the path ?  
(Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 31 YRS '70 - '00

Have you used the path:

i)	on foot ?	<input checked="" type="radio"/> Yes / No
ii)	on horseback ?	* Yes <input checked="" type="radio"/> No
iii)	by motor vehicle ?	* Yes <input checked="" type="radio"/> No
iv)	by cycle ?	* Yes / <input checked="" type="radio"/> No

How often did you / do you use the path ?  
(e.g.: weekly; monthly; occasionally) 2/3 TIMES A WEEK

For what purpose did you / do you use the path ?  
(e.g.: work, pleasure, recreation, to get to shops) DOG WALKING

Have you ever been prevented from, or challenged when, using the path ?  Yes / No  
If "Yes" please give details RECENT BUILDING WORK NO REASON WHY IT CAN'T BE OPENED

Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. THE PATH IS CURRENTLY BLOCKED OFF! THERE WERE NO SIGNS PREVIOUSLY. THERE WAS A 'KISSING GATE' FROM THE BOTTOM OF FERRY LANE

Name and Addresses of Owners (and Tenants, if tenanted) if known:

~~PARISH COUNCIL~~ PARISH COUNCIL ?  
BISHOPTWORPE

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : [Redacted]

Date : 18.9.01

Signature of Person Taking the Statement : [Redacted]

Date : 18.9.01

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

RFA  
Appendix 21  
Type 44  
RC  
NRN

CITY OF YORK  
DEEDS  
RECEIVED  
-1 OCT 2001

3880

### Public Rights of Way - User Evidence Form

Surname: \* Mr. Mrs. ~~Miss. Ms.~~ [REDACTED]

Christian Name (s): [REDACTED]

Age: (If over 21, you may insert "Over 21") BOTH OVER 21.

Address: 4 LANG ROAD, BISHOP<sup>TH</sup> WARE YORK YO23 2QL

Occupation: PERSONNEL MANAGER / RETIRED FAMILY NURSE<sup>PLANNING</sup>

Name or route of Path: CONNECTING CHANTRY LANE WITH FERRY LANE

National Grid References, at each end of the path, or other means of identifying the route :

Parish of: BISHOP WARE

Type of Path: FOOT PATH \*Footpath / Bridleway / Byway Open to All Traffic

Do you regard the route to be a Public Right of Way?  Yes / No

Is the path well defined?  Yes / No  
If "Yes" How?

Width of path (if defined) :

How many years have you known of the existence of this path? 31 YRS -

Over what period have you used the path ?  
(Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 31 YRS '70 - '00

Have you used the path:

i)	on foot ?	<input checked="" type="radio"/> Yes / No
ii)	on horseback ?	* Yes <input checked="" type="radio"/> No
iii)	by motor vehicle ?	* Yes <input checked="" type="radio"/> No
iv)	by cycle ?	* Yes / <input checked="" type="radio"/> No

How often did you / do you use the path ?  
(e.g.: weekly; monthly; occasionally) 2/3 TIMES A WEEK

For what purpose did you / do you use the path ?  
(e.g.: work, pleasure, recreation, to get to shops) DOG WALKING

Have you ever been prevented from, or challenged when, using the path ?  Yes / No  
If "Yes" please give details RECENT BUILDING WORK NO REASON WHY IT CAN'T BE OPENED

Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. THE PATH IS CURRENTLY BLOCKED OFF / THERE WERE NO SIGNS PREVIOUSLY. THERE WAS A 'KISSING GATE' FROM THE BOTTOM OF FERRY LANE

Name and Addresses of Owners (and Tenants, if tenanted) if known:

~~PARISH COUNCIL~~ PARISH COUNCIL ?  
BISHOPTWORPE

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : [Redacted]

Date : 18.9.01

Signature of Person Taking the Statement : [Redacted]

Date : 18.9.01

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
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## Public Rights of Way - User Evidence Form

Surname:	* <u>Mr.</u> Mrs. Miss. Ms. [REDACTED]
Christian Name (s):	[REDACTED]
Age: (If over 21, you may insert "Over 21")	OVER 21.
Address:	[REDACTED]
Occupation:	ACCOUNTANT.
Name or route of Path:	CHAPEL LAKE - FERRY LAKE
National Grid References, at each end of the path, or other means of identifying the route:	Chapel Lake through old churchyard along riverbank to Ferry Lake
Parish of:	BISHOPSTORP
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic
Do you regard the route to be a Public Right of Way?	* Yes / <del>No</del>
is the path well defined? *Yes / <u>No</u> If "Yes" How?	
Width of path (if defined):	
How many years have you known of the existence of this path?	37 yrs
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	37 yrs 1964 - 2001
Have you used the path:	
i) on foot?	*Yes / <u>No</u>
ii) on horseback?	*Yes / <u>No</u>
iii) by motor vehicle?	*Yes / <u>No</u>
iv) by cycle?	*Yes / <u>No</u>
How often did you / do you use the path? (e.g.: weekly; monthly; occasionally)	WEEKLY
For what purpose did you / do you use the path? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE
Have you ever been prevented from, or challenged when, using the path? If "Yes" please give details	* Yes / <u>No</u> DUNES PRESENT RIVER BANK RESTORATION WORK
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	ONE HAND GATE

Name and Addresses of Owners (and Tenants, if tenanted) if known:

*[Handwritten mark]*

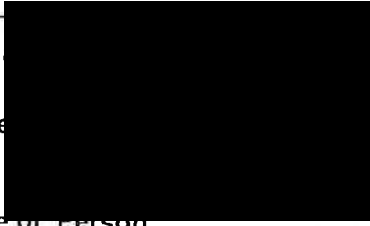
Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

*[Handwritten mark]*

\* Delete

Signature  .....

Date : 2/10/2001 .....

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
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- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms <span style="float: right;">✓</span>	
Christian Name (s)	
Age: (If over 21, you may insert "Over 21") <i>Over 21</i>	
Address:	
Occupation: <i>Housewife</i>	
Name or route of Path: <i>Chantry Lane / Ferry Lane</i>	
National Grid References, at each end of the path, or other means of identifying the route : <i>Chantry Lane through old churchyard along road back to Ferry Lane</i>	
Parish of: <i>Bishopthorpe</i>	
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
Is the path well defined ? *Yes / No If "Yes" How?	
Width of path (if defined) :	
How many years have you known of the existence of this path ?	<i>37</i>
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	<i>37 1964-2001</i>
Have you used the path:	
i) on foot ?	* <del>Yes</del> / No
ii) on horseback ?	* Yes / No
iii) by motor vehicle ?	* <del>Yes</del> / No
iv) by cycle ?	* <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	<i>Weekly</i>
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	<i>Pleasure</i>
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / <del>No</del> <i>While restoration work is being done</i>
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <i>One hand gate</i>	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : [Redacted] .....

Date : 2/10/01 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss-Ms. <span style="background-color: black; color: black;">[REDACTED]</span> ✓	
Christian Name (s) : <span style="background-color: black; color: black;">[REDACTED]</span>	
Age: (If over 21, you may insert "Over 21") 83	
Address: <span style="background-color: black; color: black;">[REDACTED]</span>	
Occupation: RETIRED	
Name or route of Path: CHANTY LANE TO FORMY LANE	
National Grid References, at each end of the path, or other means of identifying the route : CHANTY LANE TO FORMY LANE	
Parish of: BISHOPTONPE	
Type of Path: *Footpath / Bridleway / Byway Open to All Traffic	
Do you regard the route to be a Public Right of Way ? * Yes / <del>No</del>	
is the path well defined ? *Yes / <del>No</del> If "Yes" How? WELL TRODDEN - 1 - 1 1/2 METRES WIDE	
Width of path (if defined) : 1 - 1 1/2 METRES	
How many years have you known of the existence of this path ? 51 YEARS	
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 51 YEARS 1950 - 2001 (PRESENT)	
Have you used the path: i) on foot ? *Yes / <del>No</del> ii) on horseback ? *Yes / No iii) by motor vehicle ? *Yes / No iv) by cycle ? *Yes / <del>No</del>	
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) DAILY FOR 35 YEARS WEEKLY FOR 16 "	
For what purpose did you / do you use the path ? PLEASURE / RECREATION (e.g.: work, pleasure, recreation, to get to shops) WITH CHILDREN & GRANDCHILDREN	
Have you ever been prevented from, or challenged when, using the path ? * <del>Yes</del> / No If "Yes" please give details	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. SMALL GATE 50 YEARS AGO & THEN REPLACED WITH A KISSING GATE APPROX 20 YEARS AGO.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:


Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

I HAVE USED THIS PATH WHEN I LIVED IN CODA AVE & ALSO WHEN I LIVED IN FERRY LANE WHEN A NEW HOUSE WAS BUILT. I HAVE WALKED THIS PATH WITH MY OWN CHILDREN AND WITH MY GRANDCHILDREN ON A REGULAR BASIS SINCE 1950. DURING THIS TIME I HAVE ALSO SEEN MANY PEOPLE FISHING & RIDING BIKES ALONG THIS FOOTPATH.

\* Delete as appropriate

Signature : 

Date : 26-9-01

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

**CITY OF YORK**  
**DEDS**  
**RECEIVED**  
- 8 OCT 2001

**Public Rights of Way - User Evidence Form**

Surname: * Mr. Mrs. Miss Ms	[REDACTED]								
Christian Name (s) :	[REDACTED]								
Age: (If over 21, you may insert "Over 21")	OVER 21								
Address:	[REDACTED]								
Occupation:	BUILDER - ACCOUNTS CLERK (P. HIART)								
Name or route of Path:	DOWN CHANTRY LANE BESIDE RIVER TO FERRY LANE								
National Grid References, at each end of the path, or other means of identifying the route :									
Parish of:	BISHOP THORPE								
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic								
Do you regard the route to be a Public Right of Way ?	* Yes / No								
Is the path well defined ? *Yes / No If "Yes" How?	BY ENTRANCE GATE OFF FERRY LANE & WELL TRODDEN ROUTE UP & PASSEY RUINES OF ST HARRY'S ANDREW'S								
Width of path (if defined) :	APPROX 4 FT (IMPERIAL)								
How many years have you known of the existence of this path ?	40 YEARS +								
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	27 YEARS + 1969 TO DATE								
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%;">*Yes / No</td> </tr> <tr> <td>ii) on horseback ?</td> <td>*Yes / No</td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td>*Yes / No</td> </tr> <tr> <td>iv) by cycle ?</td> <td>*Yes / No</td> </tr> </table>	i) on foot ?	*Yes / No	ii) on horseback ?	*Yes / No	iii) by motor vehicle ?	*Yes / No	iv) by cycle ?	*Yes / No
i) on foot ?	*Yes / No								
ii) on horseback ?	*Yes / No								
iii) by motor vehicle ?	*Yes / No								
iv) by cycle ?	*Yes / No								
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	EVERY DAY.								
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE								
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / No								
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.									
ENTRANCE FROM FERRY LANE THROUGH (HAND) GATE. ALTERNATIVE ROUTE DOWN CHANTRY LANE PASSEY ST HARRY'S RUINES & DOWN RIVER SIDE TO FERRY LANE ANDREW'S									

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN ALWAYS ASSUMED IT BELONGED TO YORK WATERWAYS BEING A RIVER BANK.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* Yes/No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

UNTIL THE REPAIR WORKS TO RIVER BANK OR RUINES OF ST MARTIN'S I HAVE NEVER HEARD OF ANY DISPUTE OR OTHERWISE AS TO THE LEGAL RIGHTS OF THE PEOPLE OF BISHOPSTHORPE BEING CHALLENGED FOR USING THIS FOOT PATH AND HAVE ALWAYS BEEN UNDER THE IMPRESSION THAT IT WAS OPEN PEDESTRIAN WAY FOR ALL TO USE, OTHER WISE WHY WOULD A PEDESTRIAN GATE BE INCORPORATED IN THE FENCE AT THE FERRY LANE END.

\* Delete as appropriate

Signature : .....

Date : 3RD OCT: 2001.

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

**CITY OF YORK**  
**DEDS**  
**RECEIVED**  
- 8 OCT 2001

**Public Rights of Way - User Evidence Form**

Surname: * Mr. <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del>	[REDACTED]								
Christian Name (s) :	[REDACTED]								
Age: (If over 21, you may insert "Over 21")	OVER 21								
Address:	[REDACTED]								
Occupation:	BUILDER - ACCOUNTS CLERK (P. HIART)								
Name or route of Path:	DOWN CHANTRY LANE BESIDE RIVER TO FERRY LANE								
National Grid References, at each end of the path, or other means of identifying the route :									
Parish of:	BISHOP THORPE								
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic								
Do you regard the route to be a Public Right of Way ?	* Yes / No								
Is the path well defined ? *Yes / No If "Yes" How?	BY ENTRANCE GATE OFF FERRY LANE & WELL TRODDEN ROUTE UP & PASSES RUINES OF ST HARRY'S ANDREW'S								
Width of path (if defined) :	APPROX 4 FT (IMPERIAL)								
How many years have you known of the existence of this path ?	40 YEARS +								
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	27 YEARS + 1969 TO DATE								
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%;">*Yes / No</td> </tr> <tr> <td>ii) on horseback ?</td> <td>*Yes / No</td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td>*Yes / No</td> </tr> <tr> <td>iv) by cycle ?</td> <td>*Yes / No</td> </tr> </table>	i) on foot ?	*Yes / No	ii) on horseback ?	*Yes / No	iii) by motor vehicle ?	*Yes / No	iv) by cycle ?	*Yes / No
i) on foot ?	*Yes / No								
ii) on horseback ?	*Yes / No								
iii) by motor vehicle ?	*Yes / No								
iv) by cycle ?	*Yes / No								
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	EVERY DAY.								
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE								
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / No								
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.									
ENTRANCE FROM FERRY LANE THROUGH (HAND) GATE. ALTERNATIVE ROUTE DOWN CHANTRY LANE PASSES ST HARRY'S RUINES & DOWN RIVER SIDE TO FERRY LANE ANDREW'S									

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN ALWAYS ASSUMED IT BELONGED TO YORK WATERWAYS BEING A RIVER BANK.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* Yes/No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

UNTIL THE REPAIR WORKS TO RIVER BANK OR RUINES OF ST MARTIN I HAVE NEVER HEARD OF ANY DISPUTE OR OTHERWISE AS TO THE LEGAL RIGHTS OF THE PEOPLE OF BISHOPSTHORPE BEING CHALLENGED FOR USING THIS FOOT PATH AND HAVE ALWAYS BEEN UNDER THE IMPRESSION THAT IT WAS OPEN PEDESTRIAN WAY FOR ALL TO USE, OTHER WISE WHY WOULD A PEDESTRIAN GATE BE INCORPORATED IN THE FENCE AT THE FERRY LANE END.

\* Delete as appropriate

Signature : .....

Date : 3RD OCT: 2001.

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

CITY OF YORK  
DEEDS  
- 5 OCT 2001  
BISHOPTHORPE

### Public Rights of Way - User Evidence Form

REF. AC/3862, 3871, 3850 / PROW (R) 001

Surname: * Mr. Mrs. Miss. Ms. <span style="background-color: black; color: black;">[REDACTED]</span>	
Christian Name (s) <span style="background-color: black; color: black;">[REDACTED]</span>	
Age: (If over 21, you may insert "Over 21") <span style="font-size: 1.2em;">OVER 21</span>	
[REDACTED]	
Occupation: <span style="font-size: 1.2em;">RETIRED</span>	
Name or route of Path: <span style="font-size: 1.2em;">CHANTRY LANE TO FERRY LANE BISHOPTHORPE</span>	
National Grid References, at each end of the path, or other means of identifying the route: <span style="font-size: 0.8em;">RUNS FROM END OF CHANTRY LANE THROUGH OLD CHURCHYARD ALONG THE RIVERBANK TO FERRY LANE WHERE IT JOINS RIVERSIDE PATH TO ACASTER MAUSERS</span>	
Parish of: <span style="font-size: 1.2em;">BISHOPTHORPE</span>	
Type of Path: *Footpath / <del>Bridleway</del> / <del>Byway Open to All Traffic</del>	
Do you regard the route to be a Public Right of Way? * Yes / <del>No</del>	
Is the path well defined? *Yes / <del>No</del> If "Yes" How?	
Width of path (If defined): <span style="font-size: 1.2em;">4ft. approx</span>	
How many years have you known of the existence of this path? <span style="font-size: 1.2em;">AT LEAST 50 years.</span>	
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) <span style="font-size: 1.2em;">50 years 1950 - 2000</span>	
Have you used the path:	
i) on foot ?	*Yes / <del>No</del>
ii) on horseback ?	* <del>Yes</del> / No
iii) by motor vehicle ?	* <del>Yes</del> / No
iv) by cycle ?	* <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) <span style="font-size: 1.2em;">MONTHLY</span>	
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) <span style="font-size: 1.2em;">PLEASURE</span>	
Have you ever been prevented from, or challenged when, using the path ? * <del>Yes</del> / No If "Yes" please give details	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <span style="font-size: 1.2em;">GATE AT FERRY LANE END - HAND GATE</span>	

Name and Addresses of Owners (and Tenants, if tenanted) if known:


I DON'T KNOW BUT ALWAYS ASSUMED IT WAS EITHER BISHOPTHORPE PARISH COUNCIL OR THE CHURCH.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature :  .....

Date : 08-10-01 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



## Public Rights of Way - User Evidence Form

Surname: <del>Mr. Mrs. Miss. Ms.</del> [REDACTED]													
Christian Name (s): [REDACTED]													
Age: (If over 21, you may insert "Over 21") 53.													
Address: 15. APPLETON ROAD BISHOPTHORPE YORK.													
Occupation: FAMILY CENTRE WORKER. COMMUNITY SERVICES. C.Y.C.													
Name or route of Path: WE JUST CALLED IT "ALONG THE RIVER"													
National Grid References, at each end of the path, or other means of identifying the route: Chantry Lane through Old Church Yard along river bank to Ferry Lane													
Parish of: BISHOPTHORPE													
Type of Path: <input checked="" type="radio"/> Footpath / <input type="radio"/> Bridleway / <input type="radio"/> Byway Open to All Traffic													
Do you regard the route to be a Public Right of Way? <input checked="" type="radio"/> Yes / <input type="radio"/> No													
Is the path well defined? <input checked="" type="radio"/> Yes / <input type="radio"/> No If "Yes" How? WELL TRODDEN - NO GRASS GROWING ON TRACK + TRODDEN DIVERSIONS AROUND ANY PARTICULARLY MUDDY AREAS.													
Width of path (if defined): APPROX 3'													
How many years have you known of the existence of this path? 28 YEARS. (AS LONG AS I HAVE LIVED IN BISHOPTHORPE)													
Over what period have you used the path? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 28 YEARS.													
Have you used the path: <table border="0"> <tr> <td>i)</td> <td>on foot?</td> <td><input checked="" type="radio"/> Yes / <input type="radio"/> No</td> </tr> <tr> <td>ii)</td> <td>on horseback?</td> <td>* <input type="radio"/> Yes / <input checked="" type="radio"/> No</td> </tr> <tr> <td>iii)</td> <td>by motor vehicle?</td> <td>* <input type="radio"/> Yes / <input checked="" type="radio"/> No</td> </tr> <tr> <td>iv)</td> <td>by cycle?</td> <td>* <input type="radio"/> Yes / <input checked="" type="radio"/> No</td> </tr> </table>		i)	on foot?	<input checked="" type="radio"/> Yes / <input type="radio"/> No	ii)	on horseback?	* <input type="radio"/> Yes / <input checked="" type="radio"/> No	iii)	by motor vehicle?	* <input type="radio"/> Yes / <input checked="" type="radio"/> No	iv)	by cycle?	* <input type="radio"/> Yes / <input checked="" type="radio"/> No
i)	on foot?	<input checked="" type="radio"/> Yes / <input type="radio"/> No											
ii)	on horseback?	* <input type="radio"/> Yes / <input checked="" type="radio"/> No											
iii)	by motor vehicle?	* <input type="radio"/> Yes / <input checked="" type="radio"/> No											
iv)	by cycle?	* <input type="radio"/> Yes / <input checked="" type="radio"/> No											
How often did you / do you use the path? (e.g.: weekly; monthly; occasionally) WHEN MY SON WAS YOUNG AT LEAST WEEKLY (SOMETIMES DAILY). SINCE THEN MONTHLY.													
For what purpose did you / do you use the path? (e.g.: work, pleasure, recreation, to get to shops) PLEASURE. ENTERTAINING YOUNG SON. NATURE WALKS. FUN.													
Have you ever been prevented from, or challenged when, using the path? <input checked="" type="radio"/> Yes / <input type="radio"/> No If "Yes" please give details													
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. NOT THAT I AM AWARE OF - ONLY OBSTRUCTIONS WERE PUDDLES OR FALLEN BRANCHES.													

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \*Yes (NO)

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : ... [redacted] .....

Date : 27 October 2001

Signature of Person Taking the Statement .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

CITY OF YORK  
 DEEDS  
 RECEIVED  
 17 SEP 2001

## Public Rights of Way - User Evidence Form

Surname: <del>*Mr.</del> Mrs. Miss. Ms.	[REDACTED]
Christian Name (s):	[REDACTED]
Age: (If over 21, you may insert "Over 21")	OVER 21
Address:	[REDACTED]
Occupation:	SECRETARY
Name or route of Path:	CHANTRY LANE TO FERRY LANE BISHOPTHORPE
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of:	BISHOPTHORPE
Type of Path:	*Footpath / Bridleway / Byway Open to All Traffic-
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
Is the path well defined ? *Yes <del>No</del> If "Yes" How?	IT IS A LOCAL RIGHT OF WAY THROUGH THE OLD CHURCH YARD .
Width of path (if defined) :	3 - 4M .
How many years have you known of the existence of this path ?	14 YRS .
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	1987 TO DATE .
Have you used the path:	
i) on foot ?	*Yes / <del>No</del>
ii) on horseback ?	<del>Yes</del> / No
iii) by motor vehicle ?	* <del>Yes</del> / No
iv) by cycle ?	* <del>Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	DAILY
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / <del>No</del> PREVENTED BY CLOSURE OVER 1 YR AGO .
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. HAND GATE FROM FERRY LANE FOR ACCESS. OBSTRUCTIONS OF FENCING PROHIBITING ACCESS DUE TO REFURBISHMENT OF RIVER BANK .	

Name and Addresses of Owners (and Tenants, if tenanted) if known:


BISHOPSTHORPE PARISH COUNCIL ?

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \*~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant : THIS PATH WAS CLOSED FOR A PERIOD OF 12 WEEKS WELL OVER A YEAR AGO AND HAS STILL NOT BEEN OPENED FOR PUBLIC ACCESS.

\* Delete as appropriate

Signature :  .....

Date : 13/9/11 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: <del>Mr.</del> Mrs. Miss Ms.	
Christian Name (s) :	
Age: (If over 21, you may insert "Over 21")	<b>OVER 21</b>
Address:	
Occupation:	<b>RETIRED</b>
Name or route of Path:	
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of:	<b>BISHOPTHORPE</b>
Type of Path:	<del>*Footpath / Bridleway / Byway Open to All Traffic</del>
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>
Is the path well defined ? *Yes <del>No</del> If "Yes" How?	
Width of path (If defined) :	
How many years have you known of the existence of this path ?	<b>28 YEARS</b>
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	<b>28 YEARS: 1973-2001</b>
Have you used the path:	
i) on foot ?	*Yes / <del>No</del>
ii) on horseback ?	<del>*Yes</del> / No
iii) by motor vehicle ?	<del>*Yes</del> / No
iv) by cycle ?	<del>*Yes</del> / No
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	<b>APPROX MONTHLY</b>
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops).	<b>YEAR-ROUND APPRECIATION OF NATURE + INTRODUCTION OF CHILDREN + GRANDCHILDREN TO IT</b>
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	<del>Yes</del> / No
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	<b>HAND GATE AT THE FERRY LANE END</b>


Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? ~~\*Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : .....  .....

Date : .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
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## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms. <span style="background-color: black; color: black;">[REDACTED]</span>		
Christian Name (s) : <span style="background-color: black; color: black;">[REDACTED]</span>		
Age: (If over 21, you may insert "Over 21") <u>OVER 21</u>		
Address: <span style="background-color: black; color: black;">[REDACTED]</span>		
Occupation: <u>RETIRED</u>		
Name or route of Path:		
National Grid References, at each end of the path, or other means of identifying the route : <u>Charity Lane - through old churchyard along westbank to Ferry Lane</u>		
Parish of: <u>BISHOPTHORPE</u>		
Type of Path: *Footpath / <del>Bridleway / Byway Open to All Traffic</del>		
Do you regard the route to be a Public Right of Way ? * Yes / <del>No</del>		
Is the path well defined ? *Yes / <del>No</del> If "Yes" How?		
Width of path (If defined) :		
How many years have you known of the existence of this path ? <u>28 YEARS</u>		
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) <u>28 YEARS 1973 - 2001</u>		
Have you used the path: i) on foot ? *Yes / <del>No</del> ii) on horseback ? <del>Yes</del> / No iii) by motor vehicle ? <del>Yes</del> / No iv) by cycle ? <del>Yes</del> / No		
How often did you / do you use the path ? <u>APPROX MONTHLY</u> (e.g. weekly; monthly; occasionally)		
For what purpose did you / do you use the path ? <u>YEAR-ROUND APPRECIATION OF NATURE + INTRODUCTION OF CHILDREN + GRAND CHILDREN TO IT</u> (e.g. work, pleasure, recreation, <del>to get to shops</del> )		
Have you ever been prevented from, or challenged when, using the path ? *Yes / No If "Yes" please give details		
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <u>HAND GATE AT THE FERRY LANE END</u>		

**Name and Addresses of Owners (and Tenants, if tenanted) if known:**

---


**Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ?** ~~Yes~~ / No

**If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :**

---

**Any Further Information which you consider to be relevant :**

\* Delete as appropriate

Signature :  .....

Date : .....

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.




# NORTH YORKSHIRE COUNTY COUNCIL

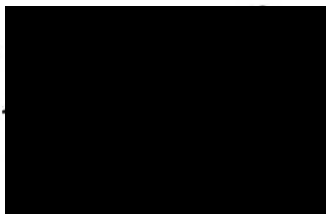
## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, Mrs, <del>Miss</del> , Ms <span style="background-color: black; color: black;">[REDACTED]</span> <span style="float: right;">X</span> Christian Names: <span style="background-color: black; color: black;">[REDACTED]</span> Age, or if over 21, state over 21: OVER 21
2	Address: <span style="background-color: black; color: black;">[REDACTED]</span>
3	Occupation: RETIRED
4	Name or route of path: RIVERSIDE PATH
5	National Grid References (ends of path), or other means of identification: OLD CHURCHYARD TO SWING BRIDGE
6	Parish: BISHOP THORPE
7	District: SELBY
*8	Type of path: Footpath/Bridleway/Byway open to all traffic
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: 2 1/2 FT
12	How long have you known the path: 28 YEARS
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): APPROX WEEKLY
14	How often over the period have you used the path: AS ABOVE
15	For what purpose did you use the path: PLEASURE WALKING
16	Have you ever been prevented from or challenged when using the path: No

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  <p style="text-align: center;"><i>2 STILES</i></p>
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del> /No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ... *14-2-94*

Signature ..  .....

Signature of person taking Statement  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms. <span style="background-color: black; color: black;">[REDACTED]</span>														
Christian Name (s): <span style="background-color: black; color: black;">[REDACTED]</span>														
Age: (If over 21, you may insert "Over 21") <span style="margin-left: 100px;">OVER 21</span>														
Address: <span style="background-color: black; color: black;">[REDACTED]</span>														
Occupation: MACHINE OPERATOR <span style="margin-left: 100px;">shop assistant / seamstress</span>														
Name or route of Path:														
National Grid References, at each end of the path, or other means of identifying the route : <i>Chantry Lane through Old Churchyard along road back to Ferry Lane</i>														
Parish of: <i>BISHOPSTORPE</i>														
Type of Path: <i>FOOTPATH</i> *Footpath / Bridleway / Byway Open to All Traffic														
Do you regard the route to be a Public Right of Way? <span style="float: right;">* Yes / <del>No</del></span>														
Is the path well defined? *Yes / <del>No</del> If "Yes" How? <i>BY A WELL TRODDEN PATH, KISS GATE AT FERRY LANE</i>														
Width of path (if defined): <i>1 - 2 MTS.</i>														
How many years have you known of the existence of this path? <i>25</i>														
Over what period have you used the path? <i>15 years 1986 SINCE MOVING TO VILLAGE UP TO</i> <small>(Please specify how many years and dates e.g.: 20 years - 1970 - 1990)</small>														
Have you used the path: <table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot?</td> <td style="width: 30%;">*Yes / <del>No</del></td> <td style="width: 40%;"><i>PRESENT CLOSER.</i></td> </tr> <tr> <td>ii) on horseback?</td> <td>*Yes / No</td> <td></td> </tr> <tr> <td>iii) by motor vehicle?</td> <td>*Yes / No</td> <td></td> </tr> <tr> <td>iv) by cycle?</td> <td>*Yes / No</td> <td></td> </tr> </table>			i) on foot?	*Yes / <del>No</del>	<i>PRESENT CLOSER.</i>	ii) on horseback?	*Yes / No		iii) by motor vehicle?	*Yes / No		iv) by cycle?	*Yes / No	
i) on foot?	*Yes / <del>No</del>	<i>PRESENT CLOSER.</i>												
ii) on horseback?	*Yes / No													
iii) by motor vehicle?	*Yes / No													
iv) by cycle?	*Yes / No													
How often did you / do you use the path? <small>(e.g.: weekly; monthly; occasionally)</small> <span style="margin-left: 100px;"><i>WEEKLY</i></span>														
For what purpose did you / do you use the path? <small>(e.g.: work, pleasure, recreation, to get to shops)</small> <span style="margin-left: 100px;"><i>PLEASURE</i></span>														
Have you ever been prevented from, or challenged when, using the path? <span style="float: right;">* Yes / No</span> If "Yes" please give details														
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.  <i>KISS GATE AT FERRY LANE END.</i>														

Name and Addresses of Owners (and Tenants, if tenanted) if known:

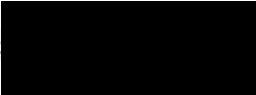
NOT KNOWN.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes/ No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature  .....

Date : 9-10-01 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss. Ms. [REDACTED]		
Christian Name (s): [REDACTED]		
Age: (If over 21, you may insert "Over 21") <input checked="" type="checkbox"/> OVER 21		
Address: [REDACTED]		
Occupation: MACHINE OPERATOR      Shop assistant / seamstress		
Name or route of Path:		
National Grid References, at each end of the path, or other means of identifying the route : Chantry Lane through Old Churchyard along road back to Ferry Lane		
Parish of: BISHOPSTORPE		
Type of Path: FOOTPATH *Footpath / Bridleway / Byway Open to All Traffic		
Do you regard the route to be a Public Right of Way ?      * Yes / <del>No</del>		
Is the path well defined ? *Yes / <del>No</del> If "Yes" How? BY A WELL TRODDEN PATH, KISS GATE AT FERRY LANE		
Width of path (if defined) : 1 - 2 MTS.		
How many years have you known of the existence of this path ? 25		
Over what period have you used the path ? 15 years 1986 SINCE MOVING TO VILLAGE UP TO (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)		
Have you used the path:    i)      on foot ?      *Yes / <del>No</del> PRESENT CLOSER. ii)      on horseback ?      *Yes / No iii)      by motor vehicle ?      *Yes / No iv)      by cycle ?      *Yes / No		
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)      WEEKLY		
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)      PLEASURE		
Have you ever been prevented from, or challenged when, using the path ?      * Yes / No If "Yes" please give details		
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.  KISS GATE AT FERRY LANE END.		

Name and Addresses of Owners (and Tenants, if tenanted) if known:

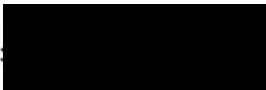
NOT KNOWN.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes/ No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature :  .....

Date : 9-10-01 .....

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. <input checked="" type="radio"/> Mrs. <input type="radio"/> Miss. <input type="radio"/> Ms. <input type="radio"/>	[Redacted]								
Christian Name (s):	[Redacted]								
Age: (If over 21, you may insert "Over 21")	Over 21								
Address:	[Redacted]								
Occupation:	PHARMACIST								
Name or route of Path:	River Bank								
National Grid References, at each end of the path, or other means of identifying the route :									
Charting Lane through old churchyard and along riverbank to Ferry Lane									
Parish of:	Bishopthorpe								
Type of Path:	<input checked="" type="radio"/> Footpath / <input type="radio"/> Bridleway / <input type="radio"/> Byway Open to All Traffic								
Do you regard the route to be a Public Right of Way ?	<input checked="" type="radio"/> Yes / <input type="radio"/> No								
Is the path well defined ? <input checked="" type="radio"/> Yes / <input type="radio"/> No If "Yes" How?	River on one boundary, vegetation on other								
Width of path (if defined) :	4ft approx								
How many years have you known of the existence of this path ?	35								
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	35								
Have you used the path:	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%;"><input checked="" type="radio"/> Yes / <input type="radio"/> No</td> </tr> <tr> <td>ii) on horseback ?</td> <td>* Yes / <input type="radio"/> No</td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td>* Yes / <input type="radio"/> No</td> </tr> <tr> <td>iv) by cycle ?</td> <td>* Yes / <input type="radio"/> No</td> </tr> </table>	i) on foot ?	<input checked="" type="radio"/> Yes / <input type="radio"/> No	ii) on horseback ?	* Yes / <input type="radio"/> No	iii) by motor vehicle ?	* Yes / <input type="radio"/> No	iv) by cycle ?	* Yes / <input type="radio"/> No
i) on foot ?	<input checked="" type="radio"/> Yes / <input type="radio"/> No								
ii) on horseback ?	* Yes / <input type="radio"/> No								
iii) by motor vehicle ?	* Yes / <input type="radio"/> No								
iv) by cycle ?	* Yes / <input type="radio"/> No								
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	Occasionally								
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	Pleasure								
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / <input checked="" type="radio"/> No								
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.									

Name and Addresses of Owners (and Tenants, if tenanted) if known:


Church + Parish Council

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes  No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature : ..... 

Date : ...22-10-01...

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.



## Public Rights of Way - User Evidence Form

Surname: * Mr. <u>Mrs</u> Miss. Ms. [REDACTED]		
Christian Name (s): [REDACTED]		
Age: (If over 21, you may insert "Over 21") <u>OVER 21</u>		
Address [REDACTED]		
Occupation: <u>PHARMACY DISPENSER</u>		
Name or route of Path: <u>From: Chantry Lane to Ferry Lane along towpath.</u>		
National Grid References, at each end of the path, or other means of identifying the route : <u>Chantry Lane through old Churchyard along weebank to Ferry Lane</u>		
Parish of: <u>Bilbottle</u>		
Type of Path: <u>*Footpath / Bridleway / Byway Open to All Traffic</u>		
Do you regard the route to be a Public Right of Way ? <u>* Yes / <del>No</del></u>		
Is the path well defined ? *Yes / No If "Yes" How? <u>WAS SIGNPOSTED</u>		
Width of path (If defined) : <u>3yds.</u>		
How many years have you known of the existence of this path ? <u>36 years.</u>		
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) <u>From 1965 to temporary closure.</u>		
Have you used the path: i) <u>on foot ?</u> <u>*Yes / <del>No</del></u> ii) <u>on horseback ?</u> <u>*Yes / No</u> iii) <u>by motor vehicle ?</u> <u>*Yes / No</u> iv) <u>by cycle ?</u> <u>*Yes / No</u>		
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) <u>WEEKLY</u>		
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) <u>PLEASURE.</u>		
Have you ever been prevented from, or challenged when, using the path ? <u>*Yes / <u>No</u></u> If "Yes" please give details		
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. <u>STILE AT FERRY LANE END</u>		

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

THE PATH HAS FOR THE LAST THIRTY PLUS YEARS TO MY KNOWLEDGE BEEN USED BY NUMEROUS VILLAGERS AT LEAST AS PART OF THE TOWPATH, RIVERSIDE WALK MUCH ENJOYED.

\* Delete as appropriate

Signature [Redacted]

Date : 12.10.01

Signature of Person Taking the Statement :

Date :

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
2) Please complete the form in clear printing or block capitals using black ink.
3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

# NORTH YORKSHIRE COUNTY COUNCIL

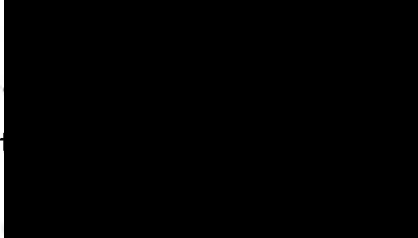
## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, <del>Mrs</del> , <del>Miss</del> , Ms [REDACTED] <span style="float: right;">Freda X</span> Christian Names: [REDACTED] Age, or if over 21, state over 21: over 21
2	Address: [REDACTED]
3	Occupation: <i>Self-employed office work</i>
4	Name or route of path: <i>LIVERSIDE PATH</i>
5	National Grid References (ends of path), or other means of identification: <i>OLD CHURCHYARD TO SWING BRIDGE</i>
6	Parish: <i>BISHOPSTORPE</i>
7	District: <i>YORK</i>
*8	Type of path: Footpath/Bridleway/Byway open to all traffic
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <i>2' 6" 8"</i>
12	How long have you known the path: <i>20 YEARS</i>
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <i>20 YEARS, FOOT</i>
14	How often over the period have you used the path: <i>AS ABOVE</i>
15	For what purpose did you use the path: <i>WALKING</i>
16	Have you ever been prevented from or challenged when using the path: <i>NO</i>

17	<p>Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.</p> <p style="text-align: center;"><i>2 STILES.</i></p>
18	<p>Name of owner(s) or tenant(s), if known:</p>
* 19	<p>Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del>/No</p> <p>If "Yes" give dates and particulars of instructions the owner gave about the path, if any:</p>
<p>Any further information:</p>	

Date ... *28. 2. 94* .....

Signature  .....

Signature of person taking Statement  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL


## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, Mrs, Miss, Ms <span style="float: right;">X</span> Christian Names: <span style="float: right;">X</span> Age, or if over 21, state over 21: ✓
2	Address: <span style="background-color: black; color: black;">[REDACTED]</span>
3	Occupation: <i>Housewife</i>
4	Name or route of path: <i>RIVERSIDE PATH.</i>
5	National Grid References (ends of path), or other means of identification: <i>OLD CHURCH JARD TO SWING BRIDGE</i>
6	Parish: <i>BISHOPTHORPE</i>
7	District: <i>SELBY</i>
*8	Type of path: Footpath/ <del>Bridleway</del> / <del>Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <del>NO</del>
*10	Is the path well defined: Yes/ <del>NO</del>
11	Width of path: <i>2ft to 8ft.</i>
12	How long have you known the path: <i>35 years</i>
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <i>FREQUENTLY.</i>
14	How often over the period have you used the path: <i>as above</i>
15	For what purpose did you use the path: <i>WALKING FOR PLEASURE.</i>
16	Have you ever been prevented from or challenged when using the path: <i>NO</i>

17	Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.  2 STILES
18	Name of owner(s) or tenant(s), if known:
* 19	Have you ever been employed by, or a tenant of, the owner of the land affected by the path: Yes/No  If "Yes" give dates and particulars of instructions the owner gave about the path, if any:
Any further information:	

Date ..... 15. 2. 94

Signature ..  .....

Signature of person taking Statement ..  .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.

# NORTH YORKSHIRE COUNTY COUNCIL

## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	Surname: Mr, <del>Mrs, Miss, Ms</del> [REDACTED] Christian Names: [REDACTED] Age, or if over 21, state over 21: <u>OVER 21</u>
2	Address: [REDACTED]
3	Occupation: <u>REG SALES MANAGER</u>
4	Name or route of path: <u>RIVERSIDE PATH</u>
5	National Grid References (ends of path), or other means of identification: <u>OLD CHURCH YARD TO SWIM BRIDGE</u>
6	Parish: <u>BISHOPTHORPE</u>
7	District: <u>SEABY</u>
*8	Type of path: <del>Footpath/Bridleway/Byway open to all traffic</del>
*9	Do you regard the path as public (SEE NOTE 2): YES/ <u>NO</u>
*10	Is the path well defined: Yes/ <u>NO</u>
11	Width of path: <u>2/68'</u>
12	How long have you known the path: <u>40 YEARS</u>
13	Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <u>40 YEARS</u>
14	How often over the period have you used the path: <u>ONCE PER WEEK</u>
15	For what purpose did you use the path: <u>WALKING OR ANGLING</u>
16	Have you ever been prevented from or challenged when using the path: <u>NO</u>

17	<p>Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.</p> <p style="text-align: center;">2 STILES</p>
18	<p>Name of owner(s) or tenant(s), if known:</p> <p style="text-align: center;">BISHOPTHORPE PARISH COUNCIL ?</p>
* 19	<p>Have you ever been employed by, or a tenant of, the owner of the land affected by the path: <del>Yes</del>/No</p> <p>If "Yes" give dates and particulars of instructions the owner gave about the path, if any:</p>
<p>Any further information:</p>	

Date ..... 11. 2. 94 .....

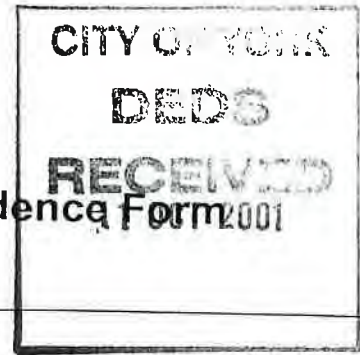
Signature ... [Redacted] .....

Signature of person taking Statement ..... [Redacted] .....

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.





## Public Rights of Way - User Evidence Form

Surname: * Mr. <del>Mrs.</del> <del>Miss.</del> <del>Ms.</del>		✓
Christian Name (s) :		
Age: (If over 21, you may insert "Over 21")	57	
Address:		
Occupation:	HEADTEACHER	
Name or route of Path:	CHANTRY LANE TO FERRY LANE	
National Grid References, at each end of the path, or other means of identifying the route :		
Parish of:	BISHOPTHORPE	
Type of Path:	*Footpath / Bridleway / Byway <del>Open to All Traffic</del>	
Do you regard the route to be a Public Right of Way ?	* Yes / <del>No</del>	
Is the path well defined ? *Yes / <del>No</del> If "Yes" How?	THE FOOTPATH WAS LAID OUT WITH LIMESTONE CHUNKS BY THE PARISH COUNCIL. AT FERRY LANE END THERE IS A "KISSING GATE"	
Width of path (if defined) :	NEAR FERRY LANE WIDER THAN ONE METRE. WHERE IT WENT THROUGH BUSHES IT WAS ABOUT 80cms WIDE	
How many years have you known of the existence of this path ?	35 YEARS	
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	35 YEARS	
Have you used the path:		
i) on foot ?	*Yes / <del>No</del>	
ii) on horseback ?	* <del>Yes</del> / No	
iii) by motor vehicle ?	* <del>Yes</del> / No	
iv) by cycle ?	* <del>Yes</del> / No	
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally)	WEEKLY	
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops)	PLEASURE	
Have you ever been prevented from, or challenged when, using the path ? If "Yes" please give details	* Yes / <del>No</del> BARRIERS ERECTED OVER PAST YEAR WHILE RIVER BANK WORKS WERE ONGOING.	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.	HAND GATE AT FERRY LANE END.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

PARISH COUNCIL ?

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? ~~Yes~~ / No

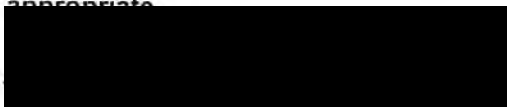
If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

You probably have no record of this right of way because Bishopthorpe formerly came under Selby District Council and prior to 1974 West Ridning County Council.

\* Delete as appropriate

Signature :



Date : .....7.....10.....01

Signature of Person

Taking the Statement :.....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. <input checked="" type="radio"/> Mrs. Miss. Ms. [REDACTED]	
Christian Name (s) : [REDACTED]	
Age: (If over 21, you may insert "Over 21") 42	
Address: [REDACTED]	
Occupation: CLASSROOM ASSISTANT	
Name or route of Path: CITANTON LANE TO FERRY LANE	
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of: BISHOPTHORPE	
Type of Path: <input checked="" type="radio"/> Footpath / Bridleway / Byway Open to All Traffic	
Do you regard the route to be a Public Right of Way ? <input checked="" type="radio"/> Yes / No	
Is the path well defined? <input checked="" type="radio"/> Yes / No If "Yes" How? The footpath was laid out with limestone chuncks by the parish council about 20 years ago. There is a 'kissing' gate at the ferry lane end.	
Width of path (if defined) : Ferry lane end wider than a metre narrower where it goes through bushes - 80cm.	
How many years have you known of the existence of this path ? 23 years.	
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 1978 until the route was closed for work to old church in 2000+ erosion work.	
Have you used the path: i) on foot ? <input checked="" type="radio"/> Yes / No ii) on horseback ? <input checked="" type="radio"/> Yes / No iii) by motor vehicle ? <input checked="" type="radio"/> Yes / No iv) by cycle ? <input checked="" type="radio"/> Yes / No	
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) Weekly.	
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) Pleasure	
Have you ever been prevented from, or challenged when, using the path ? <input checked="" type="radio"/> Yes / No If "Yes" please give details By the erection of barriers at either end during erosion work to riverbank.	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. Handgate at ferry lane end.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

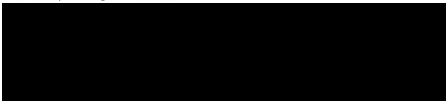
Parish Council ?

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes  No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature  .....

Date : 7.10.01.

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr. Mrs. Miss <span style="background-color: black; color: black;">[REDACTED]</span>	
Christian Name (s) : <span style="background-color: black; color: black;">[REDACTED]</span>	
Age: (If over 21, you may insert "Over 21") OVER 21	
Address: <span style="background-color: black; color: black;">[REDACTED]</span>	
Occupation: SELF EMPLOYED HEALTH & SAFETY CONSULTANT	
Name or route of Path: CHANTRY LANE TO FERRY LANE INCLUDING ST ANDREWS CHURCH SITE	
National Grid References, at each end of the path, or other means of identifying the route : From bottom of Chantry Lane Bishopthorpe - to opposite Ferry Cottage Ferry Lane	
Parish of: BISHOPTHORPE / Bishopthorpe	
Type of Path: *Footpath / Bridleway / Byway Open to All Traffic	
Do you regard the route to be a Public Right of Way ? * Yes / <del>No</del>	
Is the path well defined ? *Yes / <del>No</del> GATE AT FERRY LANE END OF PATH WHICH CAN BE USED OPEN ACCESS AT CHANTRY LANE (NOW SEALED WITH FENCING)	
Width of path (if defined) : 1 metre.	
How many years have you known of the existence of this path ? 10	
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 10	
Have you used the path: i) on foot ? *Yes / <del>No</del> ii) on horseback ? *Yes / No iii) by motor vehicle ? *Yes / No iv) by cycle ? * <del>Yes</del> / No	
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) DAILY	
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) PLEASURE - TRAINING ACCESS TO RIVERSIDE	
Have you ever been prevented from, or challenged when, using the path ? * Yes / <del>No</del> If "Yes" please give details BY THE EXISTENCE OF STEEL FENCING	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. HAND GATE AT FERRY LANE END OF PATH	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

ST ANDREWS TRUST.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* ~~Yes~~ / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

this path was closed for re construction of the old church building and the riverside for the last two years. St Andrews Trust promised Parish Council that the path and access would be reinstated in June 2001 at the latest.

\* Delete as appropriate

Signature : .....

Date : 18/09/01

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

# NORTH YORKSHIRE COUNTY COUNCIL



## PUBLIC RIGHTS OF WAY EVIDENCE FORM

1	<p>Surname: Mr, Mrs, Miss, Ms <span style="background-color: black; color: black;">[REDACTED]</span> <span style="float: right;">x</span></p> <p>Christian Names: <span style="background-color: black; color: black;">[REDACTED]</span></p> <p>Age, or if over 21, state over 21: <i>OVER 21</i></p>
2	<p>Address: <span style="background-color: black; color: black;">[REDACTED]</span></p>
3	<p>Occupation: <i>ENGINEERING MANAGER</i></p>
4	<p>Name or route of path:</p>
5	<p>National Grid References (ends of path), or other means of identification:</p>
6	<p>Parish: <i>BISHOP THORPE</i></p>
7	<p>District: <i>SALBY</i></p>
*8	<p>Type of path: Footpath/Bridleway/Byway open to all traffic <i>FOOT PATH.</i></p>
*9	<p>Do you regard the path as public (SEE NOTE 2): YES/<del>NO</del></p>
*10	<p>Is the path well defined: Yes/<del>NO</del></p>
11	<p>Width of path: <i>2ft to 8ft.</i></p>
12	<p>How long have you known the path: <i>50 YEARS</i></p>
13	<p>Over what period have you used the path on foot, horseback or by motor vehicle, (state which): <i>ON FOOT</i></p>
14	<p>How often over the period have you used the path: <i>AS ABOVE</i></p>
15	<p>For what purpose did you use the path: <i>RECREATIONAL EXERCISE.</i></p>
16	<p>Have you ever been prevented from or challenged when using the path: <i>NO.</i></p>

17	<p>Details of any Stiles, Handgates, Field gates, Bridges, Notices, Direction signs, Warning signs, Obstructions etc.</p> <p style="text-align: center;"><i>2 STILES</i></p>
18	<p>Name of owner(s) or tenant(s), if known:</p>
* 19	<p>Have you ever been employed by, or a tenant of, the owner of the land affected by the path: Yes/No</p> <p>If "Yes" give dates and particulars of instructions the owner gave about the path, if any:</p>
<p>Any further information:</p>	

Date . *18<sup>th</sup> Feb 1994*

Signature . 

Signature of  Statement of 

PLEASE NOTE

1. All numbered sections must be completed; failure to do so may invalidate the evidence.
2. A public right of way must have been used without let or hindrance for approximately 20 years or more.
3. You may be asked to give evidence at a Public Inquiry should a dispute arise over the claimed path.
4. \* Delete as necessary.



## Public Rights of Way - User Evidence Form

Surname: * <input checked="" type="radio"/> Mr. <input type="radio"/> Mrs. <input type="radio"/> Miss. <input type="radio"/> Ms. [Redacted]													
Christian Name (s) : [Redacted]													
Age: (If over 21, you may insert "Over 21") 21													
Address [Redacted]													
Occupation: Unemployed (Finished Degree)													
Name or route of Path: Path between Charkey Lane and Ferry Lane, River Path													
National Grid References, at each end of the path, or other means of identifying the route :													
Parish of: Bishopthorpe													
Type of Path: <input checked="" type="radio"/> Footpath <input type="radio"/> Bridleway / <input type="radio"/> Byway Open to All Traffic													
Do you regard the route to be a Public Right of Way ? <input checked="" type="radio"/> Yes <input type="radio"/> No													
Is the path well defined ? <input checked="" type="radio"/> Yes <input type="radio"/> No If "Yes" How? Distinct track going from old church through to Ferry Lane with a 'KISS-Gate' Entrance/Exit.													
Width of path (If defined) : Approx 1metre													
How many years have you known of the existence of this path ? 21 years													
Over what period have you used the path ? (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 21 years 1980 - 2001													
Have you used the path: <table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">i) on foot ?</td> <td style="width: 30%; text-align: center;">✓</td> <td style="width: 40%; text-align: center;"><input checked="" type="radio"/> Yes <input type="radio"/> No</td> </tr> <tr> <td>ii) on horseback ?</td> <td></td> <td style="text-align: center;">* <input type="radio"/> Yes <input checked="" type="radio"/> No</td> </tr> <tr> <td>iii) by motor vehicle ?</td> <td></td> <td style="text-align: center;">* <input type="radio"/> Yes <input checked="" type="radio"/> No</td> </tr> <tr> <td>iv) by cycle ?</td> <td style="text-align: center;">✓</td> <td style="text-align: center;"><input checked="" type="radio"/> Yes <input type="radio"/> No</td> </tr> </table>		i) on foot ?	✓	<input checked="" type="radio"/> Yes <input type="radio"/> No	ii) on horseback ?		* <input type="radio"/> Yes <input checked="" type="radio"/> No	iii) by motor vehicle ?		* <input type="radio"/> Yes <input checked="" type="radio"/> No	iv) by cycle ?	✓	<input checked="" type="radio"/> Yes <input type="radio"/> No
i) on foot ?	✓	<input checked="" type="radio"/> Yes <input type="radio"/> No											
ii) on horseback ?		* <input type="radio"/> Yes <input checked="" type="radio"/> No											
iii) by motor vehicle ?		* <input type="radio"/> Yes <input checked="" type="radio"/> No											
iv) by cycle ?	✓	<input checked="" type="radio"/> Yes <input type="radio"/> No											
How often did you / do you use the path ? (e.g.: weekly; monthly; occasionally) Once a Month.													
For what purpose did you / do you use the path ? (e.g.: work, pleasure, recreation, to get to shops) Pleasure													
Have you ever been prevented from, or challenged when, using the path ? <input checked="" type="radio"/> Yes <input type="radio"/> No If "Yes" please give details It is currently barricaded.													
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. Hand gate located at Ferry Lane end of path, joining main river path. Old Bishopthorpe Church at the end of Charkey Lane, next to Archbishops palace													

Name and Addresses of Owners (and Tenants, if tenanted) if known:


Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes  No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

The path was open until work was undertaken on the river bank and the old church. This has now been completed (or so it appears) however the path has NOT been re-opened for general use. This has always as far as I can remember been a village right of way, completing the River side walk.

\* Delete as appropriate

Signature : .....  .....

Date : 29/9/01 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

- 1) ALL sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

Surname: * Mr <input checked="" type="radio"/> Mrs <input type="radio"/> Miss. Ms. <input type="radio"/> [REDACTED]	
Christian Name (s) : [REDACTED]	
Age: (If over 21, you may insert "Over 21") OVER 21	
Address: [REDACTED]	
Occupation: SECRETARY	
Name or route of Path: RIVERSIDE PATH BETWEEN CHANTRY LANE + FERRY LANE, BISHOPTHORPE	
National Grid References, at each end of the path, or other means of identifying the route :	
Parish of: BISHOPTHORPE	
Type of Path: <input checked="" type="radio"/> Footpath / <input type="radio"/> Bridleway / <input type="radio"/> Byway Open to All Traffic	
Do you regard the route to be a Public Right of Way ? <input checked="" type="radio"/> Yes / <input type="radio"/> No	
Is the path well defined ? <input checked="" type="radio"/> Yes / <input type="radio"/> No If "Yes" How? WELL DEFINED PATH AT OLD CHURCH OF ST ANDREWS THROUGH TO KISS GATE AT FERRY LANE	
Width of path (if defined) : 1 METRE (APPROX)	
How many years have you known of the existence of this path ? 22	
Over what period have you used the path ? 22 (Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 1979 - <del>PRESENT</del> 2001	
Have you used the path: i) on foot ? <input checked="" type="radio"/> Yes / <input type="radio"/> No ii) on horseback ? * Yes / No iii) by motor vehicle ? * Yes / No iv) by cycle ? * Yes / No	
How often did you / do you use the path ? MONTHLY (e.g.: weekly; monthly; occasionally)	
For what purpose did you / do you use the path ? PLEASURE, RECREATION (e.g.: work, pleasure, recreation, to get to shops)	
Have you ever been prevented from, or challenged when, using the path ? <input checked="" type="radio"/> Yes / <input type="radio"/> No If "Yes" please give details CURRENTLY BARRICADED	
Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land. Hand gate at Ferry lane end of path, adjoining main riverside path.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path? \* Yes  No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

The path was accessible until the work was undertaken on the river bank and the old church. The work appears to have been completed but the path remains closed for general use.

I have always understood this path to be a village right of way, completing the riverside walk between Cherry Lane and Naborn rail bridge.

\* Delete as appropriate

Signature : ..... [Redacted] .....

Date : 29.9.01 .....

Signature of Person Taking the Statement : .....

Date : .....

PLEASE NOTE

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- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

### Public Rights of Way - User Evidence Form

Surname: \*  Mr.  Mrs.  Miss.  Ms. [Redacted]

Christian Name (s) : [Redacted]

Age: (If over 21, you may insert "Over 21") 0' 21

[Redacted]

Occupation: Shopkeeper

Name or route of Path: Ferry to Chantry Lane Bishopthorpe

National Grid References, at each end of the path, or other means of identifying the route :

Parish of: Bishopthorpe

Type of Path:  Footpath /  Bridleway /  Byway Open to All Traffic

Do you regard the route to be a Public Right of Way ?  Yes /  No

Is the path well defined ?  Yes /  No  
If "Yes" How?  
Clearly worn depressed path through grass

Width of path (if defined) : Between 2ft & 8ft (2/3m - 2 1/2m)

How many years have you known of the existence of this path ? All the time in Bishopthorpe (22 years)

Over what period have you used the path ?  
(Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 1979 to 1998?

Have you used the path:

i)	on foot ?	<input checked="" type="radio"/> Yes / <input type="radio"/> No
ii)	on horseback ?	* Yes <input checked="" type="radio"/> No
iii)	by motor vehicle ?	* Yes <input checked="" type="radio"/> No
iv)	by cycle ?	* Yes / <input checked="" type="radio"/> No

How often did you / do you use the path ?  
(e.g.: weekly; monthly; occasionally) weekly except winter months

For what purpose did you / do you use the path ?  
(e.g.: work, pleasure, recreation, to get to shops) pleasure

Have you ever been prevented from, or challenged when, using the path ?  Yes /  No  
If "Yes" please give details The access at both ends has been fenced

Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.  
Large Wooden Kissing gate at one end - other end free access.

Name and Addresses of Owners (and Tenants, if tenanted) if known:

Not Known.

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes  No


If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

/

Any Further Information which you consider to be relevant :

None.

\* Delete as appropriate

Signature : ..... 

Date : 25/09/01

Signature of Person Taking the Statement : .....

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.

## Public Rights of Way - User Evidence Form

<b>Surname:</b> * Mr. Mrs. Miss. Ms.	[REDACTED]
<b>Christian Name (s):</b>	[REDACTED]
<b>Age:</b> (If over 21, you may insert "Over 21")	OVER 21.
<b>Address:</b>	[REDACTED]
<b>Occupation:</b>	① RETIRED      ② FULL TIME MEDICAL SECRETARY. YORK NHS TRUST.
<b>Name or route of Path:</b>	RIVER WALK.
<b>National Grid References, at each end of the path, or other means of identifying the route :</b> Chantry Lane through Old Churchyard along river bank to Ferry Lane	
<b>Parish of:</b>	BISHOPHORPE
<b>Type of Path:</b>	*Footpath / Bridleway / Byway Open to All Traffic
<b>Do you regard the route to be a Public Right of Way ?</b>	* Yes / No
<b>Is the path well defined ?</b> *Yes / No <b>If "Yes" How?</b>	WELL-WALKED EARTHEN TRACK
<b>Width of path (if defined) :</b>	3' +
<b>How many years have you known of the existence of this path ?</b>	30 YEARS
<b>Over what period have you used the path ?</b> (Please specify how many years and dates e.g.: 20 years - 1970 - 1990)	30 YEARS
<b>Have you used the path:</b>	
i) on foot ?	*Yes / No
ii) on horseback ?	*Yes / No
iii) by motor vehicle ?	*Yes / No
iv) by cycle ?	*Yes / No
<b>How often did you / do you use the path ?</b> (e.g.: weekly; monthly; occasionally)	AT LEAST WEEKLY WHEN FAMILY YOUNG
<b>For what purpose did you / do you use the path ?</b> (e.g.: work, pleasure, recreation, to get to shops)	RECREATION : "ADVENTURE" WITH YOUNG FAMILY
<b>Have you ever been prevented from, or challenged when, using the path ?</b> If "Yes" please give details	* Yes / No
<b>Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs, Obstructions, etc encountered on the path; or signs about the path or land.</b> NO OBSTACLES KNOWN.	

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN

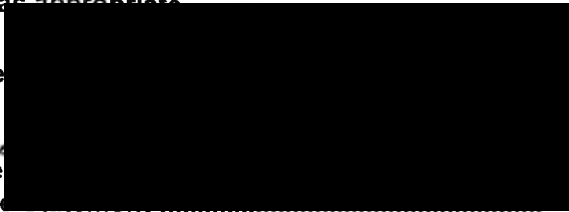
Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Delete as appropriate

Signature



Date : 6/11/01

Signature

Taking the

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.





### Public Rights of Way - User Evidence Form

Surname: \* Mr. Mrs. Miss. Ms. [REDACTED]

Christian Name (s): [REDACTED]

Age: (If over 21, you may insert "Over 21") OVER 21.

Address: [REDACTED]

Occupation ① RETIRED ② FULL TIME MEDICAL SECRETARY. YORK NHS TRUST.

Name or route of Path: RIVER WALK.

National Grid References, at each end of the path, or other means of identifying the route :  
Chantry Lane through Old Church Yard along river bank to Ferry Lane

Parish of: BISHOPHORPE

Type of Path: \*Footpath / Bridleway / Byway Open to All Traffic

Do you regard the route to be a Public Right of Way ? \* Yes / No

Is the path well defined ? \* Yes / No  
If "Yes" How? WELL-WALKED EARTHEN TRACK

Width of path (if defined) : 3' +

How many years have you known of the existence of this path ? 30 YEARS

Over what period have you used the path ?  
(Please specify how many years and dates e.g.: 20 years - 1970 - 1990) 30 YEARS

Have you used the path: i) on foot ? \* Yes / No  
ii) on horseback ? \* Yes / No  
iii) by motor vehicle ? \* Yes / No  
iv) by cycle ? \* Yes / No

How often did you / do you use the path ? AT LEAST WEEKLY WHEN FAMILY YOUNG  
(e.g.: weekly; monthly; occasionally)

For what purpose did you / do you use the path ? RECREATION : "ADVENTURE" WITH YOUNG FAMILY  
(e.g.: work, pleasure, recreation, to get to shops)

Have you ever been prevented from, or challenged when, using the path ? \* Yes / No  
If "Yes" please give details

Please give details of any Stiles, Hand Gates, Field Gates, Bridges, Notices, Direction Signs, Waymarking Signs ,Obstructions, etc encountered on the path; or signs about the path or land.  
NO OBSTACLES KNOWN.

Name and Addresses of Owners (and Tenants, if tenanted) if known:

NOT KNOWN

Have you ever been employed by, or a tenant of, the owner of the land affected by the claimed path ? \* Yes / No

If "Yes" give dates of employment or tenancy and particulars of any instructions you may have received regarding the claimed path :

Any Further Information which you consider to be relevant :

\* Dele

Signat

Date : 6/11/01

Signat

Taking the Statement

Date : .....

**PLEASE NOTE**

- 1) **ALL** sections of this form must be completed. Failure to do so will reduce the value of your evidence.
- 2) Please complete the form in clear printing or block capitals using black ink.
- 3) Under highway legislation a path must have been used, in the belief that it is a public right of way, for a minimum of twenty years before public rights are established.
- 4) You may be interviewed by an Officer of the Authority, and/or asked to give evidence at a Public Inquiry if a dispute should arise over the claimed path.