



## Order Decision

Site visit undertaken on 22 August 2023

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 23 October 2023**

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### Order Ref: ROW/3286833

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as Public Footpath Acaster Malbis 9 & Public Footpath Bishopthorpe 3 Modification Order 2019.
- The Order was made by The Council of the City of York ("the Council") on 10 October 2019 and proposes to add two footpaths, which form one continuous route, to the definitive map and statement.
- There was one objection outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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### Procedural Matters

1. All of the points referred to below correspond to those delineated on the Order Map.
2. The route included in the Order follows the western bank of the River Ouse ('the riverside path') between Acaster Malbis Footpath 3 (point A) and Ferry Lane (point K). The sole objection to the Order was submitted by Bishopthorpe Parish Council ('the parish council'), on the ground that the route should extend generally north-westwards from point K past the former St Andrew's Church and through to Chantry Lane ('the churchyard path').
3. Should the evidence support the dedication of the churchyard path it would be permissible to modify the Order to record this route. However, this is subject to it being possible to show the route on the Order Map and the requirement to advertise the proposed modifications in accordance with paragraph 8 of Schedule 15 to the 1981 Act.
4. The Council have provided copies of additional descriptions and a map in respect of the churchyard path in the event that I propose to modify the Order. These descriptions would need to be inserted into Parts I and II of the Order schedule. The supplementary map provided could be added to the Order to provide greater clarity regarding the alignment of this path.

### Statutory Framework

5. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, for me to confirm the Order, I must be satisfied that the evidence shows on the balance of probabilities that a footpath which is not shown in the definitive map and statement subsists.
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6. The Council made the Order on the basis that a public footpath has been dedicated in accordance with Section 31 of the Highways Act 1980 ("the 1980 Act"). If statutory dedication is not applicable, consideration should be given to whether the evidence is supportive of the dedication of a footpath under common law.

7. Section 31(1) of the 1980 Act 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'.*

8. Additionally, Section 31(8) of the Act specifies:

*'Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes'.*

### **Main Issues**

9. The evidence needs to be considered to determine whether there has been the dedication of a public right of way in connection with the riverside and churchyard paths. In terms of whether dedication can arise in relation to the churchyard path, I additionally need to consider the submissions made on the issue of consecrated ground.

### **Reasons**

#### ***When the status of the routes was brought into question***

10. It is apparent that the parish council submitted more than one application to add a route to the definitive map and the first of these was made in 1994. In the absence of any earlier event, I take the first application, which encompassed the churchyard path and the majority of the riverside path, as being the event that first brought the status of the routes into question. This means the relevant period for the purpose of the 1980 Act should be 1974-1994 ("the relevant period").

#### ***Evidence of use by the public***

11. A number of user evidence forms ('UEFs') were submitted in support of use of the riverside and churchyard paths. No plans are included with the forms to show the extent of these routes. Nonetheless the riverside path is broadly described as running between the churchyard and the swing bridge. This description could also possibly encompass the Churchyard path. The churchyard path by itself corresponds with a route described as running between Chantry Lane and Ferry Lane.

12. I have no reason to doubt that the riverside path used corresponds to the route shown on Ordnance survey maps from the latter part of the twentieth century and this route was evident on the ground during my visit. I also find that its southern termination point is more likely to correspond with a point just beyond the present bridge at the junction with Acaster Malbis Footpath No.3.

13. In terms of the other route, a path is shown on an alignment that follows the edge of the churchyard on maps provided from the late 1960s onwards. I note the parish council's point that there may be a variation between the original route and the path which now exists. In the absence of plans showing the route used by the people who completed a UEF, I rely at this stage on the details provided by the Council in terms of the route to be plotted on the Order Map. It is not alleged that there was more than one route that was used during the relevant period in the locality of the churchyard.
14. I find that there is evidence of use from ten people for the riverside path and at least thirty-nine people in relation to the churchyard path. The evidence is supportive of regular use on foot of both routes throughout the relevant period. There is nothing to suggest that the use was not as of right (without force, secrecy or permission) or was interrupted during this period. Nor is there anything to indicate that the routes were not used to the extent claimed. Whilst the Ordnance Survey maps and site photographs are not determinative of status, they are supportive of the existence of well-worn paths which broadly correspond to the two routes.
15. Overall, the evidence is sufficient to raise a presumption of the dedication of a footpath alongside the river and through the churchyard.

***Consecrated ground – churchyard path***

16. It is apparent that the churchyard is vested in the incumbent in their corporate capacity. The incumbent's position is similar to that of a tenant for life in cases involving a strict settlement in that they are not free to dispose of the land or grant rights over it. Therefore, the incumbent does not have the legal capacity to dedicate a public right of way at common law.
17. However, the position is different under Section 31 of the 1980 Act in that a way is deemed to be dedicated if the particular elements are satisfied. There is no need to demonstrate that the landowner had the capacity to dedicate a right of way. The reference in Section 31(1) to '*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*' should be taken to relate to the physical nature of the way rather than the capacity of the landowner to dedicate a right of way.
18. No case has been made in support of the churchyard falling under Section 31(8) of the 1980 Act. It appears to me that the land is held for ecclesiastical purposes and is not in public ownership and sits outside of land that might fall within Section 31(8).
19. The conclusion I reach from the submissions of the parish council and in particular the advice provided on the dedication of public rights of way by the General Synod Legal Advisory Commission is that the dedication of the churchyard path could arise under Section 31 of the 1980 Act.

***Whether any landowner demonstrated a lack of intention to dedicate public footpaths***

20. No evidence has been provided of any action being taken to indicate that there was a lack of intention to dedicate a public footpath alongside the river or through the churchyard.

## Conclusions

21. I have concluded that the evidence is sufficient to raise a presumption of the dedication of two footpaths in accordance with Section 31 of the 1980 Act, which coincide with the riverside and churchyard paths. Additionally, there is no evidence of any action being taken to demonstrate to the public that there was a lack of intention to dedicate these paths. Therefore, I conclude on the balance of probabilities that these public footpaths subsist.

## Overall Conclusion

22. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications.

## Formal Decision

23. I propose to confirm the Order subject to the following modifications:

- Delete 'Map' in the third line of paragraph 2 of the Order and insert 'Maps'.
- Add to the Order Map the churchyard path.
- Add the supplementary map to the Order.
- Insert the following at the end of Part I of the Order Schedule:

<u>Section of footpath as shown on the attached Maps</u>	<u>Description</u>
<b>Bishopthorpe 3 (part)</b> Indicated on the Order Map and the supplementary Order Map and marked as <b>X – Y – Z</b>	Commencing on Ferry Lane at grid reference (GR) SE 5987 4767 (POINT X) the 1.2 metre wide earth and grass surfaced footpath heads north west along the western bank of the River Ouse for approximately 94 metres to GR SE 5980 4774 (POINT Y) from where the 1.2 metre wide earth and grass surfaced footpath heads generally west for approximately 76 metres to GR SE 5973 4772 (POINT Z) where it meets the maintainable highway known as Chantry Lane.

- Insert the following text at the end of Part II of the Order Schedule:

Path No.	Grid Reference End Points	Description	Nature of Surface	Length (Km)	Width (M)	Lawful Obstructions And Conditions
3	SE 5987 4767 to SE 5973 4772	Commencing on Ferry Lane at grid reference (GR) SE 5987 4767 the 1.2 metre wide earth and grass	Earth & Grass (SE 5987 4767 to	0.17km (SE 5987 4767 to SE	1.2 metres (SE 5987 4767 to SE 5973 4772)	None

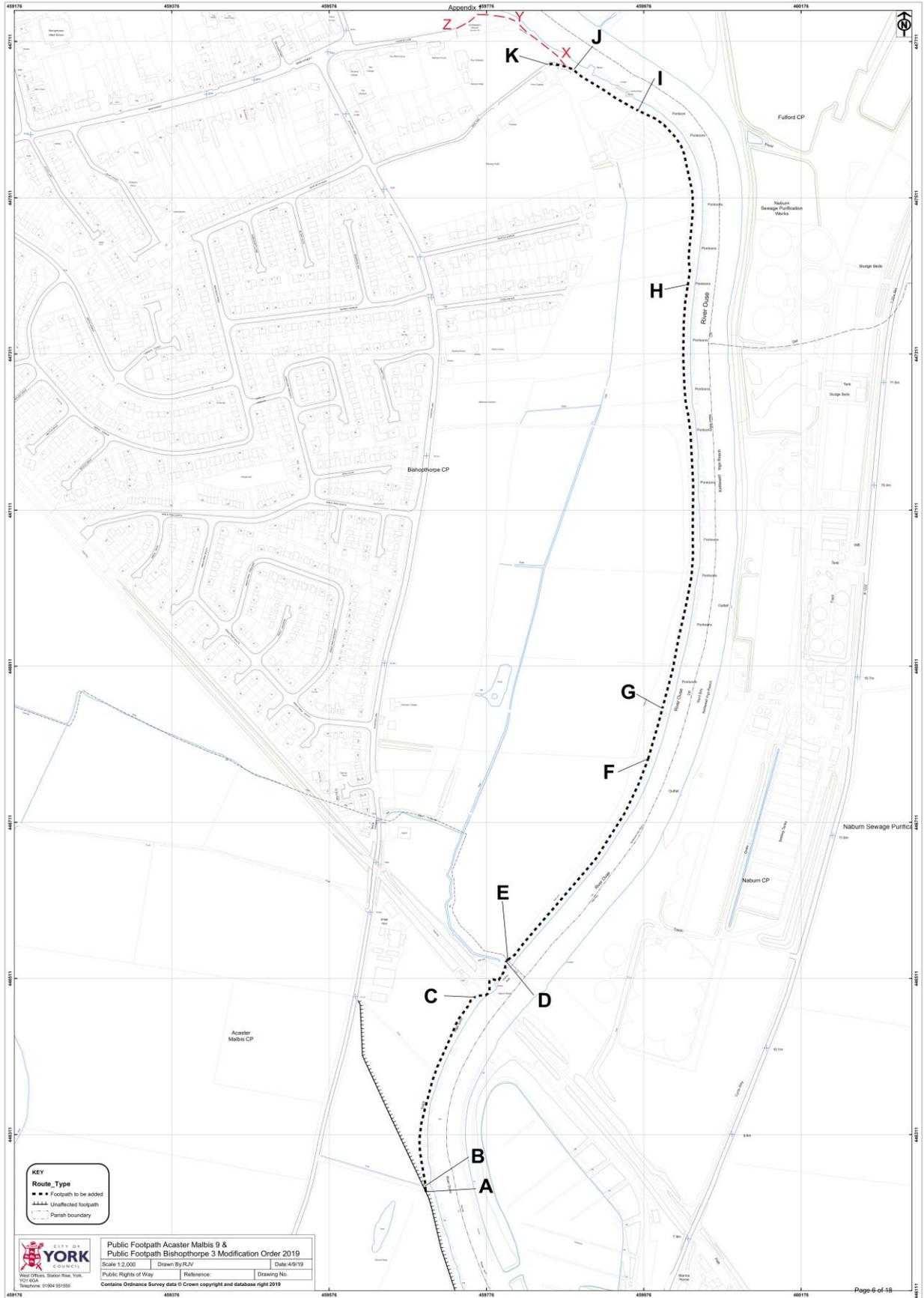
		surfaced footpath heads north west along the western bank of the River Ouse for approximately 94 metres to GR SE 5980 4774 from where the 1.2 metre wide earth and grass surfaced footpath heads generally west for approximately 76 metres to GR SE 5973 4772 where it meets the maintainable highway known as Chantry Lane.	SE 5973 4772)	5973 4772)  Total 0.17km		
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24. Since the confirmed Order would show a way not shown in the Order as submitted, I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications.

*Mark Yates*

**Inspector**

# MODIFIED ORDER MAP



**SUPPLEMENTARY MAP AS REFERRED TO IN DECISION**

