



Order Decision

Site visit made on 13 October 2020

by Alan Beckett BA MSc MIPROW

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

Decision date: 19 November 2020

Order Ref: ROW/3232280

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the East Riding of Yorkshire Council (Goodmanham Restricted Byway No. 7 and Market Weighton Restricted Byway No. 12) Definitive Map and Statement Modification Order 2019.
- The Order is dated 14 January 2019 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 8 objections and 3 representations outstanding when the East Riding of Yorkshire Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is proposed for confirmation subject to the modification set out in the Formal Decision.

Procedural Matters

1. This Order was scheduled to be determined by means of a public inquiry that was due to be held on 13 October 2020. Unfortunately, the continued restrictions on public meetings of this nature in response to the Covid-19 pandemic meant that a public inquiry could not be held as planned. In order to progress this matter without delay, all interested parties were invited to consider whether a change of procedure would be acceptable in these circumstances. As a result, it was agreed that the Order would be determined by means of written representations together with an accompanied visit to the site.
2. I am grateful to all concerned for their assistance in making this alternative arrangement during difficult times. I carried out my inspection of the route at issue on Tuesday 13 October 2020 in the company of the representative of the Council, two of the objectors and some of those who support the confirmation of the Order, and have taken account of all the evidence submitted in reaching my decision.
3. Although there were 8 objections outstanding when the Council submitted the Order for confirmation, two of those objections were withdrawn prior to the site visit being undertaken. One of the objections which was withdrawn had been made by Mr Benson, the owner of some of the land over which the claimed Restricted Byway would run. I understand that when the Selby – Driffield railway closed, the land which the trackbed occupied was offered for sale to adjacent landowners with some parcels in Goodmanham being purchased. One such parcel is that which is owned by Mr Benson.

4. With one exception, the remaining objections sought to raise matters such as anti-social behaviour, litter and vandalism which it is said had occurred at properties abutting or near to the former railway line and which were attributed to trespass on to, and mis-use or abuse of, the former railway.
5. Whilst I understand and can appreciate the views of those residents who live near the former railway, the matters which these objectors seek to raise are not ones which I can take into account in reaching my decision. I am required to consider whether the available evidence demonstrates that a public right of way has come into being; matters such as the desirability of such a right of way or whether the recording of that right of way would lead to or result in anti-social behaviour are not matters which can be considered under the provisions of section 53 of the 1981 Act.

The Main Issues

6. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in Section 53(3)(c)(i).
7. Therefore, the main issue is whether the Council have discovered evidence which, when considered with all other evidence available, is sufficient to show that a right of way which is not shown in the definitive map and statement subsists over land in the area to which the map relates such that the definitive map and statement require modification.

Legal Framework

8. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be *reasonably alleged* to subsist for an Order to be made, the standard of proof is higher for the Order to be confirmed. At this stage, evidence is required which demonstrates, on a balance of probabilities, that a right of way subsists.
9. Dedication of a public right of way through a long period of use can be deemed to have occurred under Section 31 of the Highways Act 1980 ('the 1980 Act'). Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that during that period the landowner had no intention to dedicate it. Use 'as of right' is use which has been without force, secrecy or permission.
10. 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, either by a notice or otherwise.
11. Should the tests for deemed dedication under section 31 not be met, then it may be appropriate to consider the dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few months to several decades. There is no particular date from which use must be calculated.

Reasons

Background

12. The Order route follows the line of the former Selby – Driffield railway line which ceased to operate in or around 1965. At its south-western end, the Order route commences at a junction with Market Weighton bridleway 14 (part of the Hudson Way which runs over the former trackbed of the Market – Weighton to Beverley branch of the railway) and runs in a generally north-easterly direction for approximately 400 metres to connect with Goodmanham footpath 1.

The date of which the right of the public to use the footpath was brought into question

13. The application to add a public right of way to the Definitive Map and Statement was submitted to the Council in October 2017 in response to the erection of close board fences at the boundaries of Mr Benson's property. In addition to the fences, Mr Benson also erected prohibitory notices on the fences denying the existence of a public right of way. The fences prevented access along the former railway line; I saw from my site visit that the fences have remained in position.
14. The majority of user evidence forms ('UEFs') which were submitted in support of the application state that the fences and signs had been erected in August 2017 with some noting that the fences had first been encountered in September or October of that year. The time lag between these two groups of respondents is likely to be explained by the relative frequency of use by the individuals who completed the UEFs.
15. As part of its investigation of the application, representatives of the Council had conducted a number of site visits and had noted that the signs had remained in situ until at least April 2018 when it had been noted that the position of the signs had been changed to the top of the fence. Although the signs were not present on the fences at the time of my site visit, similar prohibitive notices were present in the trees on Mr Benson's property immediately beyond the fence to hinder attempts to vandalise them.
16. Photographs submitted by the local representative of the Ramblers Association taken in August 2017 show Mr Benson's fences and notices in place. These photographs also show that a length of rope had been placed across the track between the parapets of the bridge over Goodmanham Road together with a similarly worded sign to those which were attached to Mr Benson's fences. These photographs also show the centre of the former railway trackbed to be clear of vegetation with what appears to be a narrow well-worn path running along it.
17. The Council's site visits in April 2018 and February 2019 revealed that the Order route had been obstructed by Mr Large at a point which coincided with his ownership of part of the former railway. I understand that Mr Large's ownership of the former railway extends to the middle of the trackbed and does not include the western half of the trackbed; ownership of the western half of the trackbed which abuts Mr Large's property lies with a third party whom the Council were unable to identify. Notwithstanding this, the fence erected and the felled trees which replaced the earlier barrier extended across

the full width of the trackbed and further prevented passage along the former railway.

18. No evidence has been presented to suggest that use of the former railway line had been prevented or challenged prior to August 2017. Although it has been claimed that a fence had been erected at point A to prevent access along the Driffield branch of the railway after the line had ceased to be operational, the recollections of users was that this had been erected to prevent access by motor vehicles and that pedestrian access along the line had always been possible.
19. The evidence before me is that the fences and notices erected by Mr Benson in August 2017 effectively prevented public access along the former railway line and triggered the application to record the route as a public right of way. The fence erected by Mr Large shortly afterwards placed an additional restriction on use of the route by the public. I conclude that the fences and prohibitory notices erected in August 2017 was the event which brought public use of the Order route into question. Consequently, the relevant 20-year period for the purposes of section 31 (2) of the 1980 Act is August 1997 to August 2017.

Whether the claimed right of way was used by the public for a period of not less than 20 years ending on the date the public's right to do so was brought into question

20. The application submitted to the Council contended that the route at issue was a public footpath. The application was accompanied by 50 UEFs and one letter of support.
21. Few of the UEFs were accompanied by a map to show the route to which the forms relate. However, the written descriptions of the route refer to the obstructions erected across it in 2017; as the route leading from the Hudson Way to Goodmanham; as being used as part of a walk to Wateringdike Lane and the Wolds Way; or as being used as part of a walk to Kipling Coats Race Course and Enthorpe Cutting. Although there was little or no graphic representation of the route being described, I am satisfied that the evidence contained within the UEFs relates to the Order route as it commences at a junction with the Hudson Way, and that by continuing north-eastwards along the former railway line from Point C, it is possible to connect with Wateringdike Lane and Enthorpe Cutting at Kipling Coates Race Course.
22. Those individuals who completed the UEFs claimed to have used the Order route on foot, on horseback and on a pedal cycle. Of these 50 respondents, 30 claimed to have used the Order route throughout the 20-year period prior to August 2017; with the remaining respondents claiming to have used the Order route for part of that period. The respondents were primarily residents of Goodmanham or Market Weighton, with evidence of use also being provided by individuals from Holme on Spalding Moor, Kirkella and former residents currently living in Durham and London.
23. Use of the Order route is claimed to have commenced in or around 1972 with 8 of the respondents claiming to have used the route since the 1970s; 9 having commenced their use in the 1980s; 19 having commenced use in the 1990s; 9 commenced use in the 2000s; and with 5 having only used the route during the 2010s.

24. The Selby – Drifffield railway closed in 1965 and in common with most of the railways closed at that time, the track infrastructure would have been lifted shortly after the railway ceased to operate. Whilst use of the trackbed by the public may have been possible once the railway infrastructure had been removed, no evidence has been submitted of use by the public during the late 1960s. However, the available evidence shows that the former railway line has been in use for almost 50 years prior to the fences being erected in 2017.
25. All 50 respondents describe use of the order route on foot. The frequency of pedestrian use ranged from daily (12 respondents), several times per week (11 respondents), weekly (8 respondents), fortnightly or monthly (7 respondents) with the remainder reporting use a few times per year; one respondent failed to specify a frequency of use.
26. Ten users claim to have cycled along the Order route during the relevant 20-year period under consideration. Of these, only 1 used the route daily with that use ceasing in 2000; 1 used the route 3 times per week, 2 used the route on a weekly basis (with one ceasing use in 1999). Of the remaining six respondents, 3 claimed use around once per month, with three cycling on an infrequent basis. One respondent claimed to have ridden the Order route on horseback during the period 1979 to 1988; there is no direct evidence of use of the route by the public on horseback during the relevant 20-year period under consideration.
27. Section 31 1A (b) of the 1980 Act (as amended by section 68 of the Natural Environment and Rural Communities Act 2006) provides that use by pedal cycles can be taken as contributing to the establishment of a Restricted Byway when considering the requirements for deemed dedication under the 1980 Act. Whereas the application made to the Council was for the addition of a public footpath, the Council concluded that the evidence of use set out in the UEFs was such that a reasonable allegation could be made as to the existence of a Restricted Byway.
28. Whilst there is clearly evidence of some use of the route by the public with pedal cycles, daily use with a pedal cycle ceased in 2000, with use 3 times a week or weekly use being limited to two people. The majority of users appear to have cycled the route on a sporadic or intermittent basis. In my view, this level of use is of insufficient quality and quantity to demonstrate the assertion of a public right and I am not persuaded that the evidence of use by pedal cycles set out in the UEFs is sufficient to raise a presumption of dedication as a Restricted Byway.
29. One objection to the Order was made on the grounds that the evidence of use of the route by pedestrians and cyclists may give rise to a public bridleway as opposed to a Restricted Byway. The objector submitted that the finding of the Court of Appeal in *Whitworth v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA Civ 1468 ('*Whitworth*') demonstrated that pedal cycle use may give rise to a bridleway as that designation was of a lesser burden upon the landowner.
30. A principle established by the *Whitworth* case was that where the evidence (both documentary and user) pointed to a long-established, but unrecorded, bridleway subsequently being used by the public with pedal cycles, that later use should be attributed to the bridleway status that was established first as

that status would be the least burdensome interference with the landowner's property rights.

31. Whilst the principle established by *Whitworth* is noted, there is no direct evidence of use of the Order route by the public on horseback and no evidence that in the years which followed the closure of the Selby – Driffield railway to suggest that the Order route has become established as a bridleway. Consequently, I am not persuaded that the limited bicycle use adduced in this case can be ascribed to a bridleway or is sufficient to establish that a public bridleway could be deemed to have been dedicated.
32. The pedestrian use described in the UEFs was primarily for recreational purposes although some respondents described their use of the Order route as part of a commute between Market Weighton and Goodmanham. Those who completed UEFs also recalled seeing others walking the Order route. The picture painted by the evidence of use submitted in support of the application is one of frequent and consistent use of the Order route over a prolonged period of time. Until the erection of the fences by Mr Benson in 2017, none of those using the Order route had been challenged in their use; a number recalled that previous owners of the land had engaged in conversation with users and had not indicated that such use was not permitted.
33. The photographic evidence submitted shows the existence of a wear line in the surface vegetation of the former railway trackbed. The worn line suggests the passage of many pairs of feet over a prolonged period, and whilst the photographs show that the width of the worn line varies from place to place, these photographs indicate on balance that use had occurred over the whole length of the route at issue prior to the fences being erected in 2017.
34. This frequent use of the former railway line by the public is reflected in many of the written objections made to the Order. The objectors draw attention to anti-social behaviour which is said to have occurred as a result of the public accessing the railway line; whilst any anti-social behaviour experienced by residents living adjacent to the former railway is regrettable and I can understand their concerns regarding such activities and the impact they may have, the matters raised by the objectors are indicative that there is and has been general public access over the former railway line for a considerable period of time.

Whether use was as of right and without interruption

35. Whereas some reference is made by two users of the existence of a fence at the junction with the Hudson Way to prevent access along the railway by motor vehicles, neither user suggests that pedestrian access was prevented and they note that this fence had disappeared by the 1990s. I saw at my site visit that there was the remnant of a post and rail fence which may have at one time extended across the junction of the railway lines to separate the Hudson Way from the Driffield branch line. The evidence before me however is that during the relevant 20-year period, this fence did not prevent public access on foot to the former railway line from point A. There is no evidence before me that use of the Order route had been interrupted during the relevant 20-year period.
36. The entrance and exit points at A and C have at all material times been open and users have not had to break down or climb over fences or gates in order to access the path. Use has also been conducted in full view of anyone who may

have been able to observe such use. None of the witnesses recalled having been challenged when using the path, and there is no evidence of prohibitory notices having been erected along it prior to those erected by Mr Benson and Mr Large. A number of users recall speaking to previous owners of the land without any indication being given that users should not be on the land or that such use was with the permission of the owner. I conclude that the use by the public described above was use as of right.

Conclusions regarding the evidence of use

37. There is a substantial body of evidence which demonstrates uninterrupted public use on foot of the Order route as of right throughout the 20-year period under consideration. I conclude that the evidence adduced is sufficient to raise a presumption that the Order route has been dedicated as a public footpath.

Whether there is sufficient evidence that there was during the 20-year period under consideration no intention to dedicate the claimed right of way

38. For a lack of intention to dedicate to be demonstrated a landowner is required to have taken action to make the public aware that he, she or they had no intention of dedicating a public right of way. 'Intention' in this context is an objective test of what a reasonable user of the path would have understood the landowner's intention to be; that is, whether a reasonable user would have understood that the owner intended to disabuse the user of the notion that the way was a public highway.
39. The most common way in which the landowner's intentions could have been brought to public attention would have been by the erection on the path of a notice or notices denying the existence of a right of way, or to place a suitably worded notice in the local newspaper. Whilst there is ample evidence of the erection of fences and notices by Mr Benson in 2017 and similar evidence that Mr Large erected a fence and latterly a brash barrier over his section of the railway at the same date or shortly afterwards, there is no evidence that any such action was taken by the relevant landowners at any point prior to August 2017.
40. The objectors refer to anti-social activity taking place on various parts of the Order route and that people have been told that the land crossed by the order route is private. The evidence submitted by the objectors all post-dates August 2017; no evidence has been submitted which is contemporaneous with the 20-year period under consideration which shows that overt attempts were made to prevent public use of the former railway or to inform users during that period that the way was not public.
41. There is no evidence before me that prohibitory notices were erected during the relevant 20-year period or that the owner or owners during that period (whoever he, she or they may have been) took any overt action to disabuse the public of the belief that the way had been dedicated to public use.
42. I conclude that there is insufficient evidence of actions having been taken by the landowners to rebut the presumption of dedication raised by the user evidence.

Width

43. The Order sets out the width of the route as being 1.8 metres. This width reflects the space available to users and which has remained clear of both planted and self-sown trees and vegetation during the relevant 20-year period. Whilst a public footpath of 1.8 metres may be considered somewhat narrow, the width to be recorded reflects the width which has been available for the public to use between the encroaching trees growing in the trackbed of the former railway.

Other matters

44. The owner of the land crossed by Market Weighton footpath 3 supported the recording of the former railway as a public right of way but wished to see the removal of footpath 3 because of concerns over biosecurity arising from dog walkers making use of the footpath. If the landowner wishes to divert or extinguish footpath 3, this is a matter which can be taken up with the Council under the relevant provisions of the 1980 Act, but it is not a matter for my consideration as my remit under the 1981 Act only extends to the determination of whether a public right of way subsists over the Order route.
45. One objector submitted that the effect of the evidence of pedestrian and cycle use would be that the Order route had become a cycle track through long user. Irrespective of the conclusions I have reached as to the evidence of cycle use, I would not, in any event, be persuaded by the objector's submission on this point. Whilst a cycle track is a highway, it is a particular form of highway which can be created by a Highway Authority in or at the side of a made up carriageway maintainable at public expense (section 65 of the 1980 Act) or which can be created over an existing footpath (section 3 of the Cycle Tracks Act 1984) with the resulting route being maintainable at public expense.
46. A cycle track is therefore an administrative creation under legislation other than section 31 of the 1980 Act or section 53 of the 1981 Act which are the provisions relevant to this Order.

Conclusions on statutory dedication

47. I conclude that the evidence of use of the Order route on foot by the public as of right and without interruption throughout the period between August 1997 and August 2017 is sufficient to raise a presumption of dedication of the route as a public footpath.
48. There is no evidence to suggest that prohibitive notices had been erected on the Order route at any time during the relevant period and there is no evidence of challenges to use having been made, or that the owner of the land at the time brought to the attention of the public using the path that there was no intention to dedicate.
49. For these reasons I consider that as the landowner did not demonstrate a lack of intention to dedicate a right of way, the presumption raised by the user evidence has not been rebutted.
50. It follows that I am satisfied that the evidence before me is sufficient to show that, on a balance of probabilities, a public footpath subsists over the Order route.

51. Given my finding that dedication of a public footpath can be deemed to have taken place under section 31 of the 1980 Act, it is unnecessary for me to consider whether dedication at common law could be inferred.

Overall Conclusion

52. Having regard to these and all other matters raised in the written representations I conclude that the Order should be proposed for confirmation with modifications.

Formal Decision

53. I propose to confirm the Order subject to the following modifications:

throughout the Order delete 'Restricted Byway' and insert 'Public Footpath'.

54. Since the Order as proposed to be confirmed would show as a highway of one description a way which is shown in the Order as a highway of another description, I am required by virtue of Paragraph 8 (2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Alan Beckett

Inspector