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## Order Decision

Inquiry Held on 17 November 2020

**by D M Young JP BSc (Hons) MA MRTPI MIHE**

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

**Decision date: 22 December 2020**

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### **Order Ref: ROW/3241646**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Doncaster Borough Council Public Footpath No 25 Armthorpe Definitive Map Modification Order 2012.
- The Order is dated 7 November 2012 and proposes to modify 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 were five objections outstanding at the commencement of the Inquiry.

### **Summary of Decision: The Order is not Confirmed**

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#### **Procedural Matters**

1. In March 2007 a formal claim was made to Doncaster Borough Council (the order making authority ("the OMA")), under Schedule 14 of the 1981 Act to add a footpath, known as Seven Yards Road (SYR) to the Definitive Map and Statement (the DMS).
2. On 7 November 2012, the OMA decided that the user evidence showed that a slightly different route should be recorded, commencing at Footpath No 1 (point A) and proceeding in a north-easterly direction across fields to the rear of Gatewood Grange Farm, then along the south-eastern edge of Spider Wood. The Order route then follows the line of a historic, tree-lined route known as SYR. The route then skirts the northern edge of Great Gate Wood to point B whereupon the route proceeds in a north-westerly direction passing along the edge of an arable field. The final section of the route, between Diggin Dike and Holmewood Lane (point C) runs along a surfaced track. The Council confirmed at the Inquiry that the length of the Order route is approximately 4,650m (2.9 miles).
3. The Order route crosses land owned by Mr Nadeem Shah (Shah land), and H S White and Sons<sup>1</sup> (White land) with a section of SYR between Great Gate and Spider Woods being unregistered. As objections to the Order were received from the above landowners, it was submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
4. I held a virtual public Inquiry into the Order on 17 November 2020 having visited the site, unaccompanied, on 2 November 2020. At that visit I was able to see the western section of the Order route from point A across Shah land. I was also able to travel along the northern section from point C as far as Diggin Dike. From that point I was able to see towards point B at Great Gate Wood.

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<sup>1</sup> H S White & Sons consists of partners Herbert Stanley White, Eileen White, David White and Jonathan White (the Whites)

5. At the Inquiry, Ms Sharples who represented the Shah's, suggested a further site visit might assist. However, having had time to reflect upon the evidence and in light of my decision not to confirm the Order, I am satisfied that no injustice would be caused to any party by my decision not to undertake a second site visit.

### **The Main Issues**

6. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. This section requires me to consider whether the evidence discovered by the OMA, when considered with all other relevant evidence, is sufficient to show, on the balance of probabilities, that the right of way described in the Order subsists and that the DMS therefore requires modification.
7. The Council rely on statutory dedication of the Order route under Section 31 of the Highways Act 1980 (the 1980 Act). This provides that where a way, other than a way of such a character that use of it 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 period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. As of right is set out in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council (1999)* as being without force, secrecy or permission. The 20-year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
8. The main issue is therefore whether the discovery by the OMA of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown on the DMS subsists over the land in the area to which the map relates.
9. In addition to considering the user evidence with regard to the provisions of section 31 of the 1980 Act, I am also required to consider whether dedication of the claimed route has taken place at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

### **Reasons**

#### ***When the right to use the route was first brought into question***

10. In 1992, Mr Shah who had recently purchased Gate Wood Grange Farm, erected a post and rail fence on the boundary of his land. The alignment of the fence is shown between points A-B on the plan attached as Appendix 9 to Mr Shah's Statement of Case. Although a gate was located close to point A, the evidence suggests that its purpose was to allow Mr Shah access between his fields and was kept permanently locked.
11. Oral evidence given by Nadeem and Tariq Shah as well as the written statement from Steven Burrows<sup>2</sup> indicates that the fence erected in 1992 was in fact a replacement for a less substantial fence which was erected in 1982. In my opinion, Mr Burrows' evidence should carry significant weight given his

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<sup>2</sup> Appendix 10 Tariq Shah Statement of Case

working knowledge of the land<sup>3</sup>. I acknowledge there are some inconsistencies about the design of the 1982 fence. Nonetheless, on the balance of probabilities, I am satisfied that one did indeed exist from 1982 onwards. Based on the foregoing, any use of the Order route after that date would have been 'by force'.

12. I therefore conclude that for the purposes of section 31 (2) of the 1980 Act, the public's use of the claimed path was brought into question in 1982 and the relevant 20-year period is 1962 to 1982.

***Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public's right to do so was brought into question***

13. 25 User Evidence Forms (UEFs) were submitted in support of the Order. The UEFs were supplemented by five written statements. According to the OMA, the UEFs and statements detail uninterrupted use of the Order route.
14. The OMA has produced a timeline<sup>4</sup> which summarises the dates given in the UEF's. The timeline refers to a claim period of 1977-1997 as opposed to 1962-1982. I have therefore disregarded the evidence of Terence Cooke, Marjorie and Peter Dinsdale, Joseph Clark, Christopher McGuinness and Leslie Marsden which fall outside the relevant 20-year period.
15. I have also disregarded several UEF's as the descriptions of the route are simply too vague or too inconsistent with the Order route. These include; Barry Rimmer, Allan Darley, Paul Bartle, David Freeman, Colin Jessop, Harry Schofield, James Gallagher and Marjorie McDonald. In nearly all these cases, no maps have been provided and no mention is made of SYR. I cannot therefore be sure the routes described correspond to the Order route.
16. Dealing with the route itself, I have decided to divide the route into three sections which broadly align with the evidence in this case. First, I will deal with Shah land situated at the south-western end of the route. Second, I will consider the evidence relating to the tree-lined section of SYR between Spider and Great Gate Woods. Finally, I will consider the evidence for the route between points B-C in particular that section across White land.

*Shah land*

17. At the Inquiry, the Shah's argued that by the early 1970s any remnants of a historic private route between Footpath No 1 and SYR had been 'obliterated' by quarrying which took place throughout most, if not all, of the 1970s. I acknowledge that the quality of the aerial photograph from May 1971<sup>5</sup> leaves a lot to be desired, however, it unequivocally shows a substantial quarrying operation across a large swathe of land to the rear of Gatewood Grange Farm.
18. Whilst the Council conceded that the photograph does show a quarry, it argued that the Order route might still have been present on the basis that Footpath No 1, a known right of way, does not appear to be present in the image. I am not persuaded by that argument for two reasons. Firstly, it is possible indeed probable, that Footpath No 1 was temporarily diverted around the quarry

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<sup>3</sup> Mr Burrows' statement explains that he has farmed Shah land since 1982

<sup>4</sup> Appendix 5 to the OMA's Statement of Case

<sup>5</sup> See Appendix 13 to Tariq Shah Statement of Case

- rather than being retained on its legal alignment. The planning documents which the Council were unable to produce would have helped on this point. Second, it seems somewhat paradoxical to rely on the absence of another route as evidence of the existence of the Order route.
19. The aerial image from 1989<sup>6</sup> was taken before the Shah's moved onto the land and shows that all of the land formerly used for quarrying, save for a strip of land on the south-western edge of Spider Wood, had been restored. There is also evidence from Mr Pearson and the Whites which supports the existence of the quarrying throughout the 1970s.
  20. Oral evidence from the Shahs recalls that on taking ownership of the land they found it to be poorly drained, something they attributed to the former quarrying use which left it several metres below the level of the surrounding land<sup>7</sup> including Spider Wood. These issues were gradually rectified from 1992 onwards through the construction of drainage ditches, re-grading and landscaping the bank<sup>8</sup> and infilling and restoration of the land edged in green on Plan 1.
  21. On the evidence available, I am satisfied that a quarry did exist on Shah land throughout most of the 1970s and possibly into the early 1980s. Even though health and safety standards were very different in the 1970s, it is almost inconceivable that the quarry would not have been fenced off to the general public. Even if I am wrong about that, the amount of land disturbance shown in the 1971 photograph, as well as the construction of the M18 motorway through the latter part of the 1970s, means it simply would not have been possible for the public to use this section of the Order route for most of the 1970s.
  22. Whichever 20-year period is used, the quarrying use is fatal to the Order. Even after the quarrying ceased, there is little or no evidence that the public used a route across Shah land to access SYR. At the Inquiry, neither of the Council's witnesses recalled ever taking such a route. Moreover, the aerial photograph of the western section of the Order route taken in 1989 and the written statement of Steven Burrows all militate against the public's use of this section of the Order route.
  23. One of the few witnesses who claims to have used a route over Shah land is Ian McDonald. Mr McDonald completed two UEFs, the first is dated 1996 and the second 2006. In the first UEF, Mr McDonald, in common with many of the witnesses, recalls using the section of SYR between Great Gate Wood and Spider Wood several times a year between 1955 and 1962 (outside the 20-year period). The alignment of the route shown on Mr McDonald's first hand drawn map is not consistent with the Order route over Shah land.
  24. The route shown on the map accompanying the second UEF is different to the earlier plan and is more akin to the south-western section of the Order route. However, not only has the route changed but Mr McDonald now claims to have used the route several times a month over a 50-year period from the 1950s to 2000.

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<sup>6</sup> Appendix 12 to Tariq Shah Statement of Case

<sup>7</sup> According to the objectors the change in levels is still apparent today

<sup>8</sup> Points E-F Plan 1 Appendix 9 Shah Statement of Case

25. Given the significant differences between the two UEFs, Mr McDonald's evidence has to be treated with a degree of caution. Putting that to one side, the fact that Mr McDonald, nor any other witnesses, do not refer to the south-western section of the Order route passing through a quarry which was known to be present for a significant period of time, must bring the accuracy of their evidence into question. For these reasons, I am inclined to give Mr McDonald's evidence limited weight.

### *Seven Yards Road*

26. Many of the non-discounted UEF's/statements come from people with an intimate and long-standing knowledge of the local area. For example, David Richardson lived in Armthorpe from 1960 and described in some detail his use of SYR from the 1970s onwards. During that time Mr Richardson was a member of a local Ramblers' Association and also a Parish Councillor, something which adds weight to his evidence. Mr Richardson recalls intimate details of the route such as the location of an old-World War II bunker and an incident where he was approached by a farm worker who spoke to Mr White on a CB radio.
27. John Quinn, Lawrence O'Reilly, Clifford Parsons and Peter Farrell used SYR on a regular basis from the 1940s onwards recalling stones being tipped onto the route. Malcolm Grant attests to using the western section of the Order route on one occasion in 1980. Ian McDonald describes his use of SYR between the two woods and his map indicates the location of an air raid shelter which is presumably the same structure that others have referred to as a 'bunker'. Mr McDonald also refers to his participation in landscape and archaeological studies along SYR.
28. Kenneth Jennings claims to have used SYR for 35 years from the 1960s onwards and was not challenged until 1997. He also recalls that farmers would tip stones from the fields onto SYR which along with overgrown vegetation eventually prevented his use of the route between the trees and at that point he walked the adjacent path along the field edge on the southern side of SYR.
29. Clifford Parsons recalls '*heaps of stones*' and the route being overgrown with brambles. David Richardson remembers having to walk along the field edge as the route was too badly overgrown to use. John Quinn's statement also refers to the '*lane becoming too obstructed by rocks and brambles*' and his use of an alternative path on the northern side of the trees.
30. It is clear from the above statements that there was some public use of the tree-lined section of SYR between the two woods from the 1940s onwards. It is also evident that SYR became unusable at some point and this led to users diverting onto the adjacent fields where they were often challenged by the landowners. This is consistent with the statements given by the landowners that SYR was not an '*open, clear route and was blocked by trees, holly bushes, brambles and foliage in general and could not have been walked for a twenty year period*<sup>9</sup>.
31. The condition of the route is significant because by their own admission, this led to users taking alternative routes to the north and south. Whilst it is generally accepted that the public can deviate to another line if a way becomes

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<sup>9</sup> That statement refers to the later 20-year period adopted by the OMA 1973-1993.

obstructed, that only applies to a route that is already a right of way. Therefore, had SYR already been recorded in the DMS at the time it became obstructed, then a minor deviation away from the definitive line may have been legally permissible to overcome the obstruction of the route. However, none of the route was in the DMS as a public right of way and therefore there was no lawful right of deviation around the obstructions.

32. Whether or not the route became blocked during the 20-year period is not known as none of the witness can accurately recall when this happened. However, I consider on the balance of probabilities that the route became unusable after 1982 but before 1992.

#### *White land*

33. Clifford Parsons, Christopher McGuinness, John Quinn, Kenneth Jennings, John Bennett and David Richardson all describe their use of a route to SYR from Holme Wood Lane via Poor Pieces, an area of land some 200m west of the parish boundary and not the alignment shown on the Order plan.
34. Whilst John Quinn and Kenneth Jennings both provided plans marking various routes in the area<sup>10</sup>, including the section B-C, Mr Quinn's written statement refers to "*turning off [the SYR] by Great Gate Wood to reach Holme Wood Lane on the path by Poor Pieces*". In a similar vein, Mr Jennings states: "*we used to walk along SYR about once a month, and would usually reach it by walking along Holme Wood Lane, then following the path alongside the Poor Pieces and onto Seven Yards*".
35. I am unable to identify a single UEF/statement that clearly describes use of the Order route between points B-C. This is consistent with the landowner's evidence (HS White and Sons) which states that no one was seen walking across this part of the route between 1980 and 1997 and there has never been any evidence of a walked path. The land of the other side of the parish boundary is owned by Dick Jackson whose statement also disputes the presence of a footpath between points B-C.
36. Rather than supporting the alignment B-C, the evidence overwhelmingly points to the Poor Pieces path as being the route of choice for local people wishing to access SYR.
37. In his oral submissions Mr Jennings recalled walking the section B-C as part of a Parish Council led walk. Accordingly, there appears that there might have been some very occasional use of this section. However, in my view, the level of use of B-C as well as other sections of the Order route, appears to have been very low, with occasional and intermittent use being claimed by many of the witnesses. There is no suggestion within the oral and written evidence that the use was on a daily basis by large numbers of people. Even allowing for the predominantly rural and lightly settled nature of the surrounding area, use by the public of less than once per day is use that can only be described as sporadic. In my view therefore, the user evidence does not support the requisite level of public's use for section B-C.

#### *Conclusions on user evidence*

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<sup>10</sup> It is worth noting that many of the routes marked on these plans are not recorded rights of way.

38. Given the presence of a quarry on the land throughout the 1970s, I have found that there is insufficient evidence to support the public's use of the south-western section of the Order route over the relevant 20-year period.
39. The evidence shows that a number of local people used the unregistered section of SYR in the belief it was a historical right of way from the 1940s onwards. That is consistent with the Whites' evidence who own the land on either side of SYR who concede that a track of some sort did once exist along SYR to Great Gate Wood. There are significant variations in the way in which witnesses described reaching SYR and it is clear that it became unpassable at some point, probably from the late 1980s onwards. It is germane that SYR is only part of the Order route and therefore even if I was satisfied with the evidence pertaining to this section, that would not be sufficient for me to confirm the Order.
40. It is apparent that the majority of witnesses used the Poor Pieces path in preference to the section B-C. If there was use of the Order route between these points during the 20-year period, the extent and frequency of that use was not sufficient to establish public rights over this section of the route.
41. Taking account of the evidence as a whole I am not satisfied, on the balance of probabilities, that it has been shown that there has been a full uninterrupted period of twenty years use by the public, as of right, on the Order route, prior to such use being called into question by actions on the part of the landowners. As a result, I do not consider that the Order route can be presumed to have been dedicated as a public footpath under the statute.
42. In light of the above, it is not necessary for me to consider whether the claimed use was as of right, without interruption or whether there is sufficient evidence of a lack of intention to dedicate.

### ***Common law Dedication***

43. Where a claim fails under statute fails, I am obliged to give consideration to the evidence at common law. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
44. Although the OMA's advocate invited me to consider the case for dedication of the route under Common law, up to that point the OMA did not rely on common law dedication.
45. Some documentary evidence was submitted by the Council with its Statement of Case. The Armthorpe Enclosure Award 1777 does not show any highway on the alignment of the Order route; this suggests that there was no highway of any description over the Order route at the time of inclosure which the Commissioners were required to make provision for in the post-inclosure landscape.
46. Historical maps dating back to 1817 show the physical existence of a route along part of the Order route known as SYR and connecting with Footpath No 1. However, the Council accepts that these are not indicative of the status of the route. Whilst the presence of part of the route is acknowledged, there is no indication of the existence of a public right of way over the land in question.

47. For an inference of dedication to be drawn, it would be necessary for the OMA to demonstrate that the landowners had intended to dedicate a right of way. However, the available evidence does not show any overt actions on the part of the landowners to suggest dedication.
48. I therefore conclude there is insufficient evidence to show dedication of the route at common law.

### **Other Matters**

49. Issues are raised as to the effect the confirmation of the Order would have on local ecology. However, these are not matters which can be taken into consideration under the 1981 Act.

### **Conclusions**

50. The burden of proof in this case lies initially with the Applicant to demonstrate that public use of the route occurred for at least 20 years prior to the use being brought into question. For the reasons given, I do not consider the evidence adduced in this case meets the requisite standard for confirmation. I have also found there is insufficient evidence to show dedication of the route at common law.
51. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should not be confirmed.

### **Formal Decision**

52. I do not confirm the Order.

*D. M. Young*

Inspector



## **APPEARANCES**

### **For Doncaster Council**

Piers Riley-Smith of Counsel

*He called*

Lisa Godley

Doncaster Council – Rights of Way Officer

Roy Mulligan

Local Resident

Kenneth Jennings

Local Resident

### **In opposition to the Order**

Deborah Sharples

Birketts LLP

*She called*

Tariq Shah

Landowner

Nadeem Shah

Landowner's Father

Jonathan White

Landowner

on behalf of HF White and Sons

