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| **Order Decision** |
| Inquiry Held Tuesday 11 January 2022  Accompanied site visit made Monday 24 January 2022  **by Helen Heward BSc Hons MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 03 February 2022** |

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| **Order Ref: ROW/3251672** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Public Footpath Fulford 23 Modification Order 2019. * The Order is dated 12 September 2019 and proposes to alter the Definitive Map and Statement for the area by adding a public footpath as shown in the Order Plan and described in the Order Schedule. * There was one objection outstanding when the Council of the City of York submitted the Order to the Secretary of Statefor Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed subject to minor modifications set out in the Formal Decision.** |

Procedural Matters

1. The application, dated 11 January 2012, was made by Graham Cheyne.
2. The City of York Council as the Order Making Authority (OMA) refused the application on 14 July 2016 and the applicant appealed. An Inspector, on direction of the Secretary of State, allowed that appeal[[1]](#footnote-1) on 6 July 2017.
3. The OMA was subsequently directed to make an order under S53(2) and Schedule 15 of the 1981 Act to modify the Definitive Map and Statement for the area by adding a public footpath between Landing Lane and the Nurses’ Footpath as requested by the application.
4. The OMA prepared the Order dated 12 September 2019. The outstanding objection is from the affected landowner, Denise Jagger . The objector submitted a number of objections, and the OMA has taken a neutral stance.
5. One document was handed up during the Inquiry. It set out an oral statement made to the Inquiry by Mr Nunns on behalf of the Ramblers Association. No objections were made to its submission, and I accepted it.

**Main Issues**

1. S53(2) of the WCA81 requires the surveying authority to make Orders to modify the Definitive Map and Statement in consequence of events specified in S53(3). Section 53(3)(b) includes “*the expiration… of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path*”. Section 53(3)(c)(i) includes “*the discovery of evidence which, when considered with all other relevant evidence available, 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 to which this Part applies.”* The test to be applied is whether the evidence shows, on a balance of probabilities, that the criteria set out in the relevant part of the Act have been met.
2. The matter may be determined under S31 of the Highways Act 1980 ("the 1980 Act") which states that where a way has been enjoyed by the public without interruption for a full period of 20 years, the way is presumed to have been dedicated as a highway, unless there is sufficient evidence that there was no intention to dedicate it during that period. The period of 20 years is calculated retrospectively from the date on which the right of the public to use the way is brought into question. In considering the statutory requirements, I must consider:
   1. when the status of the claimed route was called into question;
   2. the extent and nature of the claimed use - the use must be shown to have been actually enjoyed by the public as of right and without interruption for a full period of twenty years;
   3. whether there is evidence of a lack of intention to dedicate a public right of way.
3. In *Redcar[[2]](#footnote-2)* it was held that for use to be ‘as of right’ it must be without force, without secrecy and without permission. In addressing these issues I must be satisfied that the relevant tests have been met on the balance of probabilities.
4. The evidence may also be considered under common law where the issues to be addressed would be whether, during any relevant period, the owners of the land had the capacity to dedicate a public right of way, whether there was express or implied dedication by the owners and whether there is evidence of acceptance of the claimed right by the public.

**Reasons**

*The date the way was called into question*

1. It was held in *Godmanchester*[[3]](#footnote-3)that “*Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway*”. Any party may call use into question only a landowner can demonstrate a lack of intention to dedicate a public right of way. To that extent the ownership of the land crossed by the claimed route is a relevant factor.
2. The Mr and Mrs Jagger bought the land affected by the Order in 2010. There was evidence in User Evidence Forms (UEFs) submitted with the original application that the landowner may have occasionally challenged people thereafter. Some UEFs describe a specific event at or around the 19 November 2011 when a fence was erected to block the route. The main parties agree that the path was called into question at this time, not before, giving a twenty-year period 1991-2011.
3. There were 19 initial UEFs and five additional forms submitted later. At the Inquiry there was some concern about the withdrawal of evidence by one User but there was no evidence from that person, and I have discounted this UEF.

*Use ‘as of right’ or ‘by right’*

1. Evidence indicated two users were distant relatives of a tenant farmer whose use of the route would have been by right. I do not know how well known to each other they were. Adopting a precautionary approach I have discounted the evidence of the tenant farmer and two relatives.
2. Doreen Crawley moved to Hall Farm close to the claimed route in 1970. She kept large dogs. To reach the riverside she would walk the claimed route which for many years was part of an unfenced field, known as Hoisty Field. Denise Jagger moved to the adjacent Water Fulford Hall in 1997 and then, or sometime soon afterwards, she gave verbal permission to Doreen Crawley and Graham Cheyne to walk on the back drive as a route to the river and for the purpose of walking Doreen Crawley’s dog. As Doreen Crawley became older her friends and family used the path to walk her dogs.
3. Denise Jagger’s oral evidence painted a credible and persuasive picture of her general knowledge of Doreen Crawley’s friends and family, and she told the Inquiry she had been ‘*happy for them all to walk their dogs on her land down to the river which was not Hoisty field but by the old orchard onto the back drive and down to the big gate and kissing gate*’.
4. Shaun Crawley did not dispute that Doreen had been given this permission and accepted that it extended to people who walked her dogs. I find it highly plausible that this group of people would have been aware that when they were walking on Denise Jagger’s land that it was with her tacit agreement.
5. However, at the time that Denise Jagger gave this verbal permission she did not own Hoisty Field, the land which the Order Route crosses. She purchased Hoisty Field together with adjoining land that had been part of Lodge Farm in 2010. The verbal permission that was given to Doreen Crawley, and implicitly to her friends and family, around 2007, was, and could, only be in relation to her property at that time.
6. There was no evidence that Denise Jagger gave permission to Doreen Crawley or anyone else to walk on Hoisty Field after she purchased it in 2010. At the Inquiry Denise Jagger confirmed that she never said to Doreen Crawley or anyone else “*now we have bought this field you can walk on here”.* She added it was full of thistles, they did not have a clue about the path, and they had given Doreen Crawley permission to walk on safer ‘tarmac’ paths elsewhere.
7. The OMA had not disputed that any use of Hoisty Field by Doreen Crawley, her friends and family and the other remaining users would have been by right. From all of the evidence before me, neither do I.

*Use by the public*

1. Denise Jagger believed the evidence was from a closely related group of family and friends that would have shared knowledge of the route and that had been brought together by the applicant. The OMA found a common thread within nine of the UEFs asserting that the path had been in public use since the 1970’s. 1970 was when Doreen Crawley came to live at Hall Farm.
2. At Inquiry Russell Varley explained that a number of the UEFs were too consistent and too similar and drew particular attention to a reference to the route terminating at a specific lamppost. He had no reason to believe that users had been told what to write or that one person had completed multiple forms. In his experience, he thought it more likely that it was because the forms were from one similar group with common knowledge of the way. He shared with the Inquiry the names of the users to whom the OMA believed this applied. His opinion was that these users were sufficiently related that the same evidential weight could not be attached to their evidence and the OMA had set aside 11 UEFs.
3. Shaun Crawley confirmed that six of the users that the OMA had discounted on this basis were indeed friends, family, or relatives of Doreen Crawley and her husband, and the applicant describes the path as “*Doreen’s Path*”.
4. From what I heard and all of the evidence before me, it is apparent that a number of users did form part of one family/friendship group related to Doreen Crawley. Shaun Crawley’s explanation of Doreen Crawley keeping dogs and the relationships described provide a plausible common reason as to why they would have walked the way.
5. It was put to me that this small number of UEFs from this family group did not amount to an impression or example of use by the public. I agree with the Inspector in the previous appeal that family relationships do not necessarily negate claimed use ‘as of right’.
6. At least another four UEFs where there was no allegation of a family relationship, make reference to “Lamppost No 6” on Nurses’ Path. Two say they were dog walking, and one that they were making a specific journey to visit a friend. One user does not reference the Lamppost but does say that they were going to the river from Hall Farm.
7. Shaun Crawley informed the Inquiry that the applicant had stopped people he had seen walking the claimed way and asked them to complete UEFs. It is plausible that people might have learned the reference to “*Lamppost No 6*” in this way, others might have simply learned it by talking to other dog walkers. Users might have talked to each other about the application, and some could have simply read the number 6 from the lamppost.
8. On my site visit I could appreciate how convenient the claimed way would have been for Doreen Crawley and her family to walk her dogs to and from the riverside. Nonetheless, there is nothing to say that when the way was open it was only walkable by Doreen Crawley and her friends and family or that other people would have been excluded in some way.
9. In any event, at the Inquiry Russell Varley agreed that even if users were related in some way they were also members of the public and could have passed along the way as such, and that in this way their evidence could be considered to represent evidence of use by the public.
10. From all that I heard at the Inquiry and the written evidence before me, I am not persuaded that family relationships and friendships are a reason to dismiss these users as not representing the public.

*Sufficiency of use*

1. At Inquiry Denise Jagger argued that Doreen Crawley would have used a route over the back drive for which she gave consent, and therefore questioned why she would then choose to walk in the field. Shaun Crawley maintained that [they] found it more convenient to walk through the gap in the hedge and across the field. Although he conceded that in the latter years Doreen Crawley probably did “*walk along the drive and amongst the trees*”.
2. From what I heard I find it quite plausible that once Doreen Crawley started walking that way, her friends and family may have done so too. This would concur with Denise Jagger’s evidence that she variously saw friends and family of Doreen Crawley on her back drive, for example when driving her son to school. Although the plans with the UEFs from these users generally indicate a route across Hoisty Field, this casts some doubt about the robustness of the evidence for use of the claimed way from 2007 onwards by Doreen Crawley, Graham Cheyne and at least six others[[4]](#footnote-4).
3. Therefore I shall restrict my assessment of sufficiency of use to the 10 users that the OMA had been satisfied were from members of the public who had used the way as of right, without force and without secrecy during all or part of the period 1991-2011. These 10 users mainly describe using the path for recreational and dog walking, a couple describe using it as part of a route between Fulford and Fulford Ings. Not all of the 10 users cover the whole of the claimed period.
4. One user states that they used the way on a daily basis for many years, another advises that they have used it ‘all my life’ and another describes it as ‘constantly used’. Otherwise there is little detail within the evidence in relation to the frequency and regularity of use but the forms which did not request this information. Some users are dog walkers, and it is plausible that there could be a degree of regularity and frequency of such use.
5. The OMA accepts that the evidence paints a picture of a typical pattern of use for a footpath with dog walkers using the path daily and recreational walkers using it less frequently. There is no statutory requirement to demonstrate a busy level of use. The evidence within these 10 UEFs that the path only became used with the frequency suggested by the UEFs at some point after 2007 is not persuasive.
6. Some users describe seeing other people using the claimed way ‘many times’, seeing lots of friends and dog walkers, and observing frequent use by others. Two users with no known connection to Doreen Crawley attest to both having seen or being confronted by Mr Jagger when they used the route and seeing other people when they were walking the route.
7. Whilst Denise Jagger advised that she had never seen people using the claimed way, she agreed that her husband had, and had stopped and confronted people, although “not many”. Whilst the exact location of bonfires was uncertain some users attested to having been seen using the claimed way by Mr Jagger when he was attending to a bonfire. Denise Jagger reasoned that other walkers witnessed by users could have been Doreen Crawley and her family and friends. But as it was also Denise Jagger’s evidence that she believed Doreen Crawley walked on her back drive, not the Order Route. In which case these users could have been referring to other people using the claimed way.
8. Russell Varley offered that evidence from 11 individuals of use of a way on the Moors might suffice. However Fulford is a suburb of York and the parish had 2700 inhabitants in 2011. The OMA did not consider that a similarly small number of users could be taken to represent the wider area. Nonetheless, Denise Jagger conceded that probably people did walk around the edge of the field and the OMA had no doubt that the path was used. I am not persuaded by this argument. There could be other factors, that would mitigate against users knowing each other and about the application in a larger suburban area.
9. The OMA agreed that the evidence paints a picture of a typical pattern of use for a footpath with dog walkers using the route daily and recreational walkers using it less frequently.
10. Whilst the tenant farmer’s evidence of their own use of the route has been dismissed as ‘by right’, their UEF does include evidence that collaborates the evidence of use. Including that that a way through from Landing Lane and the Nurses’ Path had existed from around 1943, was used by people in the houses and the farm for about 50 years, and that they had seen people walking the route maybe several times a week from 1960. Their evidence is only up to 2008 when he then stopped farming, and at the Inquiry I heard that he had not lived so close to the route that he could see it from his house.
11. The evidence of use by another user related to the tenant farmer has similarly been dismissed as being ‘by right’, but this statement also includes evidence of bumping into others using the way such as fishermen and dog walkers.
12. A letter, 22 June 2021 headed “*Public Footpath Fulford Modification Order 2019”* from the owner of Water Fulford Hall for 10 years until March 1997 states that for the time he lived there he was aware of the footpath although they never used it. From taking ownership in 2010 to November 2011 when the path was called into question there is also evidence of Mr Jagger confronting two people on the claimed way.
13. The OMA had attempted to contact users to discuss concerns about the evidence but there had been a lack of response. The application was made in 2012, much time had elapsed before the attempts to make contact were made and even more time has elapsed by the time the Inquiry sat. Some users had died, others were now elderly, and some had moved away. The lack of response to the OMA is somewhat concerning, but I have not attached weight to any of the users that the OMA had concerns about.
14. There is not a substantial amount of evidence but there is no statutory requirement that there has to be large, or specific, number of users to prove sufficiency of use.
15. I conclude that even without the users who were part of a family/friendship group related to Doreen Crawley, the evidence collectively creates a reasonable impression, on balance, of an adequate number of users for whom the period of usage and frequency would have been sufficient to make the landowner aware that the public were asserting a right of way and provides sufficient evidence, to raise a presumption of dedication within the relevant twenty-year period 1991-2011 on a balance of probabilities.

*Without force and without secrecy*

1. The OMA were satisfied that there was no evidence that use had been by force or in secrecy. I agree and note that a reference to a runner jumping over a fence appears to relate to when the route was called into question.

*The route of the claimed way*

1. Shaun Crawley argued that dog walkers hated the kissing gate so walked down the edge of the field through the gap in the hedge which was more convenient. Denise Jagger did not dispute that dogs would not have liked a kissing gate but maintained that they could have got through a hole in the metal fencing. Even so, I think it likely that most walkers, with or without dogs, would have gone through the break in the hedge to walk across the unfenced Hoisty Field, rather than through a kissing gate which gave an impression of fenced private property.
2. The objector submitted an analysis of the routes indicated on drawings attached to the UEFs. There were variations in the alignment by up to 75m. The drawing attached to Doreen Crawley’s evidence indicates a noticeably different route. On the site visit Denise Jagger showed me the route that she had observed Doreen Crawley walking on the back drive. I observed that it very much reflected the route that I had been told she took latterly.
3. The OMA’s position was that the slightly different alignments of the trod path were not significant. From all of the evidence, including drawings prepared by the objector which overlay all of the claimed routes together with the boundary of Hoisty Field[[5]](#footnote-5), I find that with the exception of Doreen Crawley’s drawing, the routes shown are sufficiently convergent to support the claimed way.
4. On my site visit I observed where a coppice has grown. The routes shown are generally consistent in indicating a route outside of the coppice and along the field edge. The field may have been overgrown with tall thistles, even so I’m not persuaded that there is evidence to say that this would have stopped users from walking a path around the perimeter of the field.
5. However, from what I heard at the Inquiry, the drawings submitted with the UEFs, the objector’s analysis and my site visit observations I conclude that the Order Plan route crosses slightly more directly across the field than the evidence supports. The evidence suggests a route slightly closer to the western field boundary. I am strengthened in this conclusion by what I heard about dog walkers walking down the edge of the field, and one UEF where the user indicates the point at which they were confronted by Mr Jagger. Therefore there is a justification for a minor modification of the Order Route, and this is set out in my formal decision below.
6. There is a reference in the evidence to people seeing Doreen Crawley dog walking. It is possible that post 1997 people might have seen Doreen Crawley walking on the back drive for which Denise Jagger had given permission. But there is nothing to say that other people who completed UEFs forms were on that land. Rather, there is a relatively consistent picture amongst the evidence of the 10 users that the OMA accepted that the route was a trodden or compacted/worn earth path of between 2’–3’ wide. I think it likely that they are describing a path through Hoisty Field.
7. The gardens of Fulford Hall Cottages would have obstructed the route. However I heard that those dwellings had been demolished before Shaun Crawley’s mother came to live at Hall Farm in 1970. The application was concerned with the period 1991-2011. Of the UEFs which have been accepted only three refer to use prior to 1970 and in each of these cases their claimed use spans over four decades. In this context I do not find it particularly surprising that there is no reference to the cottages.
8. Like the Inspector in the previous appeal decision, and the OMA, I am not persuaded that the difficulties posed by trees and a fence would prevent the acquisition of rights on the claimed way. One user’s evidence was set aside after they advised that they had been confused with Fulford footpath No 8. There is little to say that anyone else was. Indeed most UEFs clearly state that the route connects with the Nurses’ Path.

*Documentary evidence*

1. Fulford Parish Council submitted a map extract dating from a survey in 1889 and revised in 1938 which indicates part of a route across the open field by hatched lines and with the letters “FP”. The OMA state that there is no commercial or Ordnance Survey mapping evidence showing any feature crossing the affected land in the vicinity of the Order Route.
2. A number of aerial photographs showing the field at various times over the claimed period have been submitted. Denise Jagger told the Inquiry that they had purchased everything there was. The photographs create a catalogue over time, but each image provides an image of one particular moment only.
3. The OMA considered that the evidence indicates a worn strip from 2007 and suggests that that the level of use was not substantial. The images are not very clear. An aerial photograph from 4 July 2011 indicates a walked path which the objector accepts existed at that time. In others it is possible that a way might be visible, but it is far from certain[[6]](#footnote-6). In yet others[[7]](#footnote-7) the aerial photography raises doubts. David Nunns argued that there are many public rights of way that that are not obvious on the ground due to limited use and farming practices. I agree. Ploughing the field, set aside, tall weed infestations and growing crops could all lead people to make slight variations in the route they took at various times.
4. The absence of evidence of the claimed way in some of the aerial photography and the absence of other documentary mapping evidence does weigh against the proposal but I am not satisfied that what has been submitted precludes the possibility that a public path could have been established over the claimed route during the relevant period. The weight I attach to this evidence is therefore limited.
5. I attach no weight to arguments that the Order Route was not claimed during any stages of the preparation of the Definitive Map, or to an absence of evidence relating to the claimed way in title deeds and land searches.

*Intentions of the relevant landowners*

1. Denise Jagger explained that in 2011 some people had parked on Landing Lane only to find the riverside walk blocked or too muddy whilst works by Yorkshire Water were undertaking works along the riverbank. Some of these people had then used Hoisty Field instead. Denise Jagger’s evidence was that she acquiesced or turned a blind eye as she understood why and because it was temporary.
2. There is no evidence that any of these people would have had any knowledge that they had been given permission to walk on Hoisty Field. And no evidence that any of the people who completed UEFs had been given permission to walk on Hoisty Field in this way. There is no evidence to say that a landowner expressly dedicated the route.

**Conclusions**

1. On a balance of probabilities I conclude that the evidence collectively points toward a public footpath along the claimed route. However, the detailed alignment of the route shown on the Oder Plan crosses more directly across the field than the evidence supports. Therefore, and having considered all other matters raised, and for the reasons set out above, I conclude that the Order should be confirmed, and the Order Route between Point A and Point B should be recorded on the Definitive Map and Statement as a public footpath subject to the minor modifications of the Order Plan and Schedule Parts I and II set out below.

**Formal Decision**

1. The Order is confirmed subject to the following modifications:
2. Amend the Oder Plan to indicate the route as shown in red on the drawing attached hereto.
3. Amend that part of the Schedule Part 1 description after the words “*metal estate fencing from where it*” by deleting the words “*heads generally south across the open field for approximately 184m*” and inserting the words “*heads generally south close to the western field boundary for approximately 190m until*..”
4. Amend that part of the Schedule Part 2 description after the words “*metal estate fencing from where it*” by deleting the words “*heads generally south across the open field for approximately 184m*” and inserting the words “*heads generally south close to the western field boundary for approximately 190m until*..”
5. Amend that part of the Schedule Part 2 length to read 0.19km Total 0.19km.
6. As the proposed modifications would be a minor modification of a way already shown, would not affect land not affected by the Order, and would not change the nature of the highway described I am satisfied that there is no requirement under Paragraph 8 of Schedule 15 of the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order.

**Helen Heward**

INSPECTOR

Attachment – Modified Order Plan

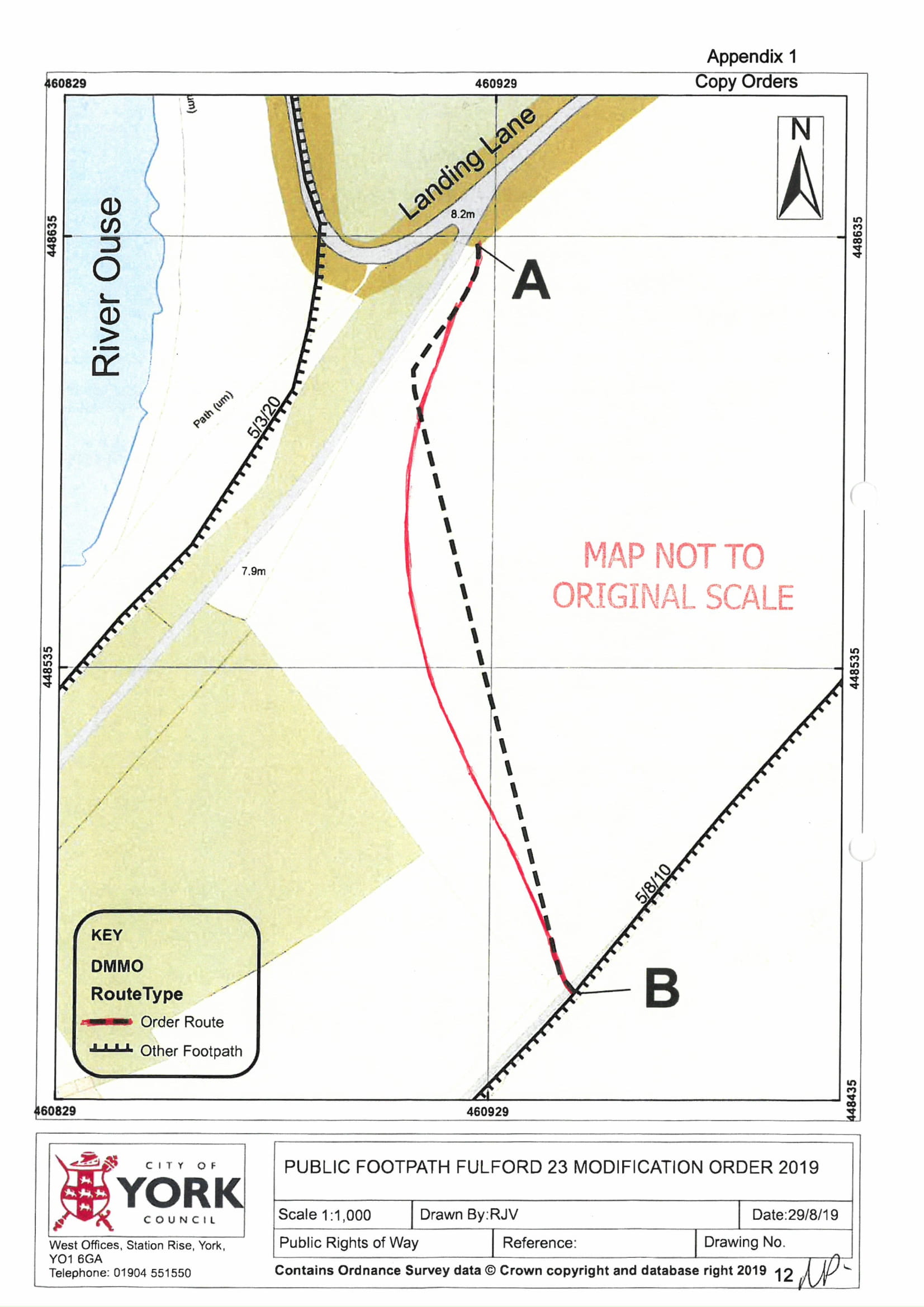
**INQUIRY ATTENDANCES**

Russell Varley, Definitive Maps Officer, City of York Council

Shaun Crawley, on behalf of the applicant Graham Cheyne

He called Mr Nunns of the Ramblers Association

Denise Jagger, landowner, and objector



1. Planning Inspectorate ref FPS/C2741/14A/1 [↑](#footnote-ref-1)
2. *R (Lewis) v Redcar and Cleveland (No 2),* [2010] UKSC 11 [↑](#footnote-ref-2)
3. R (on the application of Godmanchester and Drain) v SSEFRA, [2007] UKHL 28 [↑](#footnote-ref-3)
4. Six individuals for whom Shaun Crawley explained they or their partners had a relationship to Doreen Crawley and her husband. [↑](#footnote-ref-4)
5. DNJ/further comments/Annex 2 Composite of claimed way routes [↑](#footnote-ref-5)
6. See for example Figures 7, 10 and 11 Landowner evidence Appendix 18. [↑](#footnote-ref-6)
7. See for example Figures 5, 6 and 9 [↑](#footnote-ref-7)