

|  |
| --- |
| **Order Decision** |
| Inquiry opened on 11 March 2020 |
| **by Barney Grimshaw BA DPA MRTPI(Rtd)** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 17 March 2022** |

|  |
| --- |
| **Order Ref: ROW/3212585** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Council of the City of York Public Footpath, Knapton No.4 (Grange Lane to Rufforth Airfield) Definitive Map Modification Order 2010.
 |
| * The Order is dated 29 March 2010 and proposes to modify the Definitive Map and Statement for the area by adding a footpath, running from Grange Lane (opposite Nos 66 and 68) generally westwards to the eastern edge of Rufforth Airfield, as shown on the Order Maps and described in the Order Schedule.
 |
| * There were 12 objections outstanding when the Council of the City of York submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
 |
| **Summary of Decision: I propose to confirm the Order subject to modifications that require advertising.** |
|  |

Procedural Matters

1. I originally opened this inquiry on Wednesday 11 March 2020 but had to immediately adjourn it as a result of one of the main parties being unable to attend due to the coronavirus outbreak. Further delays occurred as a result of the outbreak and for other reasons. The inquiry resumed on Tuesday 15 and Wednesday 16 February 2022 as a ‘blended’ event with some people attending in person and some online.
2. I made an unaccompanied site inspection on Tuesday 10 March 2020 when I was able to walk most of the Order route and view the remainder. I made a further visit on Monday 21 February 2022, when I was accompanied by parties represented at the inquiry.
3. The Council of the City of York, the Order Making Authority (OMA), having considered objections and representations made to the Order, concluded that the Order route carries higher rights than a footpath and has requested that the Order be modified so as to record the route as a Restricted Byway, if it is confirmed.
4. In writing this decision I have found it convenient to refer to points marked on the Order Maps. I therefore attach copies of these maps.

The Main Issues

1. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
2. Some of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
3. Common law also requires me to consider whether the use of the route and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.
4. As the Order concerns a possible unrecorded vehicular route, it is also necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which extinguished rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions.

Reasons

1. Some of the objections are made on the grounds that no public rights exist over the Order route and it should not therefore be recorded as a public right of way of any sort. Other objections are made on the grounds that the route carries higher rights than that of a footpath and it should be recorded as a Restricted Byway, thus supporting the Order as proposed to be modified by the OMA.
2. Both documentary and user evidence has been submitted in this case. I consider the different types of evidence separately.

***Documentary Evidence***

*The Marwood Map*

1. The earliest map that has been discovered which appears to show part of the Order route is a map of Acomb Grange said to date from 1760. At that time Acomb Grange was owned by Henry Marwood and the map was referred to at the inquiry as ‘the Marwood Map’. This map shows a road running along the northern boundary of the estate, the eastern part of which appears to be within the estate and the rest outside the boundary, and which appears to be similar to the Order route.
2. At the western edge of this map the road is annotated *‘From Rufforth 1 mile’.* To the east of this section of the road, points are marked *‘A’* and *‘B’* and it is annotated *‘From A to B is part of the antient road from Wetherby to York & repaired by Marwood’*. The next sections are annotated *‘Wm Stoddard Road’* and then *‘Road to York 2 miles. To Acomb ¼ mile’*.
3. This was a map prepared privately for the landowner and not intended for use by the public. It therefore does not identify routes as being public. Nevertheless, there would be no reason for the map maker to show a road where none existed.
4. The annotations on this map seem to indicate that the route formed part of a through route between York and Wetherby and that it was regarded as an ancient (‘antient’) route in 1760. It was argued on behalf of objectors that the description of the route as ancient may have indicated that the route was disused by 1760. Alternatively, and perhaps more likely, it may simply indicate that the route had existed for a long time.
5. The note on the map that part of the route was ‘*repaired by Marwood’* might be taken to suggest that the route was maintained privately and accordingly only for private rather than public use. However, it is argued on behalf of the OMA that, prior to the 1766 Highways Act, the maintenance of roads was the duty of all the residents of a parish and that this note could be interpreted as simply indicating that the landowner had taken on the maintenance of part of the route adjoining his estate as his part of the duty owed.

*Early Commercial Maps*

1. Jeffery’s Map, published in 1775 but surveyed between 1767 and 1770, shows a route resembling the Order route. The York and Collingham Turnpike Trust was formed in 1771 and a turnpike road was established between York and Wetherby, which has now become the B1224 road. It is not known when the turnpike road was constructed but it is assumed by the OMA that this would have been some time after the establishment of the trust in 1771. This would explain why it was not shown on Jeffery’ Map.
2. Tuke’s Map (1787) shows similar information to Jeffery’s Map and also does not include the turnpike road, although it is likely to have existed for some time before 1787. However, this is perhaps not surprising as this map is believed to have been based on Jeffery’s survey and not on a new survey of the area.
3. It was argued on behalf of objectors that turnpikes were usually established mainly by improving existing routes rather than creating new ones. In this case, the 1771 Act which set up this trust was referred to in a subsequent 1826 Act as an *“Act for repairing and widening the Road from Collingham through Wetherby to the City of York”.* As the only maps discovered which fail to show the route of the turnpike were based on the same survey, it is suggested on behalf of objectors that this may have been an error and, accordingly, the Order route may not have been the only route between Wetherby and York before the establishment of the turnpike.
4. Other commercial maps published between 1801 and 1898, which were considered by the OMA, all show two routes between Rufforth and Acomb which appear to relate to the B1224 and the Order route.
5. It was argued by supporters of the Order, as proposed to be amended, that the inclusion of the Order route on maps designed to be sold to the travelling public suggested that it was believed to be available for public use. This was disputed by objectors.

*Inclosure Awards*

1. The Acomb and Holgate Inclosure Award (1776) set out the Wetherby Turnpike Road and another public highway referred to as Rufforth Road and leading to the ancient gate into the township of Rufforth. It was stated on behalf of the OMA that the term ‘gate’ may have referred to a road rather than a gate in the modern sense. Either way the wording in the award would appear to suggest that the route continued beyond the boundary of the award. The map that would have accompanied the award is missing but a copy believed to be a faithful contemporaneous copy is held in York Archives. By cross referencing the description of this road, the copy map, the earliest Ordnance Survey map and the text of the award, the OMA has concluded that this road is what is now known as Grange Lane. Although the road referred to is not the Order route but the section of Grange Lane east of Point A, it seems unlikely that such a public road would simply terminate at the parish boundary where there was no feature of public interest. Accordingly, it would appear that the road was believed to continue westwards to Rufforth.
2. The Rufforth Inclosure Award (1795) set out a way described as *“…one other private or occupation carriage road by me called Rufforth Grange Road which if fenced off shall be of the width of twenty four feet…”*. This route appears to coincide with the continuation of the Order route west of Point F. There was considerable debate regarding whether the use of the word ’private’ in the award should be interpreted in its modern sense so as to mean that members of the public were not allowed to use the route or in some other manner. The award itself states that *“…all public carriage road and private occupation roads hereinbefore by me awarded shall be made and forever hereafter repaired and maintained by and at the expense of the inhabitants and occupiers of hereditaments in the township of Rufforth aforesaid in the manner and with like exceptions from contributing to repair as the public highways of the said township…”*. This would suggest that routes were to be maintained at public expense which would seem unlikely for routes that the public were not allowed to use. It was suggested by objectors that the commissioners may have exceeded their authority by making such provision for maintenance of ‘private’ roads. However, I have seen no evidence that would lead me to such a conclusion.
3. Complex arguments have been pursued regarding the correct interpretation of the term ‘private or occupation carriage road’ in the Rufforth award. It is generally accepted that ‘occupation roads’ are not usually public which might suggest that it would be unnecessary to describe a route as a ‘private or occupation’ road. Objectors referred to the judgement in the case of *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council [1995] (Dunlop)* in which it was decided that the term ‘private carriage road’ was used in an 1820 award to distinguish a route from public roads on which all subjects enjoyed an equal right of vehicular passage. Supporters of the Order, as proposed to be amended, quoted historical references to different types of ‘private’ ways, some of which seemed to have been available for public use.
4. The *Dunlop* case related to the specific circumstances of that case and to an inclosure after the passage of the 1801 Inclosure Act which sought to provide a common framework and standard conditions for subsequent inclosures. The judgement cannot therefore be applied automatically to the present case in which the award was made under a local Act of 1794. I note that under this Act the Rufforth Court Leet was required to inspect and enforce the maintenance of private ways and it was argued by supporters of the Order that the court would not have had any interest in purely private (modern meaning) ways.
5. If it were to be accepted that the continuations of the Order route to both the east and the west were public roads, it would be logical to assume that the route linking them, the Order route, was also likely to have been public.

*Ordnance Survey (OS) Maps*

1. OS maps from 1850 to 1993 consistently show the Order route on its current alignment named as Grange Lane. They also show what is now the B1224 and on the earlier maps this is named as ‘New Gate’ in one section and New Gate Bridge is named on all the maps. This possibly reinforces the view that the word ‘gate’ might in the past have referred to a road rather than a gate in the modern sense. The OMA suggested that, if the B1224 was the ‘new’ road there may, by implication, have been an ‘old’ road, namely the Order route.
2. The OS Object Name Book that accompanied OS maps from around 1907 describes Grange Lane as a public road within Acomb and the rest as a lane. The term ‘lane’ is not specific with regard to whether the route was thought to be public or private.
3. From 1888, OS maps included a disclaimer stating that routes shown were not necessarily public. However, subsequent instructions given to OS surveyors are somewhat confusing. They seem to have been told not to investigate the public status of routes but also not to show routes unless they were in obvious use by the public. Accordingly, the depiction of routes on OS maps cannot be taken as conclusive evidence of public rights but they can be helpful, especially when considered with other evidence.

*Finance Act 1910*

1. Under this Act a survey of all land was undertaken in order to assess the value of land so that a tax could be imposed on any increase in value when the land was subsequently sold. Landowners with public rights of way on their land could claim a reduction in the taxable value of the land and accordingly survey records can be helpful in identifying the existence of public rights.
2. In this case records for the eastern part of the Order route have not been found. The records for the western part show the that part of the Order route was included within hereditaments but no deduction in respect of public rights was made.
3. Accordingly, the Finance Act records do not provide any evidence of the existence of public rights over the Order route. However, this does not necessarily mean that no such rights existed. By the time of the Finance Act survey, a better and more direct route between Rufforth and Acomb, what is now the B1224, had existed for a long time and the Order route may have faded from local memory.

*Rufforth Airfield*

1. This airfield was established during the Second World War under emergency wartime powers. After the war, in 1953, the Ministry for Transport formalised the wartime measures to allow the continued peace time use of the airfield. Part of this process involved the formal stopping up of the continuation of the Order route westwards across the airfield and the creation of a new route which is now recorded as a public footpath (Rufforth 8).
2. This would suggest that in 1953 it was believed that the route had carried public rights, albeit as a footpath. It is not known on what basis the pre-war status of the route was determined. However, if any higher rights existed, it is debatable whether they might still subsist on the original route but that is not a matter for me to address at this time

*Conclusion regarding documentary evidence*

1. The Order route appears to have existed for a long time. It was already described as an ancient route in 1760. Although the evidence that it was part of the only route between Wetherby and York prior to the establishment of the turnpike on the line of what is now the B1224 is limited, there is no substantive evidence of another route. This being the case it seems inevitable that the route would have been used by the public.
2. It is also likely that use of the Order route may have continued after the establishment of the turnpike so as to avoid paying tolls. However, after the end of the turnpike era in the 19th century it is likely that use of the Order route would have declined considerably as what is now the B1224 offered a better and more direct route.
3. The evidence of the inclosure awards does not directly assist in determining the status of the Order route. However, it does seem to confirm that the continuation of the route eastwards was a public road and it is arguable that the continuation westwards was also public. If the continuation westwards was not public, it would mean that public rights terminated either at the parish boundary of Acomb or at some point on the Order route itself. On balance, it seems more likely that public rights continued throughout the route.
4. None of the other evidence adduced precludes the possibility that the Order route was a public road available for all traffic and, when it is considered as a whole, it seems that this is the most likely interpretation that should be made. It would appear that since the 19th century use of the route has declined but there is no evidence of any rights over it having been formally extinguished and therefore rights that were established still remain.

***Evidence of Use***

Date of calling into question

1. In 1981, the Rambler’s Association submitted 6 User Evidence Forms (UEFs) claiming uninterrupted use of the Order route between 1921 and 1981. This was apparently triggered by the erection of a fence obstructing the route. Also, in 1981 a declaration under section 31(6) of the 1980 Act was made on behalf of a landowner of part of the route stating that he had no intention of dedicating any public rights of way. Similar declarations have subsequently been made by other owners in 1999 and 2010.
2. It is therefore my view that public use of the Order route was called into question in 1981 and the relevant 20 year period of public use during which a presumption that the route has been dedicated as a public right of way in accordance with the provisions of the 1980 Act runs from 1961 to 1981 in this case.

*Evidence of Users*

1. Six User Evidence Forms (UEFs) were submitted in 1981 and 2 further forms were submitted subsequently in 2001. The original forms describe use before 1981 and the later ones use from 1975 to 2001.
2. Five of the original UEFs also refereed to use by another named person, who had also signed the form in addition to the person completing the form. Use claimed was predominantly on foot but 5 people stated that they believed the route to be a bridleway. Not all users provided details of the frequency of their use but those that did claimed to have used it weekly or more often.
3. Six of the people who completed UEFs claimed to have used the route throughout the relevant 20 year period and the other 2 for part of it. References to other users suggest that a further 5 people used the route throughout the period and one for part of it.

Evidence of lack of intention to dedicate

1. I have seen no evidence of action by landowners that would indicate a lack of intention to dedicate the Order route for public use from before 1981.

*Conclusion regarding Presumed Dedication*

1. The available evidence of public use of the Order route is limited and could not be tested as a result of the passage of time. Accordingly, it is not in my view sufficient to raise a presumption that the route has been dedicated as a public right of way of any sort in accordance with the provisions of the 1980 Act. However, it does perhaps confirm that the route still existed and was available for use, at least on foot, until 1981.

**Common Law**

1. 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.
2. In this case, the evidence of recent use by the public is limited and there is no evidence of action by landowners indicating an intention to dedicate public rights. However, the documentary evidence suggests that public use of the route may have taken place over a long period in the past and it may well be that this resulted in the establishment of public rights under common law.

**The 2006 Act**

1. As mentioned before, this act extinguished rights of way for MPVs subject to certain exceptions. In this case it would appear that none of the exceptions is applicable. Accordingly, any right of way for MPVs over the route have now been extinguished and, in the light of my conclusions regarding the documentary evidence, it is appropriate that the route be recorded as a Restricted Byway.

Other Matters

1. If the Order is confirmed, as proposed to be modified, the Restricted Byway to be recorded will appear to be a cul de sac terminating at Point F for all traffic other than walkers, as a result of the stopping up and diversion of the continuation of the route westwards as a footpath only. However, this does not mean that the Order should not be confirmed as proposed to be modified given that I have concluded that the evidence indicates that the Order route is a Restricted Byway. Also, as I have mentioned already, it may be arguable that higher rights to the west have not been extinguished.
2. Objectors referred to the disruptive effect recording of the Order route as a public right of way might have on agricultural activities on the land crossed. I fully understand their concerns, but this is not a matter to which I can give weight under the legislation when making my decision.

Conclusions

1. On the balance of probabilities, the documentary evidence that is available, reinforced to some extent by the evidence of users, indicates that the Order route was a public highway open to all traffic. However, as any right of way for MPVs over the route was extinguished in accordance with the provisions of the 2006 Act, the route should now be recorded as a Restricted Byway.
2. Having regard to these and all other matters raised, I conclude that the Order should be confirmed subject to modification to record the route as a Restricted Byway rather than a footpath.

Formal Decision

1. I propose to confirm the Order subject to the following modifications:
* In the Order and the Schedule to the Order, delete the words ‘Public Footpath’ or ‘Footpath’ and substitute ‘Restricted Byway’;
* Amend the Order Map accordingly.
1. The proposed modifications would have the effect of showing as a highway of one description a way which is shown in the Order as a highway of another description. It is therefore required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act that notice of the proposal to modify the Order be given and an opportunity for objections and representations to be made regarding the proposed modification.

Barney Grimshaw

Inspector

appearances

|  |  |
| --- | --- |
|  |  |
| **For the OMA** |  |
|  |  |
| Stephanie Hall | Counsel, representing the Council of the City of York (CCY) |
|  |  |
| Who called: |  |
|  |  |
| Russell Varley | Definitive Map Officer, HCC |
|  |  |
| **Supporters (of the Order as proposed to be modified)** |  |
|  |  |
| Catriona Cook | Representing the Byways and Bridleways Trust and the British Horse Society |
|  |  |
| Joanna Roseff |  |
|  |  |
| David Nunns | Ramblers |
|  |  |
| Peter Brown | Local resident |
|  |  |
| **Objectors** |  |
|  |  |
| Nick Grant | Counsel, representing Mr & Mrs Swiers, landowners |
|  |  |
| Philippa Farthing | Landowner |
|  |  |

**DOCUMENTS**

1. Opening submission on behalf of CCY.
2. Statement of Case of CCY with 28 appendices.
3. Closing submission on behalf of CCY.
4. Proof of Evidence of Russell Varley, CCY.
5. Statement of Case for the Byways and Bridleways Trust (BBT) and British Horse society (BHS).
6. Proof of Evidence of Catriona Cook, BBT & BHS.
7. Additional submissions (2) from C Cook.
8. Summing up on behalf of BBT and BHS.
9. Opening Submission on behalf of Mr & Mrs Swiers.
10. Statement of Case on behalf of Mr & Mrs Swiers with 3 appendices.
11. Closing submission on behalf of Mr & Mrs Swiers.
12. Statement of Case of Philippa Farthing.
13. Proposals made by the landowners at Acomb Grange to the objectors, Peter Brown.
14. History of Acomb Grange by Jennifer Kaner, submitted by Peter Brown
15. Statement of Joanna Roseff.
16. Comments on Mr & Mrs Swiers Response to Further Submissions, J Roseff.
17. Statement of David Nunns, Ramblers.



