



## Order Decision

Site visit made on 14 December 2023

by **Laura Renaudon LLM LARTPI Solicitor**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

**Decision date: 16 October 2024**

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### Order Ref: ROW/3313300

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Council of the City of York Public Footpath Naburn 7 Modification Order 2021.
- The Order is dated 25 June 2021 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule ('the Order Route') with consequential amendments to the definitive statement.
- There were 17 representations made in respect of the Order at the date of my site visit, consisting of 7 objections and 10 representations made in support.

**Summary Decision: The Order is not confirmed.**

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### Main Issue

1. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i) of that Act having occurred. 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 public right of way, in this case a footpath, which is not shown in the map and statement subsists over land in the area to which the map relates.
2. The relevant legislation sets out two relevant tests, described as 'A' and 'B' in *R v SSE ex parte Norton & Bagshaw* [1994] 68 P&CR 402: (A) does a right of way subsist, on the balance of probabilities; and (B) is it reasonable to allege that a right of way subsists?
3. Test B applied to the Council's consideration of whether to make the Order in the first instance and, having considered that the relevant evidence indicated that it was a reasonable allegation to make, the Council duly made the Order. I need to be satisfied on the balance of probabilities that the claimed right of way does subsist. The Council, having made the Order on being satisfied as to test B, have taken a neutral stance as to confirmation.
4. Deemed dedication arises under the Highways Act 1980 ('the 1980 Act') where a way over any land has been enjoyed by the public as of right and without interruption for a full period of 20 years, calculated retrospectively from the date when the right of the public to use the way is brought into question. Alternatively at common law dedication by the landowner and acceptance by the public may be shown.

## Reasons

### The route

5. The route in question lies on the outskirts of the village of Naburn, itself lying to the east of the River Ouse and south of the City of York. It runs for just short of 250 metres from Vicarage Lane west across a field to join Palmes Close between nos 12 and 17. The termination point with Vicarage Lane lies to the eastern extremity of the adopted vehicular highway running eastwards out of the village. At the time of my visit the entrance to the Order Route there was obstructed by a gate and fence.
6. At the other end, the field is fenced off from Palmes Close, and there remains some evidence of a former stile said for some years to have been found in the fence between Palmes Close and the field over which the Order Route runs.
7. It is not readily apparent on the ground where the adopted highway ends at the eastern end of Palmes Close. A streetlight, presumably in the highway verge, lies in the lawned area to the front of no. 17 Palmes Close, about halfway along the short distance between the edge of the carriageway and the fence where the stile once existed. The Council's order recites that the stile lies at the start of the route, at its junction with the maintainable highway. Therefore I do not understand any part of the Order Route to be situated on land owned or occupied by no. 17 (or no. 12).

### Bringing into question

8. Palmes Close is a relatively modern housing estate, and some of the historic photographs supplied show former farm buildings on the site. Until at some point during the 1980s, the field that is the subject of the Order Route appears to have been associated with those buildings. A 1978 photograph shows it occupied by horses. The houses appear to have begun construction in the 1980s. I am not informed exactly when Palmes Close, or the eastern spur of it linking to the termination point of the Order Route, came to be used by the public or adopted as highway maintainable at the public expense. Although some use of the Order Route is said to have taken place before the housing estate was built, the claimed route runs between what are now two highways.
9. I understand the gate and fence obstructing the Order Route at Vicarage Lane to have been erected in 2007, bringing (together with some signage indicating that there was no public right of way) the use of the Order Route into question at that point. The removal of the stile at Palmes Close, which was erected at some point so to facilitate the use, also took place in 2007.
10. It is undisputed that the public user of the route was brought into question in late 2007. Following an apparent change in the land ownership of the field over which the Order Route runs, obstructions and signage were erected, and the western stile removed, thus prompting the present application. Any question of deemed dedication of the route would be calculated retrospectively from that point.
11. The Council have not suggested that Palmes Close was not an adopted highway by 1987, meaning that for a twenty year period before the route was brought into question in 2007 it connected two highways. I therefore refer to the period 1987 to 2007 as 'the relevant period'.

## Sufficiency of user

12. Upon the making of the application, only two users claimed to have used the route since (or before) 1987, the start of the relevant period. User evidence forms were supplied in which one claims daily use and the other twice weekly. Although their use began before 1987, their user evidence forms relate to the entire period of their user.
13. One of those, a resident of Palmes Close (although not of the section served by the eastern spur) was interviewed. There are some differences between what was said in interview and what was submitted on the relevant user evidence form. In one it was claimed to have used the route since 1980; in the other since the late 1970s. In one it was claimed there were no further obstructions to the route beyond the stile at Palmes Close. In the other a description of having climbed over a fence in order to use the route was given. The daily user refers to dog walking but mentioned under interview that sheep were occasionally put in the field. It was not explained whether use was still made of the field in those circumstances, although other representations suggest not, particularly in view of the accompanying electric fencing. Other evidence suggests that those using the field for dog walking would not (or not always) follow the Order Route.
14. The other pre-1987 user, giving an address two streets away, submitted a user evidence form claiming to have used the route twice a week on foot since 1985 for recreation and believing it to be public because commonly used by others.
15. Ten other user evidence forms were submitted, none evidencing use of the route for more than 12 years and none with use pre-dating 1992. Those other users attested to twice daily, daily, weekly or in one case monthly use. Two (related) users began using the route in 1992 until moving house in 2004. Other users began using the route respectively in 1997 (2) 1998 (2) 2001 (2) and 2003 (1) with one user's dates of use, for a duration of two years, unspecified (and the relevant user form apparently completed by two different people). Most users ceased using the route when it was brought into question in 2007. Some users refer to the land's use as a children's playspace or for dog walking and one for an A level geography project. A number of references are made to the use of the route as a means of access to properties in Palmes Close during flooding events.
16. Consultation replies following the making of the Order discussed the merits of the Order Route as a public footpath, which is beyond the scope of my considerations. Nonetheless some local residents discussed having used the route from the 1980s although one referred to it having been closed off from time to time by electric fencing whilst sheep were grazing. Others stated sheep were on the land in the springtime.
17. One person had witnessed use since 1982, so before the relevant period, although was unable to specify the intensity of such use beyond 'regularly' and mainly by local villagers. Another stated almost daily use for several years, possibly since 1986, so covering the relevant period, and another 'regularly' (although with unspecified frequency) since the 1970s, again covering the relevant period, and another occasionally since 1996, so for part of the relevant period. Another exercised 'full access' to the route from 1988, so for most of the relevant period.
18. These accounts are generally disputed by objectors, who include the occupiers of the three properties overlooking the western end of the route. The number of

- regular users is said to be four people. It is suggested that the field is used by residents of Palmes Close for dog walking, and in this it is disputed that all users of the field follow the Order Route, with suggestions that some use the field more generally as a recreational space for dog exercise (or children's play) rather than as a thoroughfare.
19. Although there is some evidence of use of the field since (and prior to) 1987, the lack of specificity by those making representations in support of the Order means that I am unable to give significant weight to those representations. Details about their use of the Order Route is generally lacking, as is any discussion of whether their use was as of right.
  20. Accounts differed as to the erection of the stile at the Palmes Close end of the Order Route. However, from the accounts given it appears not to have been in existence until around 2000 at the earliest, possibly installed as the consequence of a flooding event (with the route apparently then providing the only means of pedestrian access to properties in Palmes Close). Although different people are suggested as having been responsible for its installation, no suggestion is made that it was installed by the landowner of the field, but only by one or other local resident.
  21. Aerial photographs taken in 1999 and in the early years of this century show a reasonably well-worn path, particularly those of 2002 and 2007, although that would potentially be consistent with eight of those submitting user evidence forms attesting to having used the route near-daily or more often during the period of their use. However, aerial photographs can provide no more than a snapshot and cannot confirm that any use was by the public. Other trails are also visible on some photographs.
  22. It is not clear when the use for keeping sheep in the field began but it may be since the change of ownership in 2007. If so, whilst the avoidance of use of the route during the periods when livestock were present would provide a break in the continuity of user, it would fall outside the relevant 20 year period.
  23. The land is otherwise described by the person claiming daily use since 1980 as "set aside" land, i.e. taken out of agricultural production as an environmental measure. If so, this is unlikely to have pre-dated 1988 when the relevant Regulation as to set aside was made.
  24. The question arises whether the use throughout the relevant 20 year period would have been sufficient to bring home to the landowner that the right now claimed was being asserted.
  25. Although there are some discrepancies in the accounts given, I accept for present purposes the evidence of the two pre-1987 users who say, respectively, that they have used the route daily and twice a week. Of those, one describes using the route as a round walk from home to home, and the other from Palmes Close to the cycleway. Both imply one-way trips across the route on each occasion of use. That would amount to around 45 minutes' total use each week.
  26. There are no photographs demonstrating a clear desire line across the ground until 1999. A photograph from 1996 shows the route to be vaguely discernible from the air. The quality of a 1995 photograph makes it impossible to conclude on the point then. There is no evidence of a desire line established before the mid-1990s, which

would have provided the landowner with evidence of the use of the route. Evidence of use of the route must be sufficiently notorious as to alert a reasonably diligent landowner that the claimed rights were being asserted; however, I do not find, on the balance of probability, that use by two people, totalling between them around 45 minutes each week, was sufficiently notorious.

27. Each such case will turn on its own facts. Although there is no statutory minimum level of user to show sufficient use to raise a presumption of dedication, the use should have been by a sufficient number of people to show that it was use by 'the public', and this may vary from case to case. Naburn is a small village, although with nearby moorings, and so the number of users can be expected to be relatively low.
28. Nonetheless, the number of users must be such as might reasonably have been expected if the way had unquestionably been a public highway. Here, the existence of only two confirmed users covering the first five years of the relevant period is insufficient, even if that use were witnessed or otherwise reasonably evident, to have alerted any reasonably observant landowner to the fact that a public, rather than any private, right was being asserted. Sufficient user by the public at large was not established, based on the evidence before me, if at all then not until after the construction of the stile at the western end of the route some time around 2000 and in any event well after the start of the relevant period in 1987.

#### **Use as of right: without force, secrecy or permission**

29. Having concluded that the evidence of user here is insufficient to have alerted a reasonable landowner to the assertion of the claimed public right throughout the relevant period, it is unnecessary for me to consider whether the use took place without force, secrecy or permission.

#### **Intention to dedicate**

30. I find that the existence of a four foot high boundary fence at one end of the route discouraging access or egress, at least until after the stile was constructed, sufficiently evidenced a lack of any intention to dedicate the use of the route to the public. There is no suggestion that the fence was constructed by or on behalf of the (former) landowner on whose land it lies, rather than by one of the neighbours.
31. Little information is given about the former landowner, apparently constituting an investment company during the relevant 20 year period prior to the sale to the current owners. There is no mention of any actual presence of the former landowner or its representatives on or around the land during the relevant period. If the land was in 'set aside' then it may be unlikely that the landowner would have had much cause to attend the field frequently. If it was used to keep sheep then that would have entailed a farming presence, but equally the balance of the evidence before me is that use of the field has been avoided by walkers during such periods. Whether or to what extent the field forms (or formed) part of a larger agricultural holding is not explained by anyone.
32. Nonetheless, until the stile was constructed without apparent contemporaneous objection from the landowner, the existence of the barrier fence, which appears to have been constructed by the former landowner shortly before the onset of the relevant 20 year period, would have appeared as evidence of the landowner's lack of intention to dedicate the Order Route.

### **The position at common law**

33. There is no suggestion in the application or user evidence forms that the landowner has intended to dedicate the use of the route. Nor can dedication be inferred, for the reasons set out above in relation to the application of the statutory test in the 1980 Act. Although there was a period during which the stile was in existence and the use of the route became more notorious, it is necessary at common law to demonstrate that the landowner intended to dedicate the way. The period in question was, on the balance of the evidence, around seven years. It appears that insofar as the landowner was present on the land during this time, the land was then used to graze sheep and the public were excluded from it for those periods. There is insufficient evidence on which to conclude that it was likely that the landowner was aware of the public use and acquiesced in it for a sufficient period of time to conclude that dedication of the route was intended.

### **Summary and Conclusion**

34. For the above reasons I do not find that there is sufficient evidence to demonstrate, on the balance of probabilities, that a right of way on foot subsists over the Order Route. The amount of public use before the stile was put in was insufficient to say that the way had been actually enjoyed by the public until that point. The presence of the fence was indicative of the landowner's lack of intention to dedicate the route, and there is no positive evidence of any such intention. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

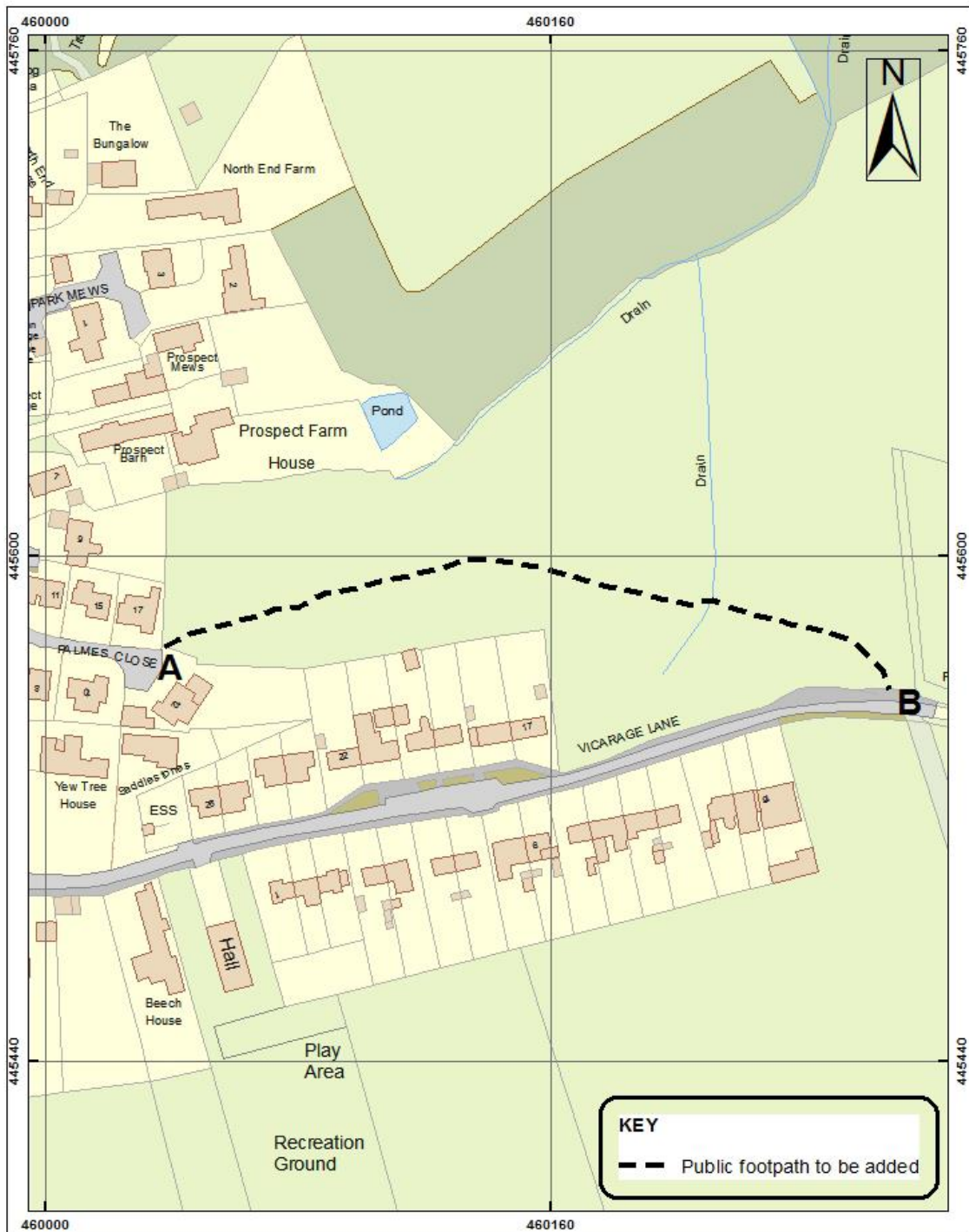
### **Formal Decision**

35. I do not confirm the Order.

*Laura Renaudon*

INSPECTOR

Order Map – Copy Not To Scale



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**PUBLIC FOOTPATH NABURN 7  
 MODIFICATION ORDER 2021**

Scale 1:1,600	Drawn By: LRG	Date: 11/6/21
Public Rights of Way	Reference:	Drawing No.

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