LOGO

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| **Order Decision** |
| Inquiry Held on 11 July 2023  Site visit made on 11 July 2023 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 September 2023** |

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| **Order Ref: ROW/3303087** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Definitive Map and Statement for the former East Riding of Yorkshire now situated inside the area of the Council of the City of York Public Footpath Dunnington 22 Modification Order 2021. |
| * The Order is dated 25 June 2021 and proposes to modify the Definitive Map and Statement for the area by the addition of a footpath between Common Road and Public Footpath Dunnington 7 as shown in the Order plan and described in the Order Schedule. |
| * There were four objections outstanding at the commencement of the inquiry. |
| **Summary of Decision: The Order is confirmed.** |
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Procedural Matters

1. I carried out an unaccompanied site visit and viewed the Order route from public vantage points prior to the public inquiry and conducted a further visit following it, when I was accompanied by parties supporting and opposing the Order.
2. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.

**The Main Issues**

1. The Council of the City of York made the Order under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). As a result, the main issue is whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that a public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates.
2. The majority of the evidence in support of this case comprises User Evidence Forms (UEFs). As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be 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 twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

Reasons

***Background***

1. The Order route follows a track which passes between a drain and field until it meets Dunnington Footpath 7. The track provides access to a dwelling, Strawberry Cottage. An area of allotments lies to the north of the route. User, documentary and landowner evidence has been submitted in respect of the Order.

***Documentary evidence***

*1854 6 inch Ordnance Survey (OS) Map, 1893 6 inch OS Map, 1893 25 inch OS Map, 1910 25 inch OS Map, 1958 1:10,000 OS Map*

1. The Order route is depicted in these documents as a track which is separate from surrounding land, with a line crossing the track’s junction with Common Road. Dashes depict the approximate Order route in the earlier documents, but do not appear in the later two.

*1910 Smiths Gore plan*

1. The Order route is shown as a separate numbered land parcel in this document. No track is marked and a line crosses the track’s junction with Common Road.

*1970, 1975, 1978, 1980, 1990, 1995 25 inch OS Maps, 1984 1:10,000 OS Map*

1. The Order route is no longer shown as a separate parcel in these documents, but is instead depicted by single or double pecked lines as part of a longer track. A line continues to be shown across the track’s junction with Common Road.

*1968, 1971, 2002, 2007, 2014, 2017, 2020 aerial photography*

1. The Order route is an open surfaced track in these documents. A gate stands open at the south side of the track close to its junction with Common Road in the photographs of 2007, 2014 and 2020.

*Documentary evidence conclusions*

1. The documentary evidence shows the physical existence of the track, which was required for vehicular access to the dwelling/s at Strawberry Cottage over most of the period covered, and that the gate was open at the dates of the three aerial photographs cited. Any private vehicular or other right over the route to the cottage could co-exist with any unrecorded public rights, so that the two would not be mutually exclusive. No conclusions can be drawn from the lack of inclusion of the Order route in a local walks booklet of 2009, which appears to have concerned recorded public rights of way. The documentary evidence does not, however, support the existence of any unrecorded public rights over the Order route.

***User evidence***

*Statutory Dedication: Bringing into question*

1. For the public’s right to use a route to have been brought into question it must be likely that some of the users were made aware that their right to use the way as a highway had been challenged.
2. A notice which said “Private, no public right of way” was fixed to the gate at point A of the Order route in 2003, resulting in the parish council submitting its modification order application in January 2004.
3. The Council considered in closing that a bringing into question may have occurred in 2001. Nevertheless, it continued to support 2003 as the primary date when any public rights were brought into question.
4. A considerable number of people who completed user forms in the autumn of 2003 refer to the notice having been put up on the route recently, with some people specifying that the notice had appeared within the last six months. Verbal challenges are additionally referred to by a number of people, however the dates of these are unclear. Nevertheless, the notice was evidently seen by many of the witnesses, and their forms were partially completed in response to this, providing a relatively clear date. Therefore the right of the public to use the Order route was brought into question by the fixing of the notice to the gate at some point between spring and autumn 2003. Thus, the statutory period to be considered is 1983-2003 (“the statutory period”).

*Route location*

1. The majority of the user evidence comprises forms completed by people in 2003 and submitted with the modification order application. These forms are not accompanied by a map marked with the route taken, with the route description “access from Common Road to allotments/Strawberry Cottage” and “gravel/stone surfaced pathway” being pre-completed on them. An objector considers that the 2003 forms may describe use of a different track to the north, which lies between Intake Lane and the allotments.
2. References which tie the 2003 evidence to the Order route include “road to Strawberry Cottages”, “adjacent bungalow”, “this small piece of footpath leads to two other paths”, a “wooden footbridge from allotments”, and two people refer by name to both the previous owner and the current owner who inherited the property from him. The current owner stated in oral evidence that he did not own land near the allotments and had not challenged people elsewhere. The track to the north meets Intake Lane rather than Common Road, so that the description on the forms is more likely to describe the Order route than the track to the north.
3. Furthermore, those who completed forms in 2003 were subsequently requested to mark a map with the route taken in 2021, with four people having returned maps showing the Order route. Four user forms were additionally completed by different people in 2019, all of which refer to use for part of the statutory period and which include maps marked with the Order route. In view of the foregoing considerations and the longstanding defined character of the route as a track between a drain and a field boundary, allowing for minimal potential deviations, I am satisfied that the user evidence relates to the Order route.

*Evidence of use*

1. A small number of people state that they used the route to get to the shops. No shops lie along or close to the route, which does not form an apparent “desire line” between dwellings and the main village shops, and there is no indication that this situation was any different over the statutory period. I concur with the submission that this use is unexplained by the evidence before me.
2. Nevertheless, as the Order route adjoins or lies close to recorded public rights of way, it is conceivable that some people may have used it as part of a longer walk to a destination elsewhere in order to enjoy a fine day, or for additional exercise. Furthermore, the people who record this use additionally used the route for pleasure or for dog walking, so that it was not the sole reason for use, in each case. Reasons for use in the wider evidence are generally walking, pleasure or exercise. In view of these considerations, I am satisfied that the minimal stated use to access shops does not call into doubt the accuracy of the user evidence.
3. How the gender balance of witnesses is considered to affect the evidence has not been adequately explained, so that this submission similarly does not demonstrate any flaw in the basis on which the evidence was provided. Similarly, user interviews are frequently carried out in the processing of these applications in order to reach a thorough conclusion, so that the Council’s efforts to conduct these do not suggest that it doubted the form evidence in any way.
4. The user evidence shows use of the Order route by nine people on foot over the whole of the statutory period. One of these people used the route daily, one person weekly, two people monthly and the use of the remainder was occasional.
5. Twenty-two people, including those who completed forms in 2019, additionally used the Order route on foot for part of the statutory period. Whilst the names of three people are written on one of the user forms, one of the questions is answered “claiming the land was private property, telling me to get off the land”, and the form is signed by only one person. The form consequently appears to have been completed by one person rather than the three referred to, and no user interview or oral evidence is available to provide clarification in this regard. Furthermore, it is unlikely that the use of all three people was identical, as the form purports to record. In view of this uncertainty, it is consequently necessary to consider the form in question to record the use of one person only, reducing the number of people who used the route for part of the statutory period to twenty.
6. This use comprised between nineteen and three years of the statutory period. Eight of these people used the route for at least ten years of the period. One person used the route twice daily, five people daily, one person most days, three people several or three times per week, six people weekly, two people every few months and two people occasionally. None of these shorter periods of use may be taken together to form a continuous statutory period of use, as their use spanned the latter part of the statutory period in each case.
7. Many of the forms record a relatively high frequency of use, stating that this has been daily, a number of times a week or weekly, for example. An objector, Mrs Dobson, suggests reasons why this use may have been more variable than stated. I acknowledge that use may not always have been of precisely the frequency stated. I return to the limitations of the information sought by the 2003 forms below. Nevertheless, the responses provide an overall picture of regular use of the route by many people over both the entire statutory period and generally lengthy timespans within it, and conjecture is insufficiently substantive to call this into doubt. Furthermore, even if the majority of the forms had been completed at a public house or other social venue, as suggested, it has not been demonstrated that this has adversely affected the precision with which they were completed.
8. Mrs Dobson visited Strawberry Cottage from the 1960s. Her family recollections of not having seen the public on the Order route in the 1960s and 1970s do not relate to the statutory period. In the 1980s she stayed at the cottage for short periods, usually in the summer, and in the 1990s and early 2000s she spent summer holidays there and stayed there at other times. According to her own and her family’s observations, there was no significant use of the Order route by the public before the 1990s and walkers were not numerous in number from that point.
9. Strawberry Cottage lies along a track a short distance from the end of the Order route and the route is somewhat obscured within views from the cottage by the distance, intervening mature vegetation (which is present on the 2002 aerial photograph) and the alignment of the track. This is supported by the evidence of Ms Kay that “the end of the Order route” was visible from the front room at the cottage, on visiting a friend there. The route may be more visible from the upper floor of the cottage or in winter, and vegetation may have been less extensive over the statutory period. Nevertheless, anyone using the route to access the westernmost section of Footpath 7, or vice versa, is likely only to be visible to occupiers of the cottage, within many views from it, for a relatively brief period of time. Equally, anyone who used the route to access Footpath 7 to walk past the cottage, or the reverse journey, could have been assumed to make use of the western part of Footpath 7 instead, and therefore their use would not have been ascribed to the Order route.
10. Furthermore, as Mrs Dobson was not resident at the cottage, her personal knowledge of the route is drawn from the occasions when she was visiting, could see use of the route from the cottage and when she had occasion to use the route. Ms Kay did not live along the route, but rented a field adjacent to it for part of the statutory period, so that her knowledge of the route over that time is restricted to the times when she was present in the field or using the route. Her evidence that people did not pass on the track whilst she tended to horses in the field in 1990, and that she recalls occasional walkers passing in 2001, is similarly limited by the restricted visibility between the Order route and field. Furthermore, the proportion of witness use which she disputes due to not having seen the people concerned on the route as often as stated is unclear. Whilst I acknowledge the recollections of Mrs Dobson and Ms Kay in this regard, these have some limitations, as set out above. They consequently do not call the stated level of use into doubt.
11. Ms Kay additionally recalls that she did not see the public using the Order route until the early 1990s when she was walking, cycling or riding past. Whilst her evidence is similar to that of Mrs Dobson in this regard, these recollections are reasonably consistent with the user evidence, which shows the least frequent use at the start of the statutory period, with use increasing between the mid-1980s and the mid-1990s.
12. The user evidence shows a reasonable intensity of use which demonstrates actual enjoyment of the Order route by the public over the statutory period, in view of the route’s location at the edge of a village. However, the 2003 forms omit some relevant questions which have a bearing in the assessment of user evidence, including whether there had ever been any periods when people did not use the route, or whether the frequency of use had ever altered. Minimal user interview or oral evidence is available to provide clarification in this regard, although the reluctance of users to give further evidence by these means may potentially be explained by both a delay in seeking interviews and the backdrop of challenges by the route’s current owner. Whilst the 2019 form did ask these questions, only four people completed these forms, all of whom used the route for less than the full statutory period. As a result of these limitations, the evidence of use attracts moderate weight.

*Whether use was without force, secrecy or permission*

1. Mr Jewitt became the owner of property including the Order route in July 2001, moving in late 2001 into a dwelling named “Hollymead”, which lies on Common Road close to the Order route.
2. Mr Jewitt’s uncle, Mr Walker, farmed land around the Hollymead property from the start of the statutory period until 2001, making a living from livestock on his land from the 1970s. He lived in an adjacent property before moving into Hollymead in the 1980s, owning the land crossed by the Order route from 1983-2001. Over this period Mr Jewitt visited his uncle most weeks and would assist at the property and on the land.
3. The owner of the route consequently lived within sight of it for almost the entire statutory period, with Mr Walker having additionally spent time tending to stock on the adjacent land. Use at the frequencies indicated would therefore have been likely to be apparent to the route’s owners. The evidence before me suggests that public use of the Order route over the statutory period was made without secrecy.
4. Turning to whether use was without force, Mr Jewitt recalled that Mr Walker used a key lock on the gate, although he could not recollect who had keys for this. He recalled that Mr Walker locked the gate several times a year on a Saturday evening, as this would not affect postal deliveries. He stated that Mr Walker had told him this was done to prevent vandalism and damage to crops, and that he was “determined” that the Order route would not become a public right of way. Mrs Dobson recollects that Mr Walker locked the gate for short periods at regular intervals in order to assert that the route was not a public right of way, notifying occupiers of properties off the route that he intended to do so. The Council considers that the gate was closed and locked on occasion.
5. Mr Jewitt stated that he started locking the gate at point A from 2001, and that he had placed a code lock on the gate at a similar time. He recalled that he had “always closed and padlocked this gate several times each year for 24 hours or more to stop it being claimed as a right of way”.
6. Ms Kay recalled occasions when she had closed the gate periodically. A later letter states that the gate was locked on these occasions. Ms Kay had kept animals in one of the fields along the Order route since the early 1990s and consequently had known it during the second half of the statutory period. Whilst some of the occasions referred to lie outside the statutory period, annual brief closures during galas or firework displays on nearby land until approximately 2012 or 2014 are the nearest dates to that period.
7. Ms Chainey, who lived at Strawberry Cottage between 1994-1997, stated that during her residence there the gate was closed and locked several times a year for 1-2 days, or occasionally longer, by Mr Walker.
8. If a locked gate had been present over the statutory period it would have been necessary to climb over it to access the route, potentially rendering such use with force.
9. The 2003 form asked for details of “any..hand gates, field gates…obstructions, etc encountered on the path”. Three of the 2003 witnesses who had used the route for the full statutory period, or almost all of it, stated either that the gate had always been open or that there had been no obstructions. The remaining 2003 witnesses, comprising over twenty people, did not recall having encountered a locked gate on the route and needed to climb it.
10. One of the user forms from 2019 showing use over the years 1984-2018 refers to the gate having been “locked intermittently”, which prevented use. Another form from 2019 showing use from the late 1980s to 2019 states that the gate had been locked “for a short period when the current owner took over”, but the witness cannot recall when this occurred. Two further forms from 2019 showing use from 1996 to 2019 state that they had never found the gate to be closed. A witness who gave oral evidence recalled finding the gate closed or locked on one occasion, and that it prevented her use but that she could not recall the date.
11. Thus, the suggested closures are not generally recalled by witnesses who completed the 2003 forms, and none of the witnesses recollect having climbed over a locked gate on the route. When the evidence of the significant number of witnesses is considered against the evidence of the objectors, there is consequently insufficient evidence to suggest that people climbed over a locked gate on the Order route at any point during the statutory period. The evidence does not indicate that use was made with force in any other regard.
12. The 2003 user form does not ask whether witnesses were ever given permission to use the route. However, all the 2019 form witnesses answer that they have not been given permission. Furthermore, the evidence of owner Mr Jewitt does not refer to either himself or his uncle, who owned the route before him, having given anyone permission to use the route. The evidence consequently does not suggest that any of the use over the statutory period was made with permission.

*Interruption*

1. The Council considers that the gate has been closed on some occasions. Whilst the 2003 form did not ask whether there had ever been any breaks in use, it did ask whether any gates or obstructions had been encountered on the route. Therefore witnesses would have been likely to state in response whether gates had ever prevented their use. Witnesses do not recall having encountered an obstruction such as a locked gate over the statutory period. The evidence indicates that any such closures have been brief and occasional, so that the stated use was still sufficient overall to suggest to the owner that a right was being asserted.
2. Furthermore, the track forms the sole access to Strawberry Cottage (which was two properties during the statutory period) and to land. It would consequently have been necessary for access along the lane to have been available for visitors, services such as refuse collection or postal deliveries, and to occupiers of property along the lane, so that locked closures cannot have been lengthy in duration without access for occupiers.
3. Reasons given for the gate’s closure include to prevent crime, to prevent vehicles parking on the route, to prevent loose animals from straying onto the highway during nearby firework events and when moving livestock between fields. Whilst three of the objectors recall that Mr Walker sometimes locked the gate to prevent the route becoming a public right of way, the circumstances in which they became aware of this motivation are unclear, and there is minimal substantive evidence to support this reason. Furthermore, it conflicts with the evidence of some users that Mr Walker did not mind public use of the route. Thus, it has not been sufficiently demonstrated that any closures were intended to demonstrate to users that there was not a public right along the route.
4. A considerable number of members of the public state that they have used the route on a regular basis during the relevant period. On the balance of evidence, such use has been “as of right” and without interruption, as required by the 1980 Act. As a result, the use raises a presumption that the Order route has been dedicated as a public footpath. It is a rebuttable presumption and so I must consider if there is sufficient evidence that there was no intention during the statutory period to dedicate the route as a public right of way.

*Lack of intention to dedicate*

1. In order for there to be sufficient evidence that there was no intention to dedicate a way as public, there must be evidence of acts by the landowner during the statutory period which showed the public who used the path that they had no such intention. The test is whether a reasonable user would have understood that the owner was intending to disabuse them of the notion that the way was a public highway.
2. Mr Jewitt stated in oral evidence that Mr Walker had a number of concerns regarding the use of the Order route by other people, chief amongst these being children playing on the track and people accessing cropped land. Mr Jewitt recalled having been present when his uncle told people that the route was not a public right of way and that they should not be there. He recollects that these statements were made to children and to people considered to be “misbehaving” on the Order route.
3. Mr Jewitt’s recollection of Mr Walker’s main concerns accords with the evidence of objectors that Mr Walker “was extremely determined in his policing of the track”, that “Mr Walker…was not concerned about local people going for a walk or exercising their dogs. He was, however, concerned about anyone he regarded as suspicious”, and that “when a few dog walkers and others began to appear, Bill Walker permitted them to walk there without hindrance…but observed their use…He was quite prepared to intervene and exclude people who abused the privilege”. Whilst Ms Kay recalls her brother having witnessed Mr Walker telling walkers on the route that it was not a public right of way, this event has not been demonstrated to have occurred within the statutory period, and furthermore the evidence has not been given first-hand, so that it attracts only minimal weight.
4. Mr Jewitt stated that he had challenged people using the Order route from July 2001, or thereafter. He recalled that he had said that people should not be visiting the land because there was no public access and it was not a public right of way. That such challenges occurred is supported by references to having been verbally challenged on the route within the evidence of several people. One of these recalls that “I was challenged by a man who I took to be the landowner in 2003 who told me the Order route was not a public footpath…at about the same time a sign appeared on the metal gate”.
5. Whilst any dates of such challenges are not generally otherwise provided, witnesses comment elsewhere that the “previous owner…was quite happy for the public to walk the path”, “Bill Walker…did not mind anyone using the path” or “Bill Walker…never minded anybody using the path”. On balance, therefore, Mr Walker’s interventions are likely to have been primarily directed to people who caused him concern that they might cause a hazard on the track or damage property, rather than to people walking along the track who were not causing these concerns. A distinction is consequently evident between witness recollections of Mr Walker’s stance and Mr Jewitt’s, who was clearly understood to have requested a significantly greater proportion of people to leave the track.
6. If Mr Jewitt had challenged people from the date of his ownership of the land in 2001 this may, depending on the circumstances, have shown a lack of intention to dedicate the route during the statutory period. Whilst Mr Jewitt’s evidence of recent years states that he challenged users within the statutory period, the 2003 challenge recalled by one witness is likely to be contemporaneous with the erection of notices by Mr Jewitt which brought the right into question, and Mr Jewitt’s recollection of the date is “July 2001, or thereafter”. The dates when Mr Jewitt challenged use of the route are consequently insufficiently clear for reliance to be placed on those challenges having shown a lack of intention to dedicate the route over the statutory period.
7. Mr Jewitt recalls that a “Private Road no public right of way” notice was attached to a new gate in the 1990s, and that it had been necessary to replace the sign twice due to vandalism. The Council accepts that a “Private Road” notice was present on the gate for at least part of the statutory period, and its presence is recalled by other witnesses. A letter submitted to the inquiry from a resident of Dunnington until 1986 sets out that they had not used the route because the sign had led them to believe that it was private. Whilst user witnesses recall the notice which brought the right into question, they do not generally recall the private road sign.
8. The private road sign consequently did not show the public who used the path that the owner had no intention to dedicate. This is further supported by the contrasting response of the public (in supplying evidence to support the DMMO application) to the 2003 notice erected by Mr Jewitt, indicating that the public understood that notice to bring any right into question. Furthermore, the private road sign is likely have been understood to refer to the level of vehicular rights considered to exist along the track, so that the sign is unlikely to have shown a lack of intention to dedicate, even if it had been noticed by users.
9. It is submitted in opposition that Mr Walker told occupiers of the cottages along the track that he locked the gate in order to prevent the route being claimed as a public right of way. However, this evidence is not clear-cut, as it conflicts with the evidence of three users that Mr Walker did not mind people using the route. Moreover, such a statement was not directed to public users of the route, so that it did not make them aware of any lack of intention to dedicate.
10. Two of the witnesses who completed forms in 2019 stated that the gate had been “locked intermittently” or “locked for a short period when the current owner took over, cannot remember which year”, however it is likely in view of the second statement that these recollections relate to the period of challenges by Mr Jewitt in 2003. The remaining two witnesses from 2019 state that they have never found the gate to be closed.Whilst it is suggested that verges along the Order route were grazed at some point in the 1980s, the circumstances in which this occurred are unclear, so that this does not provide evidence that the gate was locked at those times.
11. I accept that it was likely to be impractical for Mr Walker to keep the gate closed at all times due to the need for vehicular access along the track. Nevertheless, whilst some closures appear to have occurred, I have found above that a significant number of witnesses who provided contemporary evidence at the end of the statutory period had no recollection of having found the gate at Common Road locked. A substantial body of user evidence consequently indicates that the public were unaware of any such actions during the statutory period and hence cannot have understood them to show that the way was not a highway.
12. Furthermore, there were other means by which the landowner could have indicated any lack of intention to dedicate the route as public, as set out in section 31 of the 1980 Act, and the evidence before me does not indicate that these were pursued. Overall, there is insufficient evidence that there was no intention to dedicate the way as public over the statutory period.

**Other Matters**

1. I acknowledge concerns raised regarding the potential for the Order to cause parking issues on the route. Nevertheless, the only issue here is whether a public right of way exists: suitability and amenity must be disregarded in deciding whether to confirm an order. These matters consequently lie outside the criteria set out within the relevant legislation. As a result, I cannot give them weight in reaching my decision.
2. Whilst the Council did not interview two of the objectors, they attended the inquiry and therefore I am satisfied that they had a sufficient opportunity to respond to the evidence in support.

Conclusion

1. The user evidence shows a reasonable intensity of use over the statutory period, which attracts moderate weight, for the reasons given above. Whilst some aspects of the evidence of use are disputed, sufficient contradictory evidence in this regard is not before me. The Order route has been enjoyed by the public as of right and without interruption for a full period of twenty years, and there is insufficient evidence that there was no intention during that period to dedicate it. It is consequently deemed to have been dedicated as a public footpath, subject to the limitation of a field gate at its western end.
2. Thus, the balance of probability is tipped in favour of the confirmation of the Order. Having regard to these and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

*C Beeby*

INSPECTOR

**APPEARANCES**

**In support of the Order**

For the Council:

Mrs Rumfitt Rights of Way Consultant

Who called:

Mrs Cline

Mr Varley

**Objecting to the Order**

Mrs Dobson

Mr Jewitt

**DOCUMENTS**

Paterson v SSEFRA [2010] EWHC 394

Burrows v SSEFRA (QBD) [2004] EWHC 132 (Admin)

Statement of Case of the Objectors

Letter from G Calvert

User evidence table

Order Map - Copy Not To Scale

