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| **Order Decision** |
| Inquiry held on 14 November 2023 |
| **by Claire Tregembo BA(Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 18 December 2023** |

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| **Order Ref: ROW/3313491** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Public Footpath Nos. 30.20/13 & 30.20/14, land near Beacon Road, Seamer Modification Order 2021. |
| * The Order is dated 29 October 2021 and proposes to modify the Definitive Map and Statement for the area by adding two footpaths as shown in the Order plan and described in the Order Schedule. |
| * There was one objection outstanding at the commencement of the inquiry. |
| **Summary of Decision: The Order is not confirmed.** |
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Preliminary Matters

1. I will refer to various points and sections shown on the Order map within my decision. For ease of reference, I have appended a copy of the Order plans to the end of my decision. I will also refer to the western footpath as FP13 (A-B-C-D) and the eastern footpath as FP14 (E-F-G).
2. I carried out an unaccompanied site visit on 13 November 2023. I was able to walk most of FP13 and most of section F-G. A short section of FP13 on either side of point C and north of F had been built over so I was unable to view these sections. I was also only able to walk half of section E-F as the rest was too overgrown.

The Main Issues

1. The Order has been made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of the occurrence of an event specified in Section 53(3)(c)(i). This requires me to consider if, on the balance of probabilities, the evidence shows that a public footpath subsists along the Order routes. This is a higher standard of proof than the reasonably alleged to subsist test to determine if an Order should be made.
2. The evidence submitted in support of the Order relies on the presumption of dedication arising from tests laid out in Section 31 of the Highways Act 1980 (the 1980 Act). This requires me to consider if the Order routes are of such character that their use could not give rise at common law, to the presumption of dedication. If their character does allow the presumption of dedication, I must then consider if the public have used the routes as of right and without interruption, for a period of 20 years immediately prior to its status being brought into question. I must establish the date when the public’s right to use the Order route was brought into question and determine if use by the public occurred for a 20 year period prior to this that is sufficient to raise a presumption of dedication. If this is the case, I must then consider if there is sufficient evidence that there was no intention on the part of the landowner to dedicate public footpaths during this period.
3. Under common law, an inference that a way has been dedicated for public use may be drawn when the actions of the landowners (or lack of action), indicate that they intended a way to be dedicated as a highway and where the public has accepted that dedication.
4. Use by the public can be evidence of the intention to dedicate. For an inference of dedication, this use should be as of right without force, secrecy, or permission. There is no fixed period of use at common law and use may range from a few years to several decades, based on the facts of the case. The more intensive and open the use, the shorter the period required to raise the inference of dedication. The burden of proof lies with the claimant to demonstrate that the evidence is sufficient to indicate an intention of dedication.

Reasons

*Documentary evidence*

1. The Ordnance Survey (OS) 25-inch map dated 1891/1893 shows sections B-C-D and F-G with solid and dashed or double dashed lines. Both routes continue south to Scarborough Road, but FP13 is on a different alignment to section A-B. A route continues north from G to Weydale House, and this section is labelled *F.P.* On the OS 6-inch maps dated 1854 sections A-B-C-D and F-G are shown with double dashed lines. On the OS 6-inch maps of 1895 and 1914 sections C-D and F-G are shown with solid and dashed lines. A route continues north from G to Weydale House, and this section is labelled *F.P.* Only section F to G is shown on the 1911 OS 25-inch and the 1912 OS 6-inch maps. The 1970 1:25000 OS map shows all of FP14 with double dashed lines. The Order routes are not shown on OS maps of various scales between 1920 and 1961.
2. Some OS maps provide evidence of the physical existence of the Order routes. However, since the late 19th Century, OS maps have carried a disclaimer stating that tracks and paths shown provide no evidence of the existence of public rights.
3. Aerial photographs from 2002, 2007, 2008 and 2018 show a worn track along the line of FP13. They also show a grass strip between fields along section F- G and a slight track along section E-F. Although these photographs show the physical existence of the Order routes, it is not possible to tell if they were for public or private use.
4. I consider the OS maps and aerial photographs provide evidence of the physical existence of the Order routes, but they do not indicate if public rights existed.

*Whether the Order routes were of such character that public use could not give rise at common law to any presumption of dedication*

1. If a route is to be dedicated as a public right of way through statutory dedication under Section 31 of the 1980 Act, it must be of such character that could give rise to a presumption of dedication at common law. Necessary characteristics of a highway are that the right must be over a defined route and would normally connect to a public highway or public place at both ends. The courts have recognised that, in certain circumstances, cul-de-sacs in rural areas can be highways. However, there needs to be an identifiable terminus which is normally a place of popular resort or public interest. Examples of places of popular resort in case law include the sea or rivers, a point of natural beauty or a church.
2. Section A-B of FP13 runs between two public highways, Scarborough Road and a footpath recorded on the definitive map and statement (DMS). FP14 and section B-C-D of FP13 are cul-de-sac routes and do not end on another public highway.
3. Both Order routes run along tracks or grass strips which are visible on aerial photographs. At the time of my site visit, the available section of C-D ran along a grass strip alongside the hedge of an arable field. The available section of F-G was along a grass ‘balk’ or raised strip between two arable fields. Section A-B was also a clearly defined grass strip along the edge of a field. The Order routes were identified by path claimants on their user evidence forms (UEF). I consider both Order routes to be along clearly defined ways.
4. Points D and G are partway along tracks running alongside or through fields near electricity pylons. They are not at the top of the hill but partway up it. There are no features on the ground such as field boundaries or trees to identify the endpoints and neither point is directly underneath the pylons. Point D is not at an old field boundary or other feature shown on the OS maps. A field boundary which has been removed is shown on the OS maps at point G. The lack of clear endpoints is supported by the UEFs with very few claimants identifying points D and G as the end of their route. Several other endpoints were given including ones further up or down the hill and some people indicated circular routes or a route heading east to Stoney Haggs Road from FP14. Only a few people mentioned the former field boundary at D. Therefore, I do not consider there to be an identifiable terminus.
5. The Order Making Authority (OMA) suggested the views available from the Order routes and their use by the public would count as special circumstances and the termination points are themselves a place of public interest. Only three people mentioned the views suggesting this is not a popular reason for using the Order routes. Furthermore, better views are available further up the hill to the north of the termination points. I consider the lack of reference to the views indicates the termini are not popular viewing points and therefore, not places of public resort.
6. Most people used the Order routes for dog walking or family walks. These are activities that can be undertaken anywhere. Therefore, I do not consider this use counts as special circumstances and it would not make the terminus points places of public interest or popular resort. Wildlife was also referred to, but I have not been made aware of any nature conservation designations that would make the Order routes a place of popular resort for wildlife. For these reasons, I do not consider points D and G to be places of popular resort or public interest.
7. I have concluded above that there are no identifiable termini to the Order routes and points D and G are not places of popular resort or public interest. Therefore, I do not consider FP14 and section B-C-D of FP13 to be of a character that could give rise at common law to a presumption of dedication. As I have concluded that these sections of the Order routes do not have the characteristics of a highway, I do not have to further consider dedication under Section 31 of the 1980 Act.
8. Section A-B is a clearly defined route between two public highways so has a character that could give rise at common law to a presumption of dedication. Therefore, I need to consider if the public have used this section as of right and without interruption, for a period of 20 years immediately prior to its status being brought into question.

*Bringing into question*

1. To bring into question the right of the public to use a route some actions or events must have occurred that brought home to at least some of those using it that their right to do so was being challenged. These must have been sufficiently overt to bring that challenge to the attention of the public using the route.
2. Although there is clear evidence of notices denying public rights on some parts of the Order routes, none were erected along section A-B. The only sign referred to here was at point A requesting dogs to be kept on a lead.
3. The landowner, who purchased this part of the land in 2002, claimed they and the previous landowner, challenged members of the public using the Order routes. However, none of the path users recalled being challenged when using them and many referred to seeing the landowner or waving to him.
4. A request for a screening option for 260 dwellings was submitted in June 2016 with a public consultation occurring in July 2016. I have not seen the 2016 development plans, so I do not know if section A-B was affected by it. However, shortly after on 1 August 2016, a Definitive Map Modification Order was submitted to the OMA. This would suggest the applicant considered the public’s right to use the Order routes was being brought into question.
5. In the absence of evidence of overt acts bringing the right of the public to use the route into question, Section 31(7a) and (7b) of the 1980 Act provides that a definitive map modification order application (DMMOA) can serve as a challenge to use for the purposes of Section 31(2) of the 1980 Act.
6. Therefore, I consider 2016 to be the date of challenge and the relevant 20 year period of use to be summer 1996 to summer 2016.

*Analysis of use*

1. To satisfy the requirements of Section 31 of the 1980 Act, use must be by those who can be regarded as the public. For use to be as of right it must be without force, secrecy, or permission. Use should be without interruption, and to be effective, any interruption must be by the landowner, or someone acting on their behalf. The interruption should be with the intention of preventing use of the way by the public and not for other purposes such as car parking or building works. I must also be satisfied that there was sufficient use by the public to raise a presumption of dedication.
2. Fourteen people used section A-B between 1964 and 2016 with eight people using it for the whole relevant 20 year period. The others used it for between four and 16 years during the relevant 20 year period.
3. However, at least two people gained access to section A-B from their rear gardens, one person did not use the full length suggesting access from a garden, and one person received permission to use the Order routes in relation to keeping bees. Use from a private property or with permission is not use by the public as of right. If these users are discounted, only ten people used section A-B and only five for the full 20 year period. I consider this to be a low level of use considering the location of the footpath at the edge of the village with a housing estate to the east and the centre of the village to the south.
4. Most people stated they used the Order routes daily or weekly but used both Order routes and did not state how often they used each section. Only one person gave evidence of use of section A-B at the Public Inquiry and their use was with permission. Therefore, it is not possible to determine the amount and frequency of use of section A-B.
5. If the public is to acquire a right by prescription, they need to bring home to the landowner that a right is being asserted against them. Use should be at a level that a reasonable person would be aware that a right of enjoyment is being asserted, so they can resist use if they do not intend to recognise that right. There are two other public footpaths recorded on the DMS running through this part of the field; one commencing from point A heading northwest and the other crossing FP13 east to west at point B. Given the other paths here, I do not consider the amount of use of section A-B to be sufficient to make the landowner aware that additional rights were being asserted over their land.
6. Overall, I consider the level of use of section A-B to be insufficient to raise a presumption of dedication by the public.

*Conclusions on Section 31*

1. I have considered above that FP14 and section B-C-D of FP13 do not end on a public highway and do not have a clearly defined terminus which is a place of public resort or interest. Therefore, these routes are not of a character that could give rise at common law to a presumption of dedication and the test under Section 31 of the 1980 Act is not met.
2. Section A-B of FP13 runs between public highways and has a clearly defined way. I considered above that the date of challenge is 2016 and the relevant 20 year period is 1996 to 2016. I considered the amount of use during the relevant period to be low considering its location. There are also two other public footpaths in this part of the field. Therefore, I do not consider the level of use to be sufficient to raise a presumption of dedication or sufficient to bring to the attention of the landowner that additional rights were being asserted.
3. Therefore, I am not satisfied that there is sufficient evidence to show, on the balance of probabilities, that public rights exist over any part of the Order routes.

Overall Conclusions

1. 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

1. I do not confirm the Order.

Claire Tregembo

INSPECTOR

**APPEARANCES**

**For the Council**

Penny Noakes Principal Definitive Map Officer

Who Called:

Andrew Hunter Definitive Map Officer

**In Support of the Order:**

John Earnshaw Path User

Ian Danby Path User

**In Objection to the Order:**

Richard Sagar Partner, Walkers Morris LLP for Linden Homes and Mr and Mrs Simpson

Who Called:

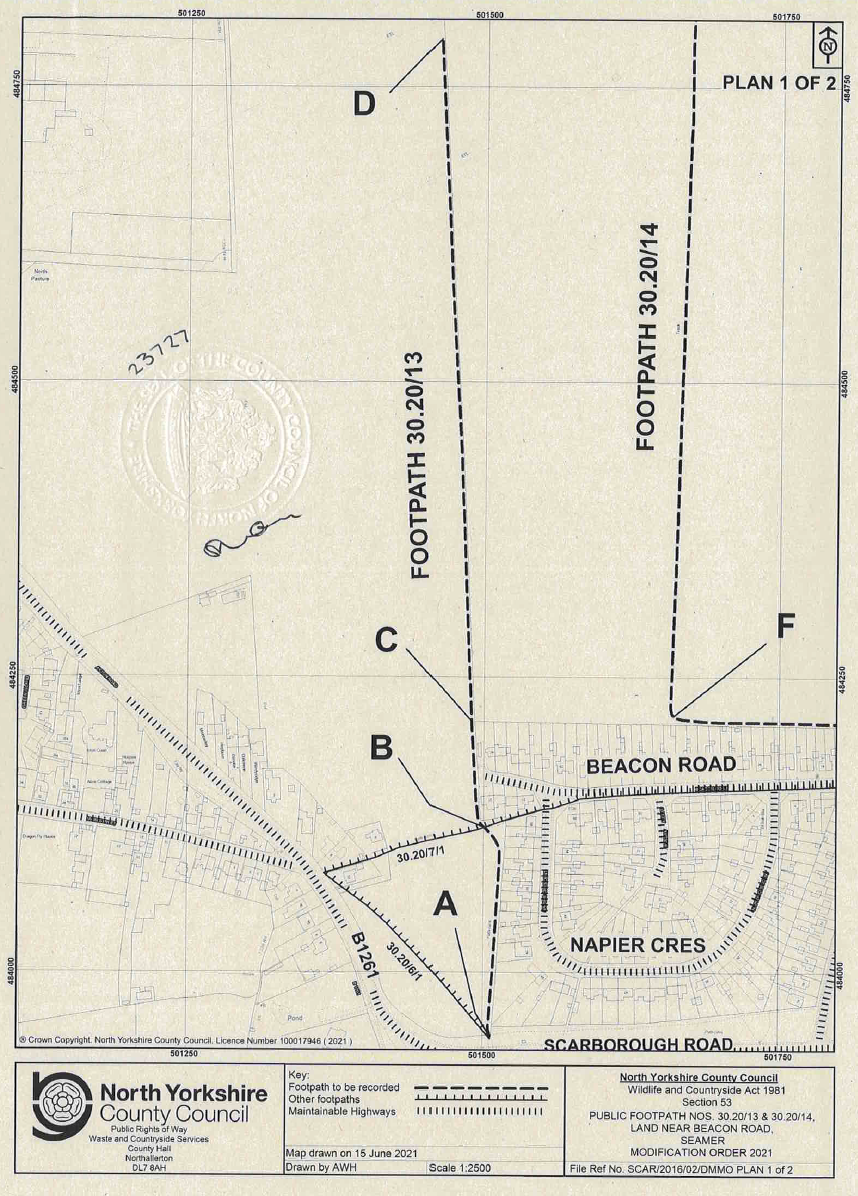
Kate Curtis Senior Director – Environment, Pegasus Group

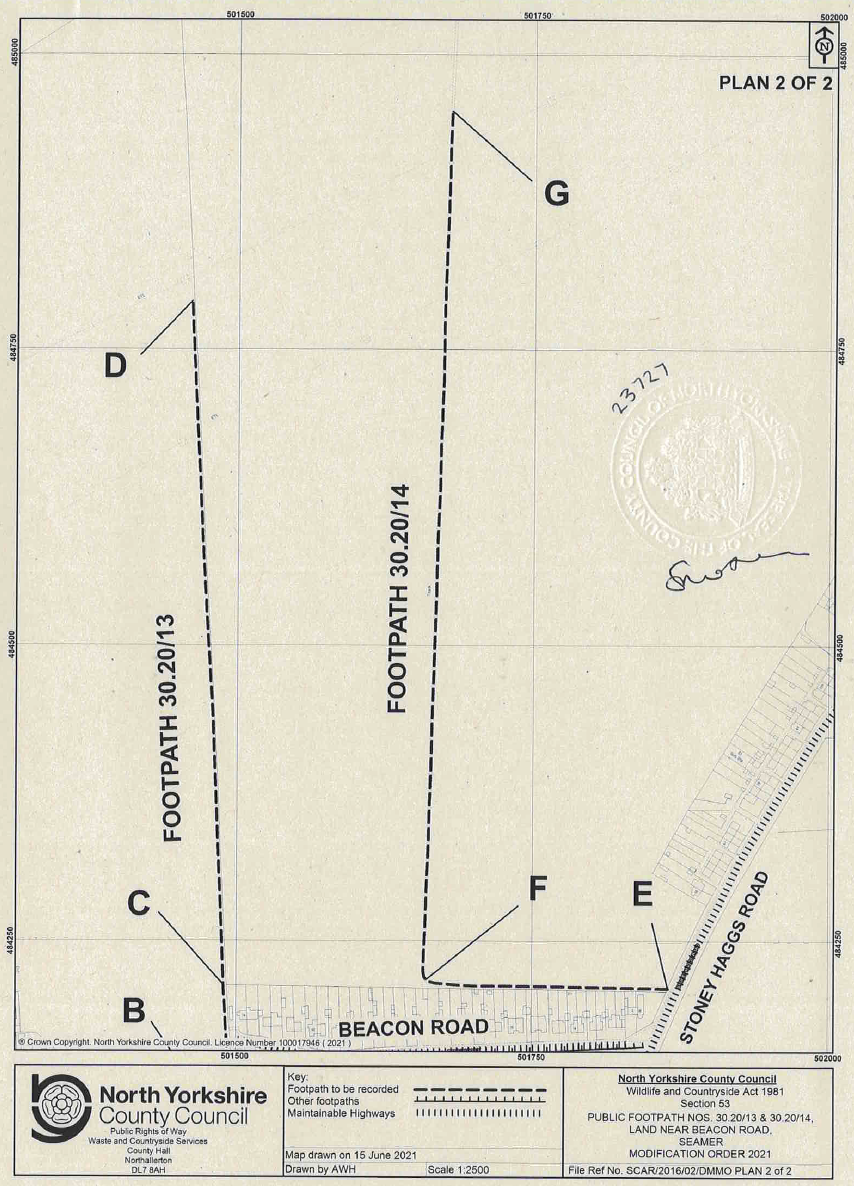
Steven Phillips Director, Mosodi Limited

**DOCUMENTS PRODUCED AT THE INQUIRY**

1. Objectors Opening Statement
2. List of Appearances for the Objectors
3. John Earnshaw’s Photographs of the Order Routes

**Order Plans**

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