

STATEMENT OF CASE OF THE COUNCIL OF THE CITY OF YORK
PUBLIC RESTRICTED BYWAY COPMANTHORPE 8 MODIFICATION
ORDER 2020

PLANNING INSPECTORATE REFERENCE: To be advised

Introduction

1. This document comprises the Statement of Grounds and Statement of Case of the Council of the City of York for the order Public Restricted Byway Copmanthorpe 8 Modification Order 2020 (“the Order”). The council is the order making authority (“the OMA”).
2. The order is the subject of one objection (see appendix 2, pg 18) from an adjoining land owner Mrs Lesley Jones (“the Objector”). Consequently the OMA is referring it to the Secretary of State for determination.

Factual Background

3. The route shown in the Order (“the order route”) runs from the maintainable highway known as Merchant Way, Copmanthorpe generally east to the railway line. The order route is noted within the order as public restricted byway Copmanthorpe 8.
4. The application was received by the OMA in August 2005 from Copmanthorpe Parish Council. The application was accompanied by extracts from the Copmanthorpe Inclosure Award. Fourteen user evidence forms in support of the application were submitted a few months later.
5. The OMA made the order on 22 January 2020 and the statutory consultation ran between 7 February 2020 and 20 March 2020 during which one duly made objection was received by the OMA.

Legal Framework

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

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

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

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

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

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

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

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

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

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

“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full

period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

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

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

12. Therefore, in relation to user evidence, the requisite period for the purpose of meeting the requirements of s53(3)(c)(i) WCA 1981 can be either of the following:
- i. 20 years, such that the relevant tests set out in section 31 of the HA 1980 have been met (the “Statutory Test”)

or

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

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

The Evidence

User evidence supporting the order

13. The order is supported by fourteen user evidence forms attesting to the use of the order route by fifteen people between 1965 and 2006 (see appendix 5, page 40).
14. Two of the fifteen users claim use of the route for a period of twenty or more years calculated back from the date the application was made (see appendix 5, pages 40 for a graph illustrating the use period).

15. All fifteen people claim use of the order route on foot. Four indicated that they used the route on a bicycle as well.
16. Three people claim to have used the route on foot every day. One user claims to have used the route on foot every week. The remaining eleven people used the route on footpath less frequently. In addition to the use on foot, three people also claim to have used the route on a bicycle every day with the remaining person using the order route once a week on their bicycle.
17. None of the users report ever having seen signs indicating the route was not public.
18. Nine of the users report coming across locked gates when they were using the order route. From the descriptions, these users are referring to a locked gate on Merchants Way beside the primary school. Investigations have shown that this part of the route is already recorded as part of the maintainable highway known as Merchants Way. Therefore, it is not relevant and its challenge to the public's use of the route does not apply to this order.
19. Three users also reported finding a locked gate at the end of Loriner's Way (point C on the Order map). This gate appears to have been locked around the same time or shortly after the application was made. It may have been the event that caused the application to be made but this is not clear within the evidence.
20. The width of the route, where reported, was recorded as being either 6 metres or 20 feet.
21. None of the users report ever having received permission to use the route.

Documentary evidence supporting the order

22. The application is supported by the Copmanthorpe Inclosure Award, two railway maps, and historic Ordnance Survey maps.
23. The Copmanthorpe Inclosure Award of 1843 set out the application route as a private carriage road known as "York Field Occupation Road" with a width of 25 feet (see appendix 17 page 154).
24. The Award went on to direct that two residents of the parish were to be appointed as "surveyors of the private carriage roads and public drains" each year. The two

surveyors were directed by the award to use the revenue generated from the sale of the herbage from the verges of the private carriage roads “..in or towards the repairs of the said private carriage roads and public drains and of the bridges...”.

25. Network Rail have submitted an extract of the maps for what is now the east coast mainline drawn up by the York and North Midland Railway Company in 1836. The map appears to show a route coincident with the application route which suggests that it existed before the inclosure award was made. However, as no book of reference has yet been found for this map it is not possible to know what view the railway had of the application route (see appendix 18 page 158).

26. In addition to the 1836 records, Network Rail have also provided copies of the railway plans and book of reference for the upgrade of the railway carried out by the North Eastern Railway in 1900. In these records the application route is clearly noted as an occupation road and depicted on the map.

27. The physical existence of the application route is also confirmed by all the Ordnance Survey (“OS”) maps consulted by the Council (see appendix 15 page 141).

Evidence refuting the order

28. The OMA has been unable to find any evidence that Yorkfield Lane was ever stopped up by a formal process. In addition its existence has been respected during the development of housing within Copmanthorpe.

Consideration of the evidence

Copmanthorpe Inclosure Award

29. The order route was awarded by the enclosure commissioners as a private carriage road. This would appear to exclude the possibility that public rights were created, or maintained, over York Field Occupation Road by the inclosure award.

30. However, nowhere in the award is there any mention that this private carriage road was for the benefit of an identifiable group, such as the land owners immediately adjacent to the road.

31. Furthermore, the award sets out that the expense of maintaining the private carriage roads set out was to be met by the sale of a parish asset (herbage from the verges). In addition, this process was to be managed by two residents appointed by the parish as surveyors.
32. The two surveyors were also directed by the award to use any monies raised by the sale to maintain public drains and bridges. Cross referencing modern maps with the award indicates that most of the bridges were located on routes that are today public highways.
33. The OMA's interpretation of the award is that two publicly appointed officials had responsibility for selling a parish asset to raise funds to maintain three pieces of infrastructure. One (the drains) was explicitly public, a second (the bridges) were almost all public and the third has the word private in its name but whose use was not restricted to an identified group (private carriage roads).
34. From this hotchpotch the OMA suggests that a strong conclusion and a strong inference can be drawn.
35. The strong conclusion is that the maintenance of York Field Occupation Road cannot be seen to have been at private expense. This means that, de facto, the order route must have been maintained at public expense.
36. From this conclusion there follows a very strong inference that a public right of access exists over York Field Occupation Road. The OMA contends that this inference is more than enough to warrant the confirmation of the order.

Railway maps and book of reference

37. Both collections of railway documents demonstrate that the route existed on the ground although they make no mention of any public rights of way.

Ordnance Survey maps

38. The depiction of the order route on all the OS map available to the OMA demonstrate not only that the route physically existed but also that its existence has been respected by multiple phases of housing development around the route.

39. The OMA contends that this also supports the conclusion drawn at para 35 that the order route was not private. Had it been thought to be private it is likely that some or all of it would have been included in the sale of the various parcels of land that have now been built on.

User evidence

40. User evidence can be considered under section 31 of the Highways Act 1980 (“the statutory test”) or under Common Law.

The statutory test

41. Under section 31 of the Highways 1980 any route that is used by the public for a period of twenty or more years becomes a public right of way (PRoW) unless the land owner can demonstrate they had no intention to dedicate it to the public.

42. The evidence does not make it clear whether the locking of a gate across the route prevented the public using the order route (there is a surfaced footway that bypasses the locked gate). Consequently, the OMA taking the view that the making of the application is the event that defines relevant twenty year period under consideration. This sets the statutory period that relevant evidence must fall in as 1985 – 2005.

43. All fifteen users claim use of the order route during this period. Two people claim use for all twenty years.

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

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

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

Use by force

47. There is no suggestion in the evidence from the users or the Objector that the route was ever accessed by force.

Use by stealth

48. There is no suggestion in the evidence from the users or the Objector that any actions were taken to attempt to conceal the use of the order route.

Use by permission

49. There is no suggestion within the evidence that any of the fifteen users had received permission to use the route.

Frequency of use

50. The usage pattern set out at para 16 above indicates that the use of the way was likely to be sufficient to make all affected land owners aware that the public were asserting a right over the order route.

Use by the public at large

51. 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.

Use by the public for twenty years

52. Only two people claim use for twenty or more years, the remaining users claiming use for at most ten years. The OMA's view is that this is insufficient, on the balance of probabilities, to trigger the provisions of the section 31 of the Highways Act.

Common Law dedication

53. Dedication of a PRow at common law can happen in two ways: explicit dedication by the land owner, or inference of dedication through long, unopposed as of right use by the public.

54. There is no evidence to suggest that any land owner ever expressly dedicated the order route.

55. For the same reasons set out with regard to the statutory test, the OMA is not satisfied that there has been sufficient as of right use for dedication at Common Law to be inferred.

56. Therefore, the OMA contends that the user evidence in isolation cannot be seen as establishing a public right of way (PRoW) over the order route either by virtue of the statutory test or at Common Law.

57. However, it does support the continued use of a PRoW that had been established by the Copmanthorpe Inclosure Award.

Natural Environment and Rural Communities Act 2006

58. The order route was set out by the inclosure award as a road and the application sought to record it as part byway open to all traffic and part footpath.

59. Having examined the evidence the OMA can see no justification for having part of a route set out by the inclosure award as a road recorded as a footpath. Consequently the OMA believes that the proper status York Field Occupation Road is byway open to all traffic throughout.

60. However, the application was received after the cut-off date specified by the above named Act.

61. The OMA has examined the exceptions set out in that Act and does not believe that any of them apply to this route and therefore considers that all rights for mechanically propelled vehicles have been extinguished.

62. Consequently, the order has been made to record York Field Occupation Road as a restricted byway.

63. In conclusion, the OMA is satisfied that, on the balance of probabilities, the Copmanthorpe Inclosure Award set out the order route in such a way that today it must be viewed as being a PRoW. Therefore the OMA is respectfully asking the Secretary of State to confirm the order.

Comment on the objection

64. The single duly made objection received from the Objector made a number of points seeking to refute the order. These mentioned the actions of the previous land owner, the appearance of the site, the actions of the parish council, and the potential for injuries happening on the piece of land. The OMA considers that none of the points made by the Objector appear to be relevant.

65. As a result the OMA asks that the Secretary of State considers exercising their power under s15 (7) (2a) of the Wildlife and Countryside Act 1981.

Conclusion

66. The OMA's view is that there is sufficient evidence to support the existence of the order route as a public restricted byway on the balance of probabilities.

67. Therefore the OMA respectfully asks the Secretary of State to confirm the order.

The Council of the City of York

March 2020