



**PUBLIC FOOTPATH FULFORD 23 DEFINITIVE MAP MODIFICATION
ORDER 2019**

STATEMENT OF CASE

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PUBLIC FOOTPATH FULFORD 23 MODIFICATION ORDER 2019

PLANNING INSPECTORATE REFERENCE: ROW/3251672

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 Footpath Fulford 23 Modification Order 2019 (“the Order”). The Council of the City of York is the order making authority (“the OMA”).
2. The Order is the subject of one objection (see appendix 2) from the affected land owner, Mrs Denise Jagger (“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 Landing Lane south to public footpath Fulford 8, York. The order route is noted within the Order as public footpath Fulford 23.
4. The application was received by the OMA in January 2012, accompanied by nineteen user evidence forms. Following investigations the OMA decided to reject the application. That decision was appealed by the applicant and the Secretary of State allowed the appeal (see appendix 16).
5. The OMA made the Order on 12 September 2019 after receiving a direction from the Secretary of State under schedule 14 of the Wildlife and Countryside Act 1981 (see appendix 16).
6. The statutory consultation ran between 25 September 2019 and 6 November 2019 during which one duly made objection was received by the OMA.

Legal Framework

7. 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.”

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

9. 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.”

10. 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.”

11. 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.”

12. 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.”

13. 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

14. The Order is supported by 24 user evidence forms attesting to the use of the order route by 24 people (see appendix 5, page 29).

15. Sixteen of the 24 users claim use of the route for a period of twenty or more years calculated back from the date the order route was closed by the Objector (see appendix 5, page 29 for a graph illustrating the use period).

16. All 24 people claim use of the order route on foot. Two indicated that they used the route on a bicycle as well but provided no further information.
17. Unfortunately the forms did not ask the witnesses to give details of how often they used the order route. However, the incidental comments suggest that there was a typical use pattern for a footpath. Dog walkers using it daily with recreational walkers making less frequent use of the path.
18. None of the users report ever having seen signs indicating the route was not public.
19. Two users report that they were challenged by the husband of the Objector a few weeks before a fence was erected over the route in November 2011. The users report that they were told that the route was not a public right of way.
20. All 24 users report that the order route was a worn grass path that was, at times, ploughed and cropped. Its width was variously reported as being half a metre to six feet wide. The most common width reported was half a metre.
21. The routes depicted within the user evidence forms have consistent start and finish points. The route across the field appears to vary slightly from form to form but there is no suggestion that the users were not following a specific route.
22. None of the users report ever having received permission to use the route.
23. Two of the users either farmed the land affected by the order route or are related to the people who farmed the land. Therefore their use cannot be as of right.
24. In 2015 the OMA wrote to all the people who initially submitted evidence. One letter was returned to the OMA because the addressee (Lister) was no longer at the address. Of the remaining eighteen letters sent only one reply was received (see appendix 19, page 346).
25. In 2016 the OMA wrote to the nineteen witnesses again. This time no replies were received. However, three letters addressed to six people were returned, the addressees had again gone away. The six people concerned were Ms Carter, Ms Knowles, Mr & Mrs Sherrin, and Mr & Mrs Westcott.
26. When the OMA received copies of the five additional user evidence forms, an officer attempted to make contact with each person by telephone. No reply was

forthcoming from four people (Graham Murray, Michael Bulmer, Keith Jameson, and Donald Atkinson).

27. One person, Terence Fisher did reply (he had used the route up to 1982). During the telephone interview with an officer from the OMA he said he had made a mistake and that his use related to the Nurse's Path which is already recorded as public footpath Fulford 8. The officer asked him to send a letter confirming that he wanted to withdraw his evidence but nothing was ever received. The copy of the officer's notes can be found at appendix 17 (pages 244).

Documentary evidence supporting the order

28. The OMA has been unable to find any documentary evidence that supports the existence of the order route.

Land owner evidence refuting the order

29. The Objector gave permission to two of the people providing evidence of use (Doreen Crawley and Graham Cheyne) enabling them to use the order route for the purpose of walking Mrs Crawley's dog.
30. The objector was also aware that, as she became older, friends and family of Mrs Crawley used the order route to walk her dog. The objector considers this use was also by permission.

Documentary evidence refuting the order

31. The order route was not claimed during any of the stages of the preparation of the definitive map.
32. None of the commercial maps or Ordnance Survey maps available to the OMA show any feature crossing the affected land in the vicinity of the order route. These maps cover the period from 1770 to the present day.
33. The order route was obstructed by the gardens of Fulford Hall Cottages. These cottages were demolished sometime between 1981 and 1987 (see appendix 16, pages 240).

34. None of the aerial photographs available to the OMA show the order route. Aerial photographs from 1936, 1961, 1971, 2002, 2007, and 2017 have been examined.
35. The Objector also provided a series of aerial photographs for the land affected by the order route. Among those photographs there are examples from 2011 which clearly show a walked line around the field that is somewhat coincident with the order route (see appendix 18, pages 251)

Consideration of the evidence

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

The statutory test

37. Under section 31 of the Highways 1980 any route that is used for a period of 20 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.
38. The relevant 20 year period under consideration is defined by the blocking of the route with a fence in 2011; this being the challenge to the public’s use. This sets the statutory period that relevant evidence must fall in as 1991 – 2011.
39. 23 of the 24 users claim use of the order route during this period. Fifteen people claim use for all 20 years.
40. 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.
41. 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.
42. Finally, the route must be used by the public at large, not a particular group.

Use by force

43. There is no suggestion in the evidence from the users or the Objector that the route was ever accessed by force. Indeed when the route was blocked in 2011 by a

fence this appears to have been respected. There is no suggestion in the evidence that anyone ever tried to remove the fence.

Use by stealth

44. 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

45. The evidence of one person (Donald Atkinson) must be discounted because they were farming the land in question up to 2008. 2008 is also when their claimed use of the order route stopped. A tenant of land has a right of access by virtue of their tenancy meaning their use cannot be as of right.

46. The evidence of Michael Bulmer indicates that he was related to Donald Atkinson which means that his use is most likely to have been by right rather than as of right. Therefore this must also be removed from consideration for the statutory test.

47. The Objector has provided evidence that they have given a number of people permission to access the field. However, by their own admission, they have only owned the land affected by the order route since 2010. Therefore any permission they have given only applies to the end of the statutory period.

48. Further, the OMA is not convinced that the need to seek permission of a new land owner would be apparent to people who continued using the order route until that land owner took some overt action. The OMA contends that the overt action in this case was the erection of the fence across the route in November 2011.

49. In addition, the OMA is concerned that not a single person providing evidence mentions that part of the route was obstructed by the gardens of Fulford Hall Cottages until at least 1981. This despite some people claiming to have used the route since 1951.

50. The presence of the cottages does not affect examination of the statutory period because they had been demolished by 1987. Nevertheless, the failure to mention either the presence of the cottages or their removal during the period of claimed use is something that needs to be examined further.

51. The OMA is satisfied that there are 21 users who can claim as of right use during the statutory period. Fourteen of these of people having used the route for the whole of the statutory period.

Frequency of use

52. As mentioned at para 17 above, the user evidence forms did not explicitly capture how frequently people used the order route. It is therefore necessary to rely on incidental comments within the forms and other sources of information.

53. From the forms it is clear that the users of the order route fall into the usual patterns, with dog walkers making most frequent use and others less so. The picture painted is of a busy path with people regularly seeing other users.

54. The OMA contends that this picture is a significant overstatement of the use of the route during the 20 year period. The OMA bases its position on the lack of corroborating evidence from other sources.

55. Of particular note are the Ordnance Survey maps, none of which show any recorded feature over the field, and the aerial photographs from 2002 and 2007.

56. As mentioned above, relying solely on the user evidence would suggest that the path was used to such a degree that a worn strip would inevitably appear over the field. However examination of the aerial photographs from these two years shows this not to be the case. Judging from the lack of leaves on the trees they were both taken during the winter and offer an excellent view of most of the land affected by the order route.

57. The aerial photography from 2011 submitted by the land owner does clearly show the kind of worn strip that the use alleged by the user evidence forms would cause.

58. The OMA contends that at some point after 2007 the route across the field began to be used with the frequency suggested by the user evidence. Before 2007 the amount of use made of the order route was not sufficient to make the land owner aware that the public were asserting a right of way.

59. Consequently, on the balance of probabilities the OMA is not satisfied that there was sufficient use of the order route throughout the statutory period to enable the Order to be confirmed.

Use by the public at large

60. There is a thread of comments within nine of the user evidence forms that asserts that the path had been in public use since 1970. Such assertions are often attributed to family history. 1970 is also when two people giving evidence (Doreen Crawley and Gary Todd) claim to have started using the order route.
61. As a consequence of these common factors the OMA is not content that these eleven people can be seen to be part of the public at large.
62. Rather, the OMA contends that these eleven people are part of one or two family/friend groups who shared knowledge of the order route being available to be used. Such use cannot be seen as being made by the public at large; their association means that they are from a particular group or groups.
63. Therefore, these eleven user evidence forms should also be set aside when considering whether statutory dedication has occurred.
64. Removing these eleven people from consideration leaves ten users to represent the public of Fulford.
65. Fulford parish was home to over 2700 people during the last census (2011). The OMA is not content that ten users are sufficient to represent the public at large in Fulford.
66. Consequently the OMA believes that it is not possible to confirm the Order on the basis of statutory dedication.

Common Law dedication

67. 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.
68. There is no evidence to suggest that any land owner ever expressly dedicated the order route.

69. 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.

70. Consequently the OMA believes that it is not possible to confirm the Order on the basis of Common Law dedication.

71. In conclusion, the OMA contends that there is insufficient evidence to confirm the order under the statutory test or the Common Law test. Therefore the OMA is adopting a neutral stance toward the confirmation of the Order.

Comment on the objection

72. The single duly made objection received from the Objector made a number of points seeking to refute the order. Each point is considered below. The full text of the objection can be found at appendix 3. The OMA's comments on the objections can be found in the sub paragraphs following the objection.

73. The Objector maintains that evidence from aerial photography demonstrates that on the ground a path has never existed over the field.

a) The OMA agrees that the evidence up to 2007 shows no sign of a worn strip across the field. However, it does not necessarily follow that no public rights exist.

74. The Objector suggests that the evidence adduced does not represent the public at large. Rather it is derived from a group of persons connected by family and friendship.

a) The OMA agrees that some of the users are related and as such their use cannot be seen as being by the public at large. However, some of the evidence does appear to be from members of the public.

75. The Objector contends that people may have confused the existing recorded footpath with the order route.

a) The OMA has seen one example of that (Terence Fisher) but the user forms include a map and people have not chosen to indicate the route of the existing

footpath. They have recorded the order route. The conflict in the evidence is something that will need to be tested further.

76. The Objector states that it is very difficult to use the northern end of the order route because it is obstructed by trees and an iron fence and this again means the order route cannot have been used as the evidence alleges.

a) The OMA accepts that it would appear difficult to access the route from the northern end. However, difficulty in using the route does not prevent the acquisition of rights over the land.

77. The Objector states that they have a number of signs around their property informing people that it is private and that they have occasionally challenged people walking up their back drive. The back drive to Water Fulford Hall being near but not coincident with the order route.

a) The OMA is aware that the Objector bought the land affected by the order route in 2010. As a result any signs cannot be interpreted as the land owner seeking to negative an intention to dedicate the order route to the public until that date. Consequently the OMA does not accept the presence of signs erected by the Objector was sufficient to indicate to users of the order route that there was no intention to dedicate it as a PRow.

78. The Objector states that they have given permission to some of the people giving evidence to walk on their land.

a) The OMA has already addressed this point at para 48 above. In summary the OMA contends that this can only have any relevance for the period 2010 to 2011 and then its relevance is very limited.

79. The Objector contends that a significant number of people who claimed they used the route as of right were in fact using the route by right.

a) The OMA agrees that some of the users did have a pre-existing right to use the order route (see para 46 to 47 above).

80. The Objector suggests that the wide disparity in the alignment of routes the users claimed to have used means that there is insufficient evidence that a single route has been used to the degree required to bring public rights into being.

- a) The OMA understands the Objector's approach to this matter. However, paths crossing open fields are wont to wander to a degree and are difficult to record accurately when there are no map features to follow. The OMA submits that given the common end points and the generally similar routes taken, the specific variance in the routes used is de minimis.

81. The Objector suggests that by permitting people to cross their land, when nearby river bank work in 2011 and 2012 rendered the riverside public footpath impassable, they have, unwittingly, give the impression that the order route was a PRow.

- a) The OMA cannot find any suggestion of this causing confusion in the evidence forms but accepts that it is a possibility.

Conclusion

82. The OMA's view is that there is insufficient evidence to support the existence of the order route as a public right of way in the balance of probabilities.

83. As a result the OMA is taking a neutral stance towards the Order.

The Council of the City of York

October 2020