



Order Decision

Site visit made on 8 September 2016

by Michael R Lowe BSc (Hons)

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

Decision date: 23 February 2017

Order Ref: FPS/N4720/7/30

Leeds City Council

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is cited as the Leeds City Council (Rothwell Footpath No. 41) Modification Order 2014, although the Order was advertised as the Leeds City Council (Footpath at Methley Junction) Modification Order 2014.
 - The Order is dated 17 November 2014 and proposes to modify the Definitive Map and Statement by adding a footpath from footpath 40 to Green Row, Methley, as detailed in the Order map and schedule.
 - There were 2 objections outstanding when Leeds City Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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Decision

1. I do not confirm the Order.

Preliminary Matters

2. None of the parties requested a public inquiry or hearing. I have therefore considered this case on the basis of the written objections and representations forwarded to me.
3. The Order is titled as the 'Leeds City Council (Footpath at Methley Junction) Modification Order 2014' but states that it is to be cited as the 'Leeds City Council (Rothwell Footpath No. 41) Modification Order 2014'. As the order was advertised with the former title I would have modified the Order to resolve this anomaly if necessary.

Background

4. In August 2011 the Rothwell Footpath Group made an application to the Council to add a footpath to the definitive map and statement of public rights of way. The Council refused the application in April 2013. The applicant appealed that decision to the Secretary of State who allowed the appeal in July 2014¹ and Leeds City Council was directed to make an Order. The Council is opposed to the confirmation of the Order but has taken a neutral stance in the exchanges between the applicant and the objectors.
5. In the 1950s the northern part of the route was shown on the draft definitive map and statement for the area but was removed in 1955 following an objection by the British Transport Commission and a subsequent hearing. In

¹ Appeal Decision Ref: FPS/N4720/14A/1

1982 the West Yorkshire Metropolitan County Council conducted a review of the definitive map and when objections were raised to the omission of ways, including parts of the Order route, the Council rejected the claim.

6. Part of the Order route and other routes were the subject of an application for additions to the definitive map in November 1999. The Council refused the application, but was directed to make an Order in 2008. The subsequent Order² was the subject of a public inquiry in July 2010 and the Order was not confirmed³.

Main Issue

7. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i). The main issue is therefore whether the evidence is sufficient to show, on the balance of probabilities, that a public footpath which is not shown in the map and statement subsist on the route in question such that the definitive map and statement require modification.
8. In the context of section 53 of the 1981 Act the requirements of section 31 of the Highways Act 1980 (the 1980 Act) are namely;
 - a) whether the claimed footpath was of such character that its use could not give rise at common law to any presumption of dedication;
 - b) whether there is any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate the claimed footpath as a highway if the existence of a highway would be incompatible with those purposes;
 - c) the date on which the right of the public to use the claimed footpath was brought into question; and
 - d) whether the claimed footpath was actually enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years ending on the date on which their right to do so was brought into question; and if so
 - e) whether there is sufficient evidence that there was, during this period, no intention to dedicate the claimed footpath.
9. Whether, in the alternative, the evidence is such, again on the balance of probabilities, as to establish dedication at common law.
10. Section 32 of the 1980 Act, requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

Reasons

Presumed Dedication of a footpath under the Highways Act

Whether the claimed route was of such character that public use could not give rise at common law to any presumption of dedication

² The Leeds City Council (Footpaths at Methley Junction, Methley, Rothwell, Leeds) Modification Order 2009

³ Order Decision Ref: FPS/N4720/7/20

11. I am satisfied that the evidence of public user relates to a reasonably defined route. The claimed route starts and ends at another public highway and there is nothing about the character of the route that is inconsistent with the common law principles of implied dedication, except as considered below with regard to the land held for public and statutory purposes.
12. I have considered whether the Order route could be considered in parts, in the event that public rights could not have been acquired along some part of the route. There is no rule of law that a cul-de-sac cannot become a highway by dedication at common law or under the provisions section 31 of the 1980 Act. However, a cul-de-sac must have a defined end point, such as the seashore or a viewpoint. I have examined the user evidence in search of evidence that the public distinctly used any particular part of the claimed route, such as from point A on the Order plan to a point along the river banks. I am not satisfied that the public's use of any part of the Order route leads to the identification of a termination point between those shown in the Order and there is no identifiable feature, such as view point, to indicate any alternative termination point. I therefore conclude that the Order route is a single way that cannot be divided into distinct parts. No party argued that the Order route should be considered in parts.

Whether there is any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate the claimed footpath as a highway if the existence of a highway would be incompatible with those purposes.

13. The northern part of the Order route, south from point B on the Order plan, forms the approach road to two former stations near Methley Junction. Methley Junction Station opened in 1849 and closed on 4 October 1943 and Methley South Station opened in 1869 and closed on 7 March 1960. The Order route then crosses a railway line by a bridge, termed Bridge No. 2 by Network Rail, to the south of Methley South Station. The bridge was demolished in December 2004.
14. In addition to the generality of section 31(8) of the 1980 Act concerning statutory incapacity, railway land is also subject to section 57 of the British Transport Commission Act 1949. The effect of the 1949 Act is to prevent presumed dedication or implied dedication at common law over any 'road, footpath thoroughfare or place now or hereafter the property of the Board and forming an access or approach to any station goods-yard wharf garage or depot ... of the Board'.
15. In my view, the effect of the 1949 Act is to exclude the possibility of any claim for a public footpath over the northern part of the Order route between 1849 and March 1960, regardless of public user during that period. It was on that same basis that claims for a public footpath along this part of the Order route were rejected in the 1950s when the first definitive map was being prepared and in the 1980s when the former County Council was conducting a review of the definitive map.
16. After March 1960 the 1949 Act would not have prevented a claim for presumed dedication under the 1980 Act or at common law. Nonetheless, the northern part of the route still crossed railway land and is subject to the provisions of section 31(8) of the 1980 Act.

17. Bridge No. 2 was constructed in about 1865 to replace an earlier level crossing at a nearby location. The bridge then provided the primary access to Methley Colliery. There is no indication that the bridge was provided other than as an accommodation bridge for the benefit of the landowners and was maintained by Network Rail and its predecessors for the sole benefit of the landowners until its demolition. In 1973 British Rail were concerned about the bridge structure and imposed a 3 tonnes weight limit. They also assessed the bridge as serving no useful purpose and consulted the local councils upon their proposal to remove the bridge. In 2004 Network Rail completed negotiations with the owner of the land served by the bridge for its removal and the provision of an alternative private means of access. The bridge was demolished in December 2004.
18. In considering whether land held by a statutory corporation, such as Network Rail and its predecessors, could be deemed to have dedicated a public footpath across a bridge over a railway line, the question as to whether the power to dedicate was incompatible with the owner's statutory objects was a question of fact and was to be assessed by reference to what could reasonably be foreseen⁴. In my view it would not be compatible with the efficient operation of a railway for a railway undertaking to dedicate a public footpath over a railway which entailed an undue burden of providing a crossing of the railway. In this case it was obvious by 1973 that the bridge was in need of repair and its removal would aid the statutory purposes of the railway undertaking. I therefore conclude that Network Rail, and its predecessors, could not be deemed to have dedicated a public footpath over bridge No. 2 after 1973 due to statutory incompatibility.
19. For the above reasons, the only period to be considered for presumed dedication under section 31 of the 1980 Act or at common law is before 1849 and between 1960 and 1973. There is no evidence that any path or way existed along the Order route before 1849. The documentary evidence of the Methley Inclosure Award of 1787, various railway plans made during the 19C and other maps and plans give no indication of the existence of a public footpath along the Order route. For the purposes of section 31 of the 1980 Act there is no 20 year period and the claim based upon section 31 therefore fails.

Common law

20. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. Use by the public of a way 'as of right' for a sufficient period could be evidence of an intention of the landowner to dedicate a public right of way. Whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must be assessed objectively. Unlike presumed dedication under the Highways Act, use by the public does not raise a presumption of an intention to dedicate. The burden of proof is on those asserting the public right to show, on the facts, that there was an intention to dedicate. The quality and quantity of public user must be sufficient to bring home to a landowner that a right is being asserted, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him.

⁴ British Transport Commission v Westmorland County Council [1958] AC 126

The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. User which is acquiesced in by the owner, is 'as of right'. However, user which is with the licence or permission of the owner, is not 'as of right'. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. Before there can be a dedication or implied dedication of a public right of way there must be an owner of the land legally capable of dedicating the way as public.

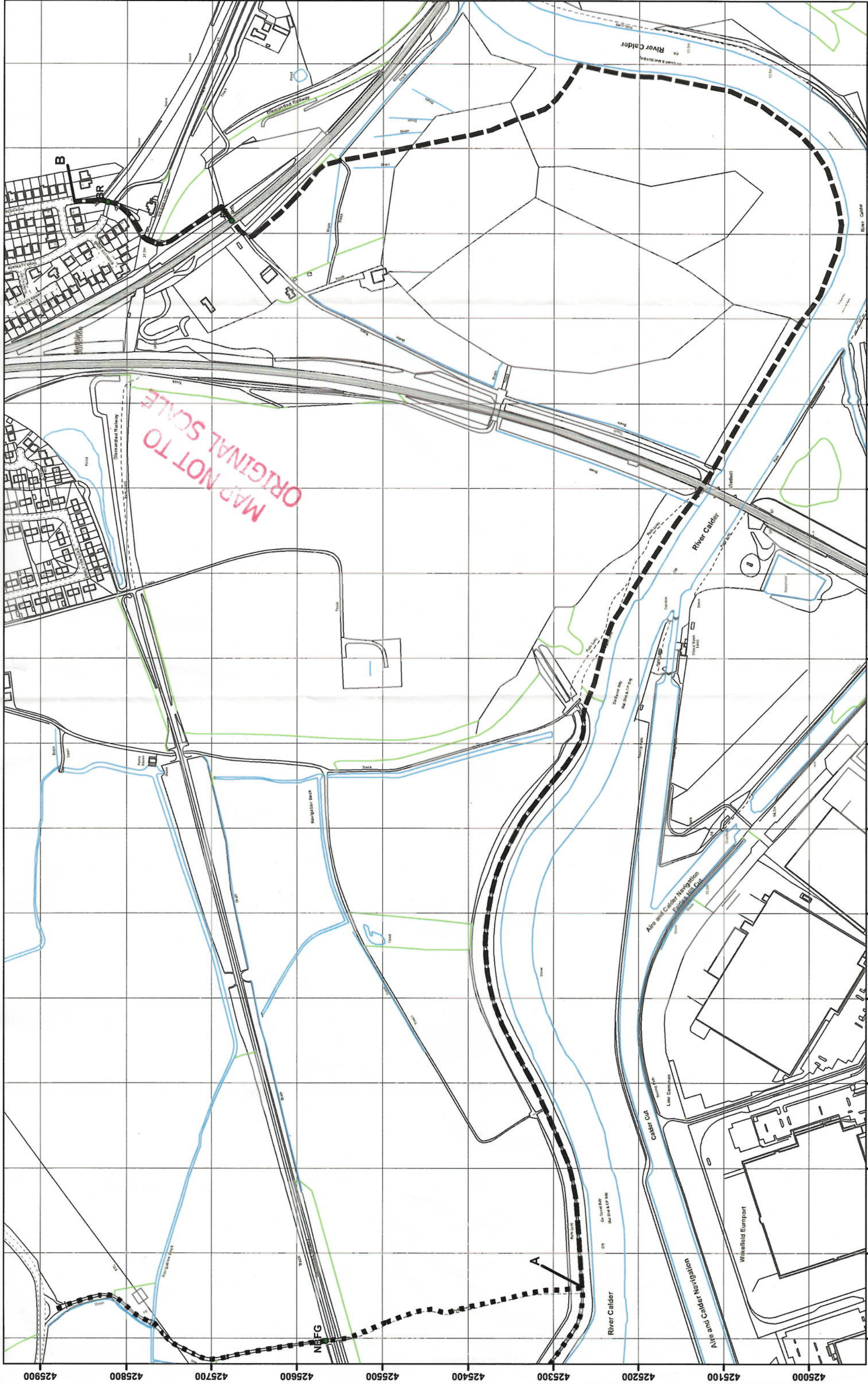
21. Between 1960 and 1975 the land to the south of Bridge No. 2 was across the site of the former Methley Colliery and leased to the National Coal Board. In about 1975 the County Council undertook a derelict land reclamation scheme and the evidence of the statements of local residents indicates that the route used by the public substantially deviated after that time. The Order route follows the alignment claimed to have been used after the reclamation works. The period between 1960 and 1973 would therefore concern a different alignment to that shown on Order and, if I were to confirm the Order, it would be necessary to modify the route accordingly.
22. With regard to the period between 1960 and 1973 I am not satisfied that the user evidence forms submitted in support of the application in 1999, combined with the additional evidence forms submitted with the 2011 application and the report of witnesses at the 2010 public inquiry, provide a coherent basis to demonstrate that the public use amounted to an assertion of a public right of way. The evidence is of insufficient quality and quantity to form a reliable assessment of events over 40 years ago.

Conclusion

23. The evidence is insufficient, on the balance of probabilities, to demonstrate that a public right of way subsists along the Order route or along a similar alignment.
24. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

Michael R Lowe

INSPECTOR



LEEDS CITY COUNCIL
(FOOTPATH AT METHLEY JUNCTION)
DEFINITIVE MAP MODIFICATION
ORDER 2014

Key

Proposed Footpath
Unaffected Path

Scale: 1:4,000

SE 32 NE & SE 32 SE or 3825, 3925 & 3924

Legal Services
St. George House
Great George Street
Leeds
LS1 3DL



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Notice Map Only
Order Map at 1:2,500