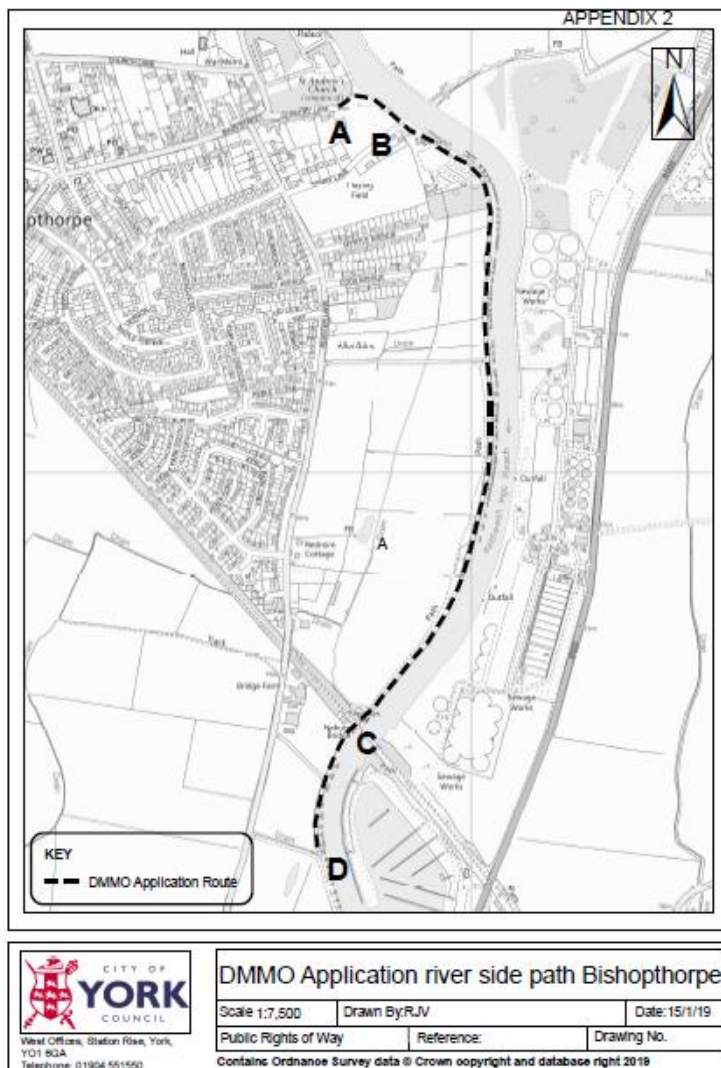


DEFINITIVE MAP MODIFICATION ORDER APPLICATION TO RECORD A PUBLIC FOOTPATH BETWEEN CHANTRY LANE BISHOPTHORPE AND ACASTER MALBIS 3

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 19th 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 24th 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

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*

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 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):

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 in 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 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.

[Clerk to] [Chair,] Bishopthorpe Parish Council

04 February 2022