



**PUBLIC FOOTPATH KEXBY 20 DEFINITIVE MAP MODIFICATION
ORDER 2020**

STATEMENT OF CASE

STATEMENT OF CASE OF THE COUNCIL OF THE CITY OF YORK
PUBLIC FOOTPATH KEXBY 20 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 Footpath Kexby 20 Modification Order 2020 (“the Order”). The Council is the order making authority (“the OMA”).
2. The order is the subject of ten objections from eleven objectors (see appendix 2, page 17). The objectors comprise:
 - i. Kexby Parish Council
 - ii. Mary Byworth of Dunnington
 - iii. Gil Calvert of Dunnington
 - iv. A. Cole of Dunnington, joint land owner
 - v. Joan Drummond of Middleton-on-the-Wolds, former land owner
 - vi. Michael Gray of Dunnington
 - vii. Richard Hart of Dunnington
 - viii. John Hornby of Dunnington
 - ix. Gary Kay of Dunnington
 - x. Christine Simpson and Michael Thompson of Dunnington, joint objection and joint land owners.
3. The OMA also received two representations in support of the application from the Friends of Hagg Wood and the Ramblers.
4. The OMA has been unable to secure the withdrawal of these objections and consequently is referring it to the Secretary of State for determination.

Factual Background

5. The route shown in the Order (“the Order Route”) runs from public footpath Kexby 11 to public bridleway Kexby 8. The Order Route is noted within the order as public

footpath Kexby 20.

6. The application was received by the OMA in December 1997 from the Friends of Hagg Wood. The application was accompanied by user evidence forms, 1910 Finance Act records, a number of old maps, and a history of Hagg Wood written by the applicant.
7. The OMA made the order on 24 February 2020 and the statutory consultation ran between 3 March 2020 and 17 April 2020 during which ten duly made objections were received by the OMA.

Legal Framework

8. 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.”*

9. The OMA is the relevant “surveying authority”.
10. 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.”

11. 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.”

12. 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.”

13. 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.”

14. 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

15. The order is supported by 41 user evidence statements attesting to the use of the Order Route by 42 people between 1927 and 1997 (see appendix 5, page 73).
16. 24 of the 42 users claim use of the route for a period of twenty or more years (see appendix 5, page 74 for a graph illustrating the use period).
17. All 42 people claim use of the Order Route on foot. Two indicated that they used the route on a bicycle as well.
18. Eight users claim to have used the route on foot every week. Seventeen users claim to have used the route every month .The remaining seventeen people used the Order Route less frequently. In addition to the use on foot, two people also claim to have used the route on a bicycle occasionally.
19. One of the users reports seeing a sign on the route which they describe as being green and gold and located in the corner of the field where the route enters Hagg Wood. They saw this sign in the 1950s but they do not record the purpose of the sign. A handful of users report seeing fire beaters in this location as well.
20. Eleven of the users report coming across gates and stiles when they were using the Order Route. It is not clear from the forms whether the gates and stiles were in place at the same time or if a gate replaced a stile or vice versa. Eight users record finding stiles only on the Order Route and twelve users report finding only gates on the Order Route.
21. The locations of the gates and/or stiles remain consistently reported. A piece of furniture is recorded in the corner field where the Order Route goes into Hagg Wood and a second piece of furniture allowed people to leave the field and gain access to bridleway 8. It is also clear from the user forms that the location of the

access on to bridleway 8 changed over the period of use from the western corner of the field to the eastern corner.

22. 36 witnesses report using the Order Route with six users recording that they only gained access to bridleway 8 via a gate or stile in the eastern corner of the field.
23. None of the users report ever finding the gates locked. One instance was recorded in the evidence where some obstruction prevented use of the Order Route. This occurred when there was a wire fence over the Order Route and the witness's dog became too heavy to lift over. It is not clear from the form if there was a stile present over the wire fence.
24. One witness reports that they worked for the farmer who rented the field crossed by the Order Route. From the description it appears that this work was of a casual, ad-hoc nature. Nevertheless it is sufficient to cast some doubt over whether their use would have been as of right.
25. No other users report ever having been challenged by any of the land owners or tenants during the 70 years use claimed by the user evidence statements.
26. In addition none of the users record ever having received permission from the land owner or tenant to use the Order Route. Consequently 41 of the 42 witnesses appear to have used the route as of right.
27. The width of the route, where reported, was variously recorded between two feet and three metres, although the most users recorded the width being in the region of 3 feet.

Documentary evidence

28. The application was supported by Finance Act 1910 records, historic Ordnance Survey (OS) maps, and a history of access into Hagg Wood written by the applicant.
29. The OMA has added some additional historic OS maps which show the Order Route.
30. Two of the objectors have submitted documentary evidence refuting the existence of the Order Route set out below.

31. In the 1910 Finance Act records the OMA can find no mention of deductions for the presence of a right of way. The entry for Keepers Cottage notes an easement but this property is some 200 metres east of the northern end of the Order Route and does not appear to relate to it (see appendix 16, page 308).
32. The Order Route appears sporadically in the historic OS maps and other old map evidence. It is shown on all the maps available to the OMA up to 1906 (the registry of deeds map relating to the Scoreby Estate). However the 1910 25 inch map does not show the Order Route (see appendix 15, page 277).
33. The Order Route is not depicted again until 1952 and is shown again in 1958. The next map available to the OMA dating from 1969 does not show the Order Route and it remains absent from the map records thereafter.
34. The history of access to Hagg Wood provided by the applicant shows that before the Second World War access to the wood was not encouraged by the land owners and the gamekeepers they employed (see appendix 17, page 318).
35. It also gives 1987 as the date when the access on to bridleway 8 at the northern end of the Order Route may have been prevented by the erection of a wire fence.
36. Finally, one of the photos included with the history clearly shows a sign reading “dogs to be kept on a lead”.
37. The 1905 sale particulars accord with the applicant’s history in that they clearly state the land subject to the sale is “without public road or footpath thereon”. Unfortunately one of the accompanying maps has been shaded to the point where any details on it have been obscured nor is it clear that the accompanying maps relate to the sales particulars (see appendix 20, page 345).
38. The letter from the Forestry Commission to the OMA asserts that the Forestry Commission has never considered the public had a right of access on foot over the triangular field. The letter is dated 15 January 1998.
39. The letter from Smiths Gore to Mr & Mrs Drummond supplied by the objector does not appear to offer any comment on whether the Order Route was a public right of way.

40. The local land charge search supplied by the objector shows that no public rights of way were recorded over the land being purchased in 1986.
41. The two aerial photographs from 1970 and 1974 supplied by the objector show no worn strip through the field at the northern end of the Order Route. The aerial photographs available to the OMA only start in 2002 but, like the objectors photographs, shown no worn strip (see appendix 19, page 341).
42. A photograph of metal rails at the point where the Order Route enters Hagg Wood was also supplied by the objector.
43. Finally, the records of the initial survey for the definitive map for Kexby show that the Order Route was not claimed as part of that process.

Consideration of the evidence

User evidence

44. User evidence can be considered under section 31 of the Highways Act 1980 or under Common Law.

The Statutory Test

45. Under section 31 of the Highways Act 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.
46. The relevant 20 year period under consideration is, at first glance, defined by the submission of the DMMO application in 1997; this being the event that called the public's right to use the route into question. This would set the statutory period that relevant evidence must fall in as 1977 – 1997.
47. However, the OMA is somewhat sceptical that 1997 is the point when the public's right to use the route was first called into question. The first reason for this scepticism is that many of the user forms that appear to show use to 1997 do not clearly state a period over which they walked the Order Route. Rather it is based on an inference from the date they filled out the form.

48. Second, the applicant's history clearly states that the Order Route was obstructed by a wire fence in 1987. One user may also corroborate the presence of the wire fence because when her dog became too heavy to lift over it she stopped using the route. Although it is not clear from the user's statement if there was a stile present that would have enabled her to get over the fence.
49. Finally, the OMA is aware that at some point during the middle of the 1980s the Forestry Commission (the leaseholder of Hagg Wood) constructed a stone access track to the west of the Order Route. This provided an easier way into Hagg Wood and appears to have supplanted the Order Route over time as the main access from Dunnington into the wood.
50. As the date the Forestry Commission installed the track is not clear it is not possible to use this date for the calculation of the statutory period. Furthermore, the OMA is not entirely convinced that the construction of an alternative route represents an action that has the capacity to call the public's right to use the route into question.
51. Consequently, the OMA considers that the erection of the fence in 1987 to be the first time the public's right to use the route was called into question. This means that the statutory period is 1967-1987.
52. Changing the statutory period to end in 1987 means that thirteen people have used the route for a period of 20 or more years, reduced from 24.
53. 36 of the 42 users fall within the revised statutory period the remaining six users evidence use prior to the revised statutory period.
54. 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.
55. 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.
56. Finally, the route must be used by the public at large, not a particular group.

Use by force

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

Use by stealth

58. There is no suggestion in the evidence from the users or the objectors that any actions were taken to attempt to conceal the use of the Order Route.

Use by permission

59. The evidence of one person (Harriet Gosling) suggests that she worked with the farmer's wife on an ad-hoc basis. The OMA considers that this use may not be as of right and should be removed from consideration under the Statutory Test.

60. The OMA is satisfied that there are 41 users who can claim as of right use during the statutory period. Thirteen of these of people having used the route for the whole of the statutory period.

Frequency of use

61. As set out at para 16 above, the user evidence forms show that the Order Route was not used on a daily basis. Rather it used by most people once every month or two.

62. The historic OS maps dating from the statutory period do not record any feature on the ground that could be the Order Route.

63. The aerial photographs supplied by the objector are the most relevant being from 1970 and 1974 and clearly show no worn strip crossing the field.

64. The OMA is content that the frequency the Order Route was used as shown by the user evidence was unlikely to be enough to create such physical features.

65. One user noted a green and gold sign where the Order Route entered the wood and several other users report seeing fire beaters at this location.

66. Whilst the sign was not described the OMA considers it likely that it was an enamel Forestry Commission sign possibly asking people to take care not to start fires.

These signs were commonly found across the Forestry Commission's estate on access roads and other ways the public were likely to use. They were often placed near racks of fire beaters. Such signs could be predominantly either brown with white writing or green with gold coloured writing.

67. Looking at some of the photographic records the Forestry Commission has made available online following its centenary in 2019 it would appear that the green and gold signs were in use around the start of the 1960s and the brown and white signs replaced them towards the end of that decade. The person reporting the sign claims to have used the Order Route at the time such signs would have been in use.

68. As there is a field between this entrance and bridleway 8 (known as Intake Lane) the OMA contends that the only reasonable explanation for the placement of the sign and the fire beaters indicates that the Forestry Commission expected this to be used as access into Hagg Wood.

69. Furthermore, if the green and gold sign was asking people not to set fires it seems to the OMA that this would have been aimed exclusively at members of the public. Forestry workers being all too aware of the fire risk during extended dry spells.

70. All of which points to the Forestry Commission, despite the letter from 1998, having some awareness that the public used the Order Route.

71. The OMA contends that the owners of the field were also aware of the public's use of the Order Route because one of the photographs supplied by the applicant clearly shows a sign on a gate post beside the Order Route on Intake Lane asking people to keep their dogs on a lead. Why would a land owner or tenant go to the trouble of erecting such a sign if the route was never used as claimed by the objectors?

72. Consequently the OMA is satisfied that whilst the Order Route was not heavily used it was sufficient to make the land owner aware that the public were asserting a right over the land.

Use by the public at large

73. The user evidence shows that whilst the Order Route was enjoyed by several families from Dunnington there is sufficient diversity in the evidence to demonstrate that, on the balance of probabilities, it was used by the public at large.

Evidence indicating a lack of intention to dedicate

74. The OMA has been unable to find any evidence that the land owner took any steps during the statutory period to communicate to the users of the Order Route that they had no intention to dedicate the Order Route as a PRow.

75. There is nothing in the evidence submitted by the objectors that shows any steps were taken by the land owner during the statutory period demonstrating a lack of intention to dedicate.

76. Therefore, whilst the evidence of use is not overwhelming, the OMA is satisfied the Statutory Test has been met and that, on the balance of probabilities, a public footpath exists over the Order Route based on use occurring between 1967 and 1987.

Common Law dedication

77. 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.

78. The OMA has been unable to find any evidence indicating that any land owner ever expressly dedicated the Order Route as a PRow.

79. Inference of dedication at Common Law supposes that at some point in the past the land owner dedicated the route to the public and this dedication explains why the public have used the route unchallenged from that time on. The documentary evidence for this dedication having been subsequently lost, the fact of the user evidence being used to infer the existence of the past dedication.

80. Of the 42 people giving evidence of use, fifteen used the path before the statutory period began in 1967. The person using the route for the longest period began in 1927 with a further four people starting to use the route during the 1930s and 1940s.

81. Whilst there is clear evidence from the sales particulars that the land owner in 1905 did not admit to any PRoW crossing the land there is sufficient time between 1905 and 1927 for the land owner to have dedicated the Order Route to the public.
82. Until the erection of the fence in 1987 there is no evidence to suggest that the land owner did not acquiesce to the public using the route from 1927. Again this could be interpreted to indicate that they had dedicated the route to the public sometime between 1905 and 1927.
83. The OMA considers that, although finely balanced, there is sufficient evidence to infer dedication of the route at Common Law on the balance of probabilities. That being said the OMA considers that the Statutory Test presents the stronger case for the existence of a public right of way

Documentary evidence

84. Beyond what has already been mentioned the OMA has been unable to locate any documentary evidence that either supports or refutes the existence of the Order Route.
85. Consequently, the OMA considers that the Statutory Test and the Common Law Test support the existence of a public footpath over the Order Route and respectfully asks that the Secretary of State confirms the order.

Comment on the objections

86. The ten duly made objections made a number of points seeking to refute the order. Each point is considered below. The OMA's comments on the objections can be found in the sub paragraphs following the objection. The full text of the objections can be found at appendix 2, page 17.
87. The objection of Kexby Parish Council was made on the grounds that the evidence does not support the existence of public rights over the Order Route and the local infrastructure was insufficient to cope with the existence of a public right of way.
- a) The parish council have provided no detail on why they consider the evidence insufficient. The OMA looks forward to receiving their detailed arguments in due course in their statement of case.

- b) The adequacy of local infrastructure is not a relevant legal consideration when determining the existence of a right of way.
88. The objection of Mary Byworth was made on the ground that no track following the Order Route existed.
- a) Whilst the existence of a physical feature may indicate the presence of a PRoW, the converse is not true. Public rights can exist without physical features being present.
89. The objection of Gill Calvert was made on the ground that no track following the Order Route existed.
- a) Whilst the existence of a physical feature may indicate the presence of a PRoW, the converse is not true. Public rights can exist without physical features being present.
90. The objection of A. Cole was made on the ground that the field has never been accessed at point shown in the order.
- a) The evidence adduced does not support A. Cole's unsupported assertion. The OMA looks forward to receiving evidence in his statement of case.
91. The objection of Joan Drummond was made on the grounds that no track following the Order Route existed over the field, it was not accessed by the public during her ownership, and the land was used for grazing livestock.
- a) Whilst the existence of a physical feature may indicate the presence of a PRoW, the converse is not true. Public rights can exist without physical features being present.
 - b) Based on user evidence and period of ownership the OMA's view is that Mrs Drummond and her husband were likely to be responsible for erecting the fence in 1987 that obstructed the Order Route and first called the public's right to use it into question. Therefore her recollections of the use of the Order Route relate to a period not under consideration.
 - c) That land is used for grazing livestock does not prevent the existence of a public right of way.

92. The objection of Michael Gray was made on the ground that the Order Route was never open to the public.

- a) The evidence adduced does not support Michael Gray's unsupported assertion. The OMA looks forward to receiving evidence in his statement of case.

93. The objection of Richard Hart was made on the ground that no track following the Order Route existed and the land was used for grazing livestock.

- a) Whilst the existence of a physical feature may indicate the presence of a PRoW, the converse is not true. Public rights can exist without physical features being present.
- b) That land is used for grazing livestock does not prevent the existence of a public right of way.

94. The objection of John Hornby was made on the ground that the public never accessed the triangular field.

- a) The evidence adduced does not support John Hornby's unsupported assertion. The OMA looks forward to receiving evidence in his statement of case.

95. The objection of Gary Kay was made on the grounds that no track following the Order Route existed, that the public never accessed the triangular field, and the land was used for grazing livestock.

- a) Whilst the existence of a physical feature may indicate the presence of a PRoW, the converse is not true. Public rights can exist without physical features being present.
- b) The evidence adduced does not support Gary Kay's unsupported assertion. The OMA looks forward to receiving evidence in his statement of case.
- c) That land is used for grazing livestock does not prevent the existence of a public right of way.

96. The joint objection of Christine Simpson and Michael Thompson was made on the grounds that the evidence does not support the existence of public rights over the Order Route and that evidence they hold demonstrates that the Order Route never existed as a PRow.

- a) The 1905 sale particulars. The OMA accepts that in 1905 the land owner did not believe any PRow were present over the land being sold
- b) The 1998 letter from the Forestry Commission is directly contradicted by the user evidence. On balance, the OMA considers that the evidence of 42 local people possess significantly more local knowledge than the land agent for an area that extended from County Durham south to north Nottinghamshire.
- c) The comments of Rt Hon Malcolm Alison MP were made in the context of a debate over the loss of access to Hagg Wood when the Forestry Commission were proposing disposal of the lease in 1996 and ultimately lead to the submission of the DMMO in 1997. It is worthy of note that the debate also featured the Rt Hon Frank Dobson who was born in Dunnington and clearly notes that he had been accessing Hagg Wood for 50 years. The OMA considers that whilst the exchange is interesting there is insufficient detail to enable any conclusions to be drawn in respect of the Order Route.
- d) The Order Route does not appear in the parish survey records. The OMA agrees with this and would add that the records held by the OMA also offer no insight regarding the discussion surrounding the survey carried out by Kexby Parish Council.
- e) The correspondence from Smiths Gore states that no mention is made of the Order Route. Again the OMA agrees with the objector, however, the OMA does not accept the objectors' implication that the failure to mention the Order Route excludes the possibility of the Order Route being a public right of way.
- f) Local authority search. There is no mention of a public right of way in the search because nothing was recorded on the definitive map. If it had been there would be no need for the order that is the subject of this statement of case.

- g) Aerial photographs. The OMA is very grateful to the objectors for including these photographs which are directly relevant to the statutory period under consideration. However, whilst the existence of a physical feature may indicate the presence of a PRow, the converse is not true. Public rights can exist without physical features being present.
- h) Historic maps. Whilst the depiction of a physical feature on a map may indicate the presence of a PRow, the failure of a map to show a physical feature does not exclude the existence of public rights over the land shown on the map.
- i) With regard to the comments concerning the alignment of the Order Route, the OMA thinks this is a misunderstanding of the map. The feature described by the objector as the extraction track is clearly labelled on the map as a drain so does not appear to be relevant.
- j) With regard to the red lines added to the map, the OMA agrees these were added by the applicant but understands they illustrate the different routes suggested by the user evidence.
- k) The photographs taken in 1997 showing the gates and other obstructions of the Order Route are not relevant as they were taken a decade after the public's right to use the route was called into question by Mr & Mrs Drummond when they erected the fence across it.
- l) The OMA is content to allow the objectors' analysis of the user evidence forms to stand.
- m) That the Order Route could not be monitored constantly by the land owner is not relevant.

Conclusion

97. The OMA's view is that there is sufficient evidence to support the existence of the Order Route as a public footpath on the balance of probabilities.

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

The Council of the City of York

July 2020

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