

**In the Matter of The Council of the City of York Public Footpath, Knapton No 4
(Grange Lane to Rufforth Airfield) Definitive Map Modification Order**

STATEMENT OF CASE ON BEHALF OF MR AND MRS SWIERS

Introduction

1. The Council of the City of York (“the OMA”) has not made out its case that the Order Route should be added to the Definitive Map as either a public footpath or any other public right of way.
2. As there is no applicant and the OMA has not provided a Statement of Case, this Statement of Case is in response to the OMA's Statement of Grounds dated September 2018.
3. It appears that the Order was made on the basis that the OMA was satisfied that the grounds set out in s. 53(3)(c)(i) of the Wildlife and Countryside Act 1981 were met. In order to confirm the Order, the Secretary of State must be satisfied on the balance of probabilities that the right of way subsists over the Order route (*Todd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin)) (Appendix 1).
4. The Order Route has not previously been recorded on the Definitive Map and Statement. There is a presumption of regularity of administrative decisions (*R v IRC, ex p TC Coombs and co* [1991] 2 AC 283, 300) (Appendix 2). Unless the OMA can demonstrate that previous decisions were wrong not to include the Order Route on the Definitive Map and Statement, the position should be that the Definitive Map and Statement remain unaltered and the Order fails.
5. The OMA's case appears to be based in the main on the inference that at some unknown point pre-dating any of the documentary evidence, the Order Route served as a public right of way. This is despite the fact that (even on the OMA's own case) no sufficiently reliable user evidence exists and the documents relied upon by the OMA do not directly demonstrate that any public rights of way subsist. Without any evidence of the creation of public

rights over the route (i.e. by dedication), such a vague inference is not sufficient to displace the presumption of regularity and establish the existence of public rights on the balance of probabilities. This is even more so where there is documentary evidence which strongly indicates that there are no such public rights.

6. The OMA refers to 7 main pieces or sets of documentary evidence:

(a) Commercial Map Evidence;

(b) The 1760 Marwood Map;

(c) Inclosure awards relating to i) Accomb and ii) Rufforth;

(d) OS Maps and object books;

(e) Finance Act maps;

(f) The 1953 Stopping up order; and

(g) User evidence.

7. Set out below is Mr and Mrs Swiers' submissions on each of these pieces of evidence in turn. In short, Mr and Mrs Swiers contend that none of these matters indicate that the Order Route is subject to any public rights of way:

(a) The OMA's treatment of the commercial map evidence is illogical and inconsistent;

(b) The 1760 Marwood Map is not probative as to the status of the Order Route;

(c) The Turnpike Trust documents are not probative and do not support the OMA's arguments;

(d) The Inclosure award for Accomb is not probative and the basis on which the OMA relies on this is unclear. The award for Rufforth demonstrates that the Order Route was a private route;

- (e) The OS maps are not probative;
- (f) The Finance Act maps support the argument that the Order Route is not subject to public rights;
- (g) The 1953 stopping up order is not probative; and
- (h) The user evidence is sparse, inconsistent and unreliable.

Commercial Map Evidence

8. The OMA's case is the Commercial Maps demonstrate that the Order Route was the only route between Rufforth and Acomb pre-1771 and so must have been an ancient highway and accordingly should now be subject to public rights. Mr and Mrs Swiers submit that this conclusion has only been reached on an inconsistent and illogical approach to interpreting the Commercial Map Evidence.
9. The key stone of the OMA's argument is that the Turnpike Road is not shown on Jeffrey's 1775 Map, the surveys of which we are told took place between 1767 and 1770. However, whilst attaching great weight to this omission, the OMA have not given any weight to the fact that the Turnpike Road is also not shown on Tuke's 1787 Map. The OMA does not deny that the Turnpike Road existed by 1787 and no reason is offered for its omission. This considerably weakens the OMA's argument that Jeffrey's Map is evidence that no route existed along the route of the Turnpike Road pre-1771. If one commercial map, drafted after the establishment of the Turnpike Road, could omit the Turnpike Road either deliberately or inadvertently, then why not two?
10. Furthermore it is not logical to conclude that the reason for the Turnpike Road's omission from Jeffrey's Map was because it did not exist pre-1771, as this assumes that the Turnpike Road would have appeared overnight. Even if the road was not built until 1771, the surveyors of Jeffrey's Map would have been aware that the Turnpike Road was under construction or at the very least that construction was intended to commence. Even on the OMA's own case, there would have been an awareness that the Turnpike Road was being

built or was about to be built at the time of the survey and it was built before publication of Jeffrey's Map.

11. Even if the OMA are correct in their understanding that, prior to 1771, the Order Route was the only route between the two villages: this does not of itself establish that public rights subsist over the route. Indeed, the building of the Turnpike Road may have partly been necessitated by the lack of a route between the villages which was available to the public.
12. The Commercial Maps do not provide any insight as to the status or rights enjoyed over the routes shown and in this sense are not probative to this matter.
13. In response to Mr and Mrs Swiers' objections, the OMA has argued that there is a strong inference that public rights existed over any route depicted on the commercial maps as the maps were made available to anyone who could afford them. There is no basis for this argument and it cannot be assumed that all routes carry public rights just because they appear on maps made available to the public.

1760 Marwood Map

14. The OMA argues that the 1760 Marwood Map demonstrates that the Order Route was at this time the most significant route linking the villages of Rufforth and Acomb. Mr and Mrs Swiers submit that the Marwood Map has no probative value in this matter.
15. The OMA argue that the fact that the distances to Rufforth and Acomb are shown on the map demonstrate that the Order Route was the most significant route between the two villages. Mr and Mrs Swiers submit that the OMA attach far too much weight to this. Where the map depicts only a limited area it would be normal to record the distances to nearby settlements, if only for the sake of orientation. The fact that the Order Route appears to be the only major route between the villages shown on the map is also of no significance as the map relates to a relatively small area and so cannot be taken to mean that there were no other routes between the villages at this time.

16. The description of the route as the "ancient road" does not shed any light on the status of the route. The description of the route as "ancient" does not support the argument that the route was the main route in use between the villages at this time. Indeed, it would more readily suggest that even by this time the route was considered as an historical route which was not of great relevance to the inhabitants at the time. If this is the case then the OMA are seeking to modify the definitive map based on an inference of the historical importance of the Order Route in circumstances where the Order Route was already considered an anachronism some 260 years ago. In these circumstances and without any evidence of creation by statute or dedication at common law, how can the OMA possibly hope to establish the status of the Order Route?
17. OMA's interpretation of the reference to the route being repaired by Marwood is pure speculation. It is at least equally plausible that this note could record that a private landowner was repairing the road as there were no public rights over it.
18. It is unclear why the OMA considers that public rights subsist over the Order Route purely because it considers that the Marwood map demonstrates an early enclosure of land around the route.
19. It should also be noted that only a section of the route is labelled as part of ancient route. Whilst it does appear that the route depicted follows the same course of the Order Route, only part of it is noted as being part of the ancient road to York. Therefore, to the extent that any weight is attached to this evidence it does not support an argument that public rights subsist over the whole Order Route.

Turnpike Trust

20. The OMA argues that the fact that the Order Route appears to be shown on the Turnpike Trust maps as a spur of the Turnpike Road demonstrates that the Order was an important route which was outside of the Trust's responsibilities but which needed to be taken into account. Mr and Mrs Swiers submit that this is not in the least bit probative. There are a number of routes

showing as spurs on this map. Whether the routes were public or private they would clearly need to be taken into account for any proposals made by the trust. This evidence does not shed any light on the status of the route.

21. The OMA's argument that the fact that the Turnpike Road comprises a bridge called "New Gate Bridge" suggests that it is a more recent road than the Order Route is particularly speculative. "New" is clearly a relative term. Simply because a place name contains the word "new" it cannot be taken to mean that it is most recent at any given time. A good example is that New College, Oxford University was founded in the 14th century and is one of the oldest of the University's colleges. The OMA's reliance on the presumption that "gate" refers to "street" with reference to Norse language and medieval English etymology suggests to the contrary that the Turnpike Road has a long history. The poor condition of New Gate Bridge as recorded by the trust likewise suggests that the Turnpike Road was not a recent route.

Inclosure Awards

Acomb & Holgate

22. The OMA concedes that the Acomb & Holgate Inclosure Award does not offer any direct evidence that the Order Route carried a public right of way. The OMA nonetheless infer that the reference to an "antient gate" means that the Order Route was a public right of way.

23. The OMA's conclusion appears to be based on a number of tenuous assumptions. First is that the "Inclosure Map" discovered does in fact relate to the Award. Second is that the route referred to is the Order Route, which does not seem at all clear from the documents. Third and most tenuous of all is the assumption that a reference to an "antient gate" is a reference to a public right of way. This description sheds no light on the status of the route in question, save that it could suggest that the route is disused or anachronistic.

24. Given the tenuous nature of these assumptions, Mr and Mrs Swiers submit that this evidence does not support the OMA's case to modify the definitive map.

Rufforth Inclosure Award

25. The OMA concedes that the Rufforth award also offers no direct evidence that the Order Route is a public right of way. In fact the award indicates quite the opposite, referring to the western end of the Order Route as a "*private or occupation carriage road*". This description is among the small amount of evidence which actually speaks to the status of the Order Route and it clearly indicates that the status of the Order Route was and is private and not public.

26. The OMA seeks to establish the contrary by relying on *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* (1995) 70 P&CR 307 (Appendix 3). It is unclear how the OMA can possibly consider that this judgment assists their case, and it appears that the OMA have sought to rely on the Inspector's decision which was the subject of the judgment, rather than the judgment itself. As the Inspector's decision was quashed as a result of the judgment, the OMA is clearly misguided to seek to rely on it.

27. In *Dunlop* the Inspector's decision was that:

...roads described in the Glatton with Holme Inclosure Award as "public Carriage Roads and highways" and "private Carriage Roads and Drift Ways" both refer to roads for use by the public.

28. Despite the high threshold which must be met for the court to question an inspector's decision, in this case the court chose to quash the order on the basis of the inspector's erroneous construction of "private carriage roads". Sedley J. held that:

All the indications are that "private carriage road" is deliberately used in the Award as a term of art distinguishing the particular road according to the extent of the particular rights over it from the public carriage roads on which all subjects enjoyed an equal right of vehicular passage. The subsequent history of many such roads, to which Ms Willmore draws attention in her article and which has resulted in such roads becoming public routes maintained at public expense, does not destroy the distinction deliberately made in Awards such as the Glatton with Holme

Award, which concerns a track for which no case of lost modern grant has been able to be erected.

The Inspector's order was therefore quashed on the basis that a public right of way for vehicular traffic could not be established by the use of the words "private Carriage Road".

29. The OMA's interpretation of the Rufforth Inclosure Award clearly runs contrary to the ratio of this case. The OMA cites "*many other*" unnamed cases to support their argument, but *Dunlop* remains good law and to the extent that decisions of inspectors have departed from it, these decisions are wrong in law.
30. *Dunlop* also provides helpful guidance in relation to the width of tracks and the effect of this on status. In *Dunlop* it was found that carriage ways whose width were less than 30 feet were likely not to carry public rights. It should be noted that in the Rufforth Inclosure Award part of the Order Route is referred to as being "*of the width of twenty four feet*". This further supports the argument that the Order Route is not subject to public rights.
31. The OMA seeks to attach weight to the reference to the route's "*ancient course*" as evidence that the Order Route carries public rights. This is misguided, as clearly this reference provides no insight as to status and comes in the context of a route specifically said to be private. If one end of the route did not carry public rights, it is highly unlikely that the remainder of the route did, as there would be no logic in a public route leading only into a private route.
32. The OMA submit that their argument is strengthened by the fact that the land surrounding the Order Route was enclosed by 1760. It is unclear on what basis this supports the OMA's argument. The only probative evidence from the Inclosure Awards discovered is the description of the route as "private" and this strongly suggests that no public rights subsist over the Order Route.

OS map and Object Name Book

33. The OMA refer to the OS maps which show the physical existence of the Order Route since 1850. This evidence gives no insight as to the status of the Order Route or the rights over it.
34. The fact that the OS Object Name Book refers to the Order Route as a "*public road*" only within Acomb and describes the remainder as a "*lane*" suggests a distinction that whilst part of Grange Lane was public (i.e. the part within Acomb which is not the subject of the Order) the remainder (i.e. the Order Route) was not. This is further evidence that no public rights subsist over the Order Route.

Finance Act Records

35. The fact that the western part of the Order Route was included in the records of land holdings but no deductions were made is a strong indication that no public rights subsist over the Order Route. Had any such rights existed, there would be a strong financial incentive for the land owner to declare these rights in order to reduce their tax liability.
36. The OMA suggest that it might be that no deductions were claimed because the land owners thought the Order Route was not included within their land. However, this appears very unlikely given that the Finance Act plan shows boundaries extending over the Order Route and given that the Order Route was included in the land holdings. The more likely explanation is that no reduction was claimed because no public rights subsisted over the Order Route.
37. The OMA also suggest that it may be that memories of the public rights over the route had faded by 1910. The OMA's case is once again therefore that it is more likely than not that public rights were created over the Order Route but so long ago that such status appears to have been forgotten before any records of its status was made. Mr and Mrs Swiers submit the more likely explanation is that the Order Route never carried public rights.

Stopping up Order

38. Whilst the 1953 Stopping Up order does appear to suggest that part of the Order Route was a footpath, minimal weight should be attached to this evidence.
39. It should be noted that five routes were identified for stopping up. As such the need to make an order was not solely due to concerns about the Order Route. Where an order already had to be made, it would make sense for the Minister to approach the matter with an abundance of caution and ensure that any route which could conceivably be said to carry public rights capable of interfering with the use of the airfield was stopped up. As such, the inclusion of part of Grange Lane as a footpath represents the worst case scenario of what rights did subsist along a small part of the route and is a strong argument against any higher public right subsisting.
40. It should further be noted that this is evidence only that the particular section of the route stopped up carried public rights. This does not form part of the Order Route. The inclusion of part of Grange Lane in the stopping up order does not change the position that the OMA has been unable to present any direct evidence of the status of the actual Order Route.

User Evidence

41. The OMA concedes that the user evidence would alone not be sufficient to demonstrate that public rights subsist over the Order Route on the balance of probabilities.
42. Mr and Mrs Swiers agree that the user evidence does not establish the existence of public rights. Even if cogent and consistent user evidence was provided, it would be difficult to reliably test this, given that it would involve the cross-examination of witnesses on matters occurring some 60 years ago. What is more, in the current case the evidence is vague, inconsistent and does not suggest that use of the Order Route was as of right.

43. There does not appear to be any consensus amongst the users of whether the Order Route was a bridleway or a footpath. This is unusual as if regular users were walking and riding on the route, the walkers would be aware of the riders and there would be consensus that the route was a bridleway. There also appears to be considerable inconsistency amongst those claiming to use the route regularly regarding the presence of any signs or gates. Users' description of the width of the route also vary wildly. Furthermore, the user evidence form of Mr Gray stated that the land owner did not object to "*genuine walkers*". This suggests that there was a wide-ranging, informal licence for a specific class of person to use the path for walking and as such, to the extent that members of the public were walking along the Order Route recreationally, this use was not as of right and so cannot be used to establish presumed dedication.

Status of Route

44. The only evidence produced by the OMA which suggests that the Order Route is subject to any public rights is the 1953 Stopping Up Order, which describes a former part of the route as a "footpath" and provides for the route to be stopped up. As stated above, Mr and Mrs Swiers' position is that little weight should be attached to this evidence. However, as it is the only evidence suggesting public rights, it is surprising that the OMA now seek to argue that the Order Route carries public rights beyond those of a footpath. There is no evidence to support such an argument.

45. The first letter of Mrs Cook of the British Horse Society argues that the route should be recognised as a "road" given its description in various documents and inclusion in various maps. The documents Mrs Cook refer to only speak of the physical characteristics of a route and not its public status. Furthermore, at this time "road" was not a species of highway, the different species being cart, horse and foot. Evidence from *RH Spearman: The Common and Statute Law relating to Highways in England and North Wales, with an Appendix of Statutes* (London: 1881) (Appendix 4) makes it clear that "road" can mean simply "highway over land"

46. The second letter from Mrs Cook seeks to argue that the inclosure awards support an argument that the Order Route should be a restricted byway. However, as set out above, the inclosure awards do not support an argument that any public rights subsist over the Order Route and specifically state that the western end of the route was private. Mrs Cook's submissions ignore the principle of construction from *Dunlop* as set out above.
47. Lady Kirk's submissions on behalf of the Byways and Bridleways Trust appear to be based solely on the assumption that some people must have ridden on the route and so it therefore must have a higher status than a footpath. This argument is pure speculation and should be disregarded.
48. Note that pursuant to paragraph 8, Schedule 15 of the Wildlife and Countryside Act 1981, where an order is confirmed with modifications which alter the status of the public right of way, further notice must be given and objections invited. If objections are made which are not withdrawn, a further public inquiry or hearing must be held. For the avoidance of doubt, Mr and Mrs Swiers intend to object to any such modification on the basis of the above.

Approach of the OMA

49. The OMA appear to have approached this matter on the basis that because it considers that a public route must have existed between Acomb and Rufforth and because the Order Route matches this description, it follows that the Order Route must be a public right of way. This position has been taken despite the fact that the evidence as to the status of the Order Route (such as the Rufforth Inclosure Award and Finance Act Records) demonstrate that it was not public.
50. The OMA states that only evidence of a formal public process to remove or alter public rights would be sufficient to refute the existence of public rights of way. This approach is entirely inappropriate as it assumes the existence of a public right of way and seeks to pass the burden of demonstrating there are no such public rights to those objecting. Furthermore, it suggests that the presumption can only be defeated by producing evidence of the stopping up

of public routes. This approach leads to the paradoxical situation where if no such public rights existed (and there is very little evidence to suggest they did) there will be no evidence to refute the OMA's overly-eager presumption.

Conclusions

51. For all the above reasons, the OMA has not made out its case that the legal status of the Order Route is either a footpath or a restricted byway. The evidence does not support either such conclusion.

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