



# Order Decision

Site visit on 23 March 2017

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

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

**Decision date: 30 May 2017**

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## Order Ref: FPS/P2745/7/51

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as "Public Footpath No 35.22/19 Cinder Path and No 35.22/20 Parsons Garth, Church Fenton Modification Order 2010".
- The Order was made by the North Yorkshire County Council ("the Council") on 8 September 2010 and proposes to add two footpaths ("the claimed routes") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There were eight objections outstanding<sup>1</sup> 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 not confirmed.**

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## Procedural Matters

1. I visited the site on 23 March 2017 accompanied throughout by Mr Smith (applicant) and Mrs Mason (landowner) and at times by Mr Varley for the Council and two other landowners (Dr Eyre and Mrs Dalton). All of the points referred to below correspond to those delineated on the Order Map.
2. An application was made by Mr Smith on 16 September 2000 to add two footpaths to the definitive map and statement. These are referred to as the 'Cinder Path' (points A-B-C-D-E-F-G-H) and 'Parsons Garth' (points F-I). This application was refused by the Council but Mr Smith appealed against the decision in accordance with Schedule 14 to the 1981 Act. The Inspector appointed by the Secretary of State concluded that the two claimed routes could be reasonably alleged to subsist and the Council was directed to make an Order. However, in reaching my decision at the Schedule 15 stage, I must have regard to the test outlined in paragraph 5 below. Although it appears that Mr Smith no longer wishes to pursue the confirmation of the Order for Parsons Garth, I still need to consider the evidence in relation to this route.
3. The Council has adopted a neutral stance in relation to the Order. Nonetheless, it has supplied copies of the user evidence forms ("UEFs") and the documentary evidence submitted in support of the application. There was no response from Mr Smith to correspondence from the Planning Inspectorate asking if he would present the case in support of the Order at a public inquiry. In the circumstances, it was decided that the Order would be determined by an exchange of written representations. Mr Smith has made submissions in support of the Order as part of this process<sup>2</sup>. However, these generally relate to rebuttal comments in response to the statements made by the other parties. He has placed little reliance on the documents supplied and there is no assessment of the user evidence in relation to dedication under statute or common law. Whilst the parties may have provided evidence or made

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<sup>1</sup> Submitted during the specified period for the making of objections or representations to the Order

<sup>2</sup> I have not seen his original letter which was returned to him in light of its content

submissions at the Schedule 14 stage, I can only reach my decision on the basis of the matters presented to me.

4. It became apparent shortly before the date of the site visit that Mrs Mason had not been notified of the making of the Order. To remedy this procedural issue, she was provided with copies of the submissions made at the Schedule 15 stage and given the opportunity to comment. Her statements and the subsequent responses have been circulated for comments.

### **Main Issues**

5. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a right of way, which is not shown in the map and statement, subsists. The burden of proof to be applied is the balance of probabilities.
6. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980. This requires consideration of whether there has been use of a way by the public, as of right<sup>3</sup> and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
7. If statutory dedication is not applicable, I shall consider whether an implication of dedication can be shown at common law. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

### **Reasons**

#### ***Statutory dedication***

8. Aside from one of the users (Mr Holdsworth), the evidence of use detailed in the UEFs had ceased by the mid-1960s. There is no evidence of any action that brought the status of either route into question during, or prior to, the 1960s. I consider there to be doubt regarding whether any subsequent action taken to deter use was applicable to the land crossed by the claimed routes and no challenges are acknowledged by Mr Holdsworth. If the application is taken to be the event that brought the status of the routes into question, there is an absence of evidence of use for the preceding eleven years.
9. In my view, statutory dedication fails in light of the lack of evidence of use for a period of twenty years prior to the status of the claimed routes being brought into question.

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<sup>3</sup> Without force, secrecy or permission

## ***Common law dedication***

### *The documentary evidence*

10. The 1849 Ordnance Survey ("OS") map shows the area prior to the existence of the railway goods yard and there is no sign of the northern part of the Cinder Path. Whilst two paths are evident proceeding from the railway line towards Rose Farm, there is some doubt regarding whether either corresponds to the relevant section of the Cinder Path. Nonetheless, a proportion of the A-B section is shown. There is also a path in the locality of Parsons Garth. These features are generally depicted on the 1889 OS map but Parsons Garth is not shown.
11. The 1906 OS map shows the goods yard but it is not possible to determine whether the claimed routes are shown on the copy provided. Although the majority of the Cinder Path is shown on the 1908 OS map, Parsons Garth is not represented on this map. Mr Smith has also provided an extract from a 1965 OS map which shows a section of path adjacent to the former goods yard.
12. The OS maps are a good indication of the physical features present when the land was surveyed but they provide no clarification regarding whether the paths shown had public or private status. Further, the Cinder Path is only shown to varying degrees on the OS maps provided and Parsons Garth is potentially only depicted on the 1849 map. I do not find that the photographic evidence provided adds anything further to the OS maps.
13. The 1846 tithe map shows a proportion of the Cinder Path around points E-H and also Parsons Garth. The latter is annotated as a footpath. However, it provides no indication regarding the status of the routes shown and the accompanying apportionment has not been supplied. In terms of the notes provided from research of the 1910 Finance Act records, it cannot be determined from these notes whether any deduction was claimed for a public right of way in respect of either the Cinder Path or Parsons Garth. I note that the Council does not believe that a deduction was applicable in relation to the land crossed by the claimed routes.
14. A plan stated to be a Home Guard map of 1939 appears to depict the E-H section of the Cinder Path and Parsons Garth as footpaths. However, there is nothing to suggest that this map should be given any greater weight than the OS maps outlined above.
15. From a review of the documentary evidence supplied, I do not find that it is sufficient on balance to show that the claimed routes have been dedicated as public rights of way at some point in the past. The Order therefore needs to be determined in light of the user evidence provided.

### *The user evidence*

16. Twenty UEFs have been submitted in support of the use of one or both of the claimed routes. These generally comprise of two or three pages of standard questions and were all completed by Mr Smith and signed by the users. It cannot be determined that Mr Smith led the users in relation to particular responses as alleged by some of the objectors. However, there is nothing to suggest that the Council undertook follow up interviews with any of the users when it investigated the application. Nor has additional information been provided to clarify matters recorded in the forms. This raises concerns about the quality of the evidence when set against some of the issues outlined below.

There will also be concerns about people recalling details regarding their claimed use which had ceased over forty years prior to the completion of their UEF.

17. The claimed use documented in the UEFs spans a number of years. In terms of the frequency of this use it mostly falls with the "*Up to 10 times a year*" or "*More than 10 times a year*" categories. There is some uncertainty from looking at particular UEFs in ascertaining whether the use related to one or both of the claimed routes. Where it is clear that both routes were used, the extent to which each route was used cannot be determined. However, it is apparent that, in terms of the number of users, the potential use of Parsons Garth was less than that of the Cinder Path.
18. The objectors suggest that the northern part of the Cinder Path proceeded through the site now covered by the housing development at Bridge Close which was previously the goods yard<sup>44</sup>. This is denied by Mr Smith and the route included in the Order runs initially along the eastern side of the development. It also needs to be borne in mind that the period covered by the UEFs had on the whole ceased by 1965. This will potentially impact upon the presence of features identified at a later date. Nonetheless, there is a significant problem in identifying the route or routes used by the majority of the users. Only three of the UEFs have a plan attached to indicate where the person claims to have walked. The end points have been written on the forms but it cannot be determined how the individuals proceeded between these points. In terms of those people who supplied a map, Mr Holdsworth depicted the Cinder Path, Mr Dean recorded a route that varied between points D and E and Mr Hill depicted a route between points H-G-F-I.
19. It cannot be confirmed that the use by particular people in the past to reach the village school was by way of permission, as suggested by the Council, given the nature of the user evidence. However, eight of the users have provided information that is suggestive of permissive use, for instance by working for a landowner or making deliveries to Rose Farm. In some cases the period of employment is specified and in other cases it is not possible to determine how long the person was employed by the landowner. In my view, the evidence of these witnesses should be treated with caution bearing in mind that their use was unlikely to have been as of right for particular periods of time. This will significantly impact upon the extent of the claimed use.
20. I have concluded that the documentary evidence is not supportive of the claimed routes being public rights of way. In terms of the user evidence, it may well be sufficient to reasonably allege that a right of way subsists. However, having regard to the matters outlined above, I am not satisfied on balance that this evidence is sufficient to raise an implication of dedication at common law in respect of either route. It follows that I do not find that the alleged public footpaths subsist on the balance of probabilities.

## Other Matters

21. Issues relating to whether it is desirable for the claimed routes to be recorded as public rights of way are not relevant to my decision. This is also applicable to other matters raised such as the potential impact on a proposed development, the presence of Japanese Knotweed and Great Crested Newts.

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<sup>44</sup> Mrs Mason states that the goods yard was sold in 1969

**Conclusion**

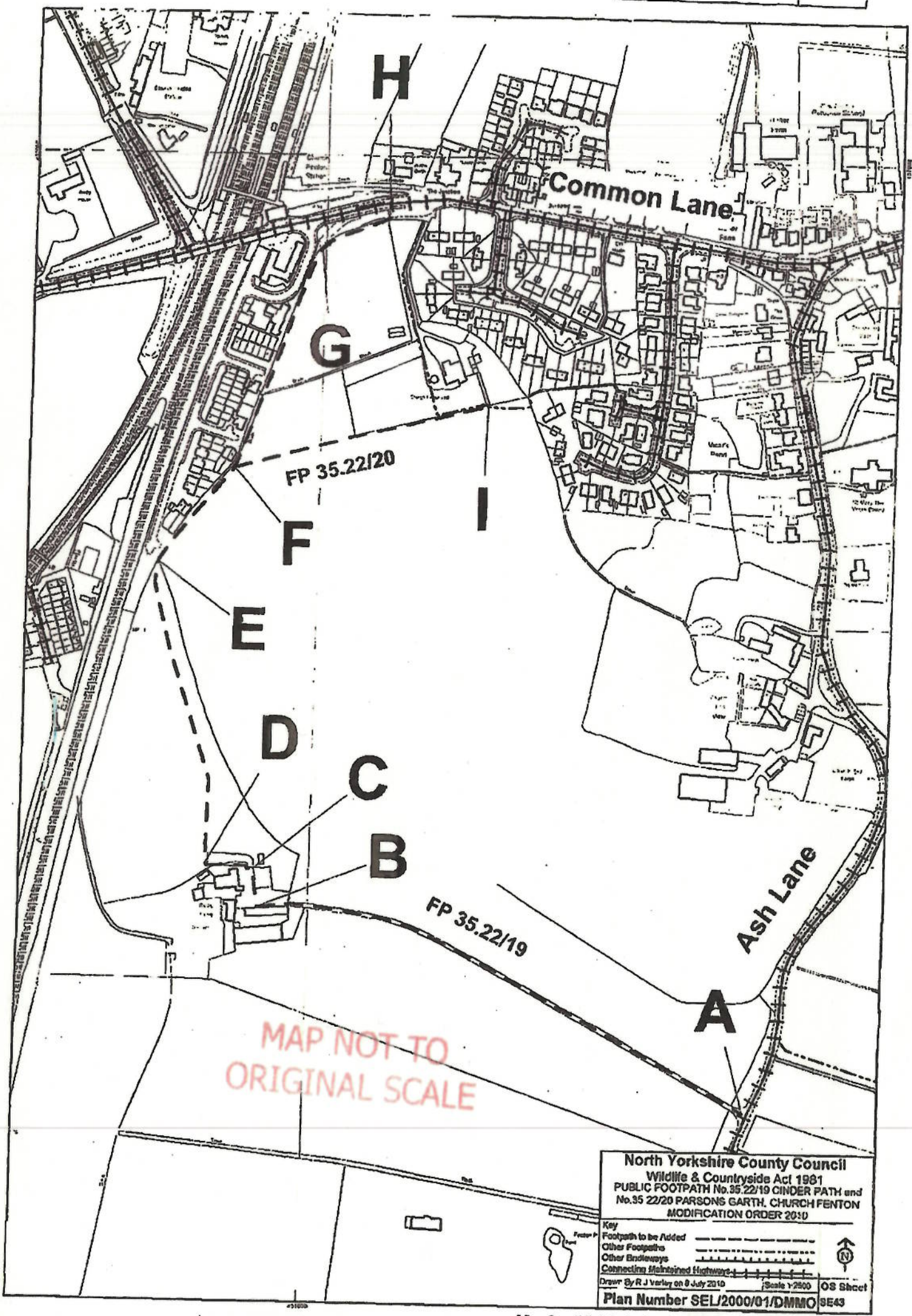
22. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.

**Formal Decision**

23. I do not confirm the Order.

*Mark Yates*

**Inspector**



MAP NOT TO  
ORIGINAL SCALE

**North Yorkshire County Council**  
**Wildlife & Countryside Act 1981**  
**PUBLIC FOOTPATH No.35.22/19 CINDER PATH and**  
**No.35.22/20 PARSONS GARTH, CHURCH FENTON**  
**MODIFICATION ORDER 2010**

Key  
Footpath to be added  
Other Footpaths  
Other Boundaries  
Connecting Mainlined Highways

Drawn By R.J. Varley on 8 July 2010  
Scale 1:2500  
OS Sheet SE43

Plan Number SEL/2000/01/DMMO