

THE EAST RIDING OF YORKSHIRE COUNCIL

STATEMENT OF CASE

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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

PINs Ref: ROW/3232280

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BACKGROUND INFORMATION

1. On 31st October 2017 Mr Barrie Young (“the applicant”) of Grove Farm, Goodmanham, YO43 3HX submitted an application (Document A) to the East Riding of Yorkshire Council (“the Council”) under section 53(5) of the Wildlife and Countryside Act 1981 (“WCA”) to modify The Humberside County Council Borough of East Yorkshire Definitive Map and Statement of Public Rights of Way (‘DMS’) (Documents C & D). The application claimed a footpath along a section of the decommissioned railway line from the junction with the Hudson Way to Goodmanham Footpath No. 1, a feeder path to the national trail The Yorkshire Wolds Way (as shown by the blue line on the application map in Document A and Photographs 1-2 in Document O) (“the claimed route”).
2. The application was duly made under the requirements of Schedule 14 of the WCA and based on evidence of use; supporting it were fifty User Evidence Forms (“UEF’s”) and one letter of support which testify to use of the claimed route on foot, horse and pedal cycle between 1972 and 2017 (Document B). The application has been considered under section 31 Highways Act 1980, deemed dedication of a way after uninterrupted use of twenty years.
3. In 2018, the East Riding of Yorkshire Council started an investigation into all the available evidence relating to the claimed route and consulted all known landowners, Goodmanham Parish Council, Market Weighton Town Council, Wolds Weighton Ward Members and the applicant (Documents E and F). The Council also consulted with all interested user groups and they, along with all other consultees, were requested to submit any evidence that they were aware of relating to the claimed route.
4. Further to this the Council interviewed a small selection of users to assist in determining the status of the route (Document G). Those selected for interview used the claimed route for the full 20 years, with 3 stating they had used it on foot and 3 on bicycle. With 3 users from Goodmanham and 3 users from Market Weighton, the interviews provided the council with a balanced interpretation of use of the claimed route. The available evidence established that two continuous restricted byways could be reasonably alleged to subsist over the claimed route. The Council therefore made the decision to reject the application to record a footpath and instead to make a Definitive Map and Statement Modification

Order ('DMMO') to record two restricted byways on the DMS (collectively referred to as "the Order route").

5. Authority to make the DMMO was granted on 9th October 2018 (Document H) and the Notice of Determination was issued on 22nd November 2018 (Document I), which the applicant did not appeal against. 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") was sealed on 14th January 2019 (Document J) and advertised in accordance with Schedule 15 of the WCA on 24th January 2019 (Documents K & L).

6. The public notice period ended on 11th March 2019 during which the Order elicited eight duly made objections (Document M) and three letters of support (Document N). Following submission to the Secretary of State, Goodmanham Parish Council withdrew their objection. As of date there are seven outstanding objections to the Order. The main grounds for objection that the Council consider relevant are: reliability of the user evidence, one of the objectors stating that the use was by force, that landowners alerted users that the land was private and the objection to the status of the route. However, the Council will comment on each of the remaining objections in turn, in paragraphs 33 to 35 below.

DESCRIPTION OF THE ROUTE

7. The Order route lies to the west of the village of Goodmanham, commencing at a point to the north east of the town of Market Weighton and runs north-easterly along the disused Selby – Driffield railway line to Goodmanham. The railway was decommissioned following its last use in 1965. Once the track was lifted, the British Railway Board sold several sections of land to the adjoining landowners from the late 1960's onwards.
8. Market Weighton Restricted Byway No. 12 commences on Market Weighton Bridleway No. 14 (part of The Yorkshire Wolds Way) spanning the bridges over Market Weighton Footpath No. 3 and Goodmanham Road to the parish boundary where it meets Goodmanham Restricted Byway No. 7.
9. Goodmanham Restricted Byway No. 7 commences at the parish boundary on Market Weighton Restricted Byway No. 12 and follows the decommissioned railway line north-easterly to join Goodmanham Footpath No. 1 which is a feeder path to The Yorkshire Wolds Way.

STATUTORY PROVISIONS

10. The Order was made under section 53(2)(b) of the WCA in consequence of an event specified in section 53(3)(c)(i) of the WCA, namely, the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:

(i) *that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which right subsists is a public path a **restricted byway** or, subject to section 54A, a byway open to all traffic*

11. The relevant statutory provision, in relation to the dedication of a public right of way, is found in section 31 of the Highways Act 1980. This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

12. Evidence is usually presented through the completion of evidence questionnaires by users of the route. It is possible for a public right of way to come into existence through long usage if the people using the route have used it ‘as of right’ and ‘without interruption’:

- **‘as of right’** - without force i.e. not breaking into the land to access the route
 - without secrecy i.e. not by stealth or knowing the landowner to be absent
 - without permission i.e. not having the landowners permission
- **‘without interruption’** - using the route for a period of 20 years.

13. A right of way can also come into existence in less than 20 years under common law if it can be proven that the landowner dedicated the route and the public accepted it.

14. Under section 31 of the Highways Act 1980 if users can show usage of 20 years or more it is presumed that a right of way has come into existence through dedication. However, if a

landowner can show he has taken steps to prevent a right of way coming into existence then no right will be dedicated. These steps must make the public aware that the landowner has no intention to dedicate the way for public use. For example, by placing notices on site stating that the route is 'not a public right of way' or use 'is by permission', gates can be erected and locked or by verbally telling users that it is not a public right of way.

15. A landowner may also deposit, with the Council, a landowner's statement and map under section 31(6) of the Highways Act 1980 which protects their land against any claims from the point of the Council receiving it. This deposit must be followed up every 20 years for continued protection. However, such deposit will not affect any rights prior to the deposit. Currently none of the land that is covered by the Order route has a deposit protecting it against claims.
16. It was established in the case of *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (1994), and clarified in *R v Secretary of State for Wales ex parte Emery* (1998), that there are two tests involved at the Schedule 14 stage:

Test A: Does a right of way subsist? This requires clear evidence in favour of the appellant and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the Council should find that a public right of way has been reasonably alleged to subsist.

At the pre-Order stage no incontrovertible evidence had been submitted. Accordingly, Test B, as outlined above, was met and it was reasonable to allege that a restricted byway subsists along the decommissioned railway line. This was sufficient to justify making the Order. At the Schedule 15 stage, however, the confirming authority, in this case the Secretary of State determining an opposed order, must be satisfied on the balance of probabilities that the right of way subsists.

CASE LAW

R v Secretary of State for the Environment ex parte Bagshaw and Norton (1994) – Paragraph 16

R v Secretary of State for Wales ex parte Emery (1998) – Paragraph 16

Whitworth v Secretary of State for Environment, Food and Rural Affairs (2010) – Paragraph 27

USER EVIDENCE

Brought into Question

17. The event that brought the public right to use the land into question was the erection of two fences by Mr Benson of Torr Hus, Goodmanham in August 2017, which blocked the Order route and displayed notices stating the land was private property and denied the existence of a public right of way (as shown in Document O – Point E and F on PER/DM/GOOD/S14/110/Drg01 (“Drg01”) and photographs 3-5). Most users confirm the only time the Order route was blocked was in 2017, with the majority stating August as the month the signs and fences appeared. Some users, depending on frequency of use, state they did not come across the fences until September/October 2017. Therefore the relevant twenty year period of continuous use considered for the purposes of this application is August 1997 to August 2017. From site visits undertaken by the Council, it can be confirmed that the original signs were in place until at least April 2018. After this date there appeared to be a new sign in a higher position on the existing fence in February 2019 (Document O – photographs 6 and 7). The Council concluded that the original signs may have been vandalised or removed. Further obstructions were discovered on site visits in April 2018 and February 2019 near to where the Order route crosses the parish boundary, these included a low fence with signs and several felled trees (Document O – Point D on Drg01 and photographs 8-10).

Public Use

18. The Council have analysed the UEF’s and produced a tabulated summary (Document B). All of the UEF’s provide evidence of public use with the majority claiming to have used the entire length of the Order route. Thirty users claimed to use the Order route

throughout the full relevant period prior to 2017; a further twenty people claimed use for parts of that period. It is not necessary that each claimant has themselves used the Order route for all of the twenty year period; it is their collective use during that period which is relevant. The UEF's have been submitted by a number of local residents living in the surrounding area. It is not considered that this precludes the evidence as being representative of the public at large. Some of the users are clearly related to one another, living at the same address; which has resulted in some duplication. However, this does not diminish the value of each individual contribution which have been signed separately. The letter of support will not be included as user evidence, as it is not in the form of a completed questionnaire.

19. The Selby to Drifffield Railway closed in 1965 and although there is no recorded date it is reasonable to assume that, as with a lot of the lines being closed at that time, the track was lifted shortly after closure and sold for scrap. Therefore, the Order route could not have been used by pedestrians or cyclists (or any other user) until 1966 or 1967. The earliest claimed use of the Order route was by one user in 1972 with a further seven in the 1970's; nine in the 1980's, nineteen in the 1990's, nine in the 2000's and 5 in the 2010's, demonstrating long standing use of the Order route by the public.
20. All fifty used the Order route on foot; twelve also used the route on pedal cycle (ten within the relevant period) and one on horseback. Within the relevant period of those which used the Order route on foot, twelve used the route daily, eleven used the route several times a week, eight used the route weekly, seven used the route fortnightly or monthly and a further eleven used the route yearly or a few times a year. Only one respondent did not answer with a frequency of use. The use on pedal cycle spanned the whole period between 1972 and 2017 with ten of the users being within the relevant period: one used the Order route daily then monthly until 2000; one used the route three times a week, two weekly (one of these until 1999), three monthly and a further three used the route occasionally/infrequently. The use by horseback was not within the relevant period but use was daily between 1979 until 1988.
21. There is a consistent view amongst users that the public status of the Order route is a footpath with twenty-eight claiming a footpath on the UEF's. Nineteen people did not specify the claimed use, two people claimed footpath or bridleway with only one person

claiming for footpath, bridleway or restricted byway. The nature of use is primarily recreational for exercise, dog walking, and also serving as an off road route between Market Weighton and Goodmanham. Forty nine users recalled seeing other people walking the Order route, eighteen recalled seeing cyclists and nine recalled seeing horse riders. The use described is consistent with the existence of a public right of way along the Order route.

22. The reliability of the user evidence was questioned by Mr Benson as well as the sudden willingness of users coming forward when they, as landowners, have seen only a handful of people walking the route. Within the first few months of the Order route being blocked the Council received queries from twenty different parties asking about the status of the way including contact from: Market Weighton Town Council, Goodmanham Parish Council, a Ward Member, and several individuals. Half of these were within the first week or two, it appeared to the Council that there was a lot of public interest in the Order route which is reflected in the quantity of user evidence that was collated by the applicant.

Use As Of Right

23. The evidence of use between 1997 and 2017 does not mention any challenge to the use of the way nor that users sought permission to walk, ride, and cycle or had a private right along the Order route. Twelve people mention speaking with various landowners over the years, past and present, and they were never turned back until August 2017. Use of the Order route by the public was clearly with the landowners' knowledge. Two users mention in their user evidence forms that they were encouraged to use the Order route by previous landowners. The fact that people knew one or two of the landowners does not mean that they used the Order route by permission. There is also no evidence that use was by force or secrecy. Two users mention in the past there being a fence at the southern end at the junction with the Hudson Way to prevent use by MPV's but one user mentions it being a partial fence and the other said one section of the fence was low to allow access for pedestrians. Both users refer to it only being there before the relevant period and one said the fence disappeared in the early 1990's.

Lack of Intention to Dedicate

24. Mr Benson informed the Council that Mr Large repaired a fence at Point A on the Order route between 2 and 5 years ago; the Council have seen no evidence to support this and none of the users mention the Order route being blocked at any point before the bringing into question date in August 2017. The only mention of a section of fencing at Point A (as mentioned above in paragraph 23) is from the 1980's. The dates mentioned by Mr Benson are imprecise and as users make no mention of the blockage it could be assumed that Mr Large repaired the fence after the bringing into question date. It did not amount to a challenge to public use by the landowner as Mr Large does not own the land at Point A on the Order route, therefore any overt act by Mr Large on this land cannot demonstrate a lack of intention to dedicate on behalf of the proprietor.
25. Objectors Mr Large and Ms Smith state that they were constantly telling people that the land was private but to the Council's knowledge much of this conflict occurred after 2017 and there was no mention of any signs to alert users that the land was private before 2017. A number of the challenges made were to people behaving anti-socially but these do not represent a challenge to the public at large. The Council does not consider that any of the above shows sufficient overt steps were taken during the period of 1997-2017 to show that the landowner did not intend to dedicate the rights of way.

Status

26. The application claimed for the addition of a public footpath, however the use provided is not consonant in quality to the nature of the right which was being claimed. It is recognised that a number of users stated that they had seen horses being ridden or had seen hoof prints on the Order route, however, there is no user evidence within the relevant period to support this. Taking the user evidence at face value there is a much higher volume and frequency of use by the public primarily on foot and pedal cycle. The pedal cycle use is sufficient to alert the landowners that public vehicular rights were being asserted and for the landowners to have an opportunity to resist the use and is of the kind envisaged by section 48(4) of the Countryside and Rights of Way Act 2000.

27. Section 68 of the Natural Environment and Rural Communities Act 2006 (‘the NERC Act’) amended section 31 of the Highways Act 1980 so that the use of non-mechanically propelled vehicles, such as pedal cycles, on a route with no recorded status can give rise to the presumption of dedication of a restricted byway. The case of *Whitworth v Secretary of State for Environment, Food and Rural Affairs* (2010) (‘Whitworth’) at paragraph 42 of the decision holds that it is appropriate when considering claims under section 31 of the Highways Act 1980 to infer the form of dedication least burdensome to the landowner. This decision arose from the fact that since the coming into force of section 30(1) of the Countryside Act 1968, cyclists can lawfully use bridleways, providing they give way to pedestrians and persons on horseback. Regular use by both horse riders and cyclists is therefore consistent with the dedication of a bridleway or a restricted byway. It is necessary to depend on the extent of the user evidence and balance their evidential value.
28. This case differs to *Whitworth* in that section 30(4) of the Countryside Act 1968 states: “*Subsection (1) above shall not affect any definition of ‘bridleway’ in this or any other Act*”. Accordingly public use predominantly by pedal cycle, where there is insufficient equestrian use, cannot give rise to a deemed dedication of a bridleway as defined in section 329(1) of the Highways Act 1980 and section 66(1) of the Wildlife and Countryside Act 1981 but can give rise to the dedication of a restricted byway as defined in section 48(4) of the Countryside and Rights of Way Act 2000, which horse riders also have a lawful right to use. There is insufficient evidence of use on horseback during the relevant period and the claimed route should therefore be recorded as a restricted byway.
29. Following the investigation into the UEF’s the Council conducted a small number of interviews (Document G) to test the quality of the evidence provided. The interviews also gave officers the opportunity to test if the amount of cycle use was conducive to the dedication of a restricted byway. The application (Document A) had with it one plan completed by the applicant, the nature of the Order route means users are very unlikely to have wandered but the Council requested those interviewed to mark on a map the route used and the approximate location of the fences erected to substantiate the evidence.
30. From the interviews all users sometimes travelled further than the end of the Order route at Point C, with five of the six users travelling as far as Enthorpe (which is approximately 4km further along the line in a north-easterly direction). Five of the six used the Order route on a bicycle, two of these only cycled the Order route before the relevant period.

Three of the six still use the Order route on a bicycle but less frequently than their use on foot. All of the users interviewed recall either seeing cyclists on the Order route or seeing cycle track marks in the mud. Following these interviews the Council came to the conclusion that the amount of cycle use was sufficient to give rise to restricted byway rights.

31. The objection from Goodmanham Parish Council, which has since been withdrawn, related to the status of the route. The parish council did not dispute the existence of the Order route but only agreed to it being recorded as a public footpath on the DMS. Although the claim was for a footpath, the user evidence described in paragraphs 18-30 details how the Council came to the decision that the cycle use is sufficient to raise the presumption that the landowners dedicated the route as a restricted byway. The route would be a cul-de-sac restricted byway as it joins a bridleway at Point A and a footpath at Point C, however, it appears the route in use on the ground spans a much greater distance along the decommissioned railway line than the Order route claimed. Some users have stated that they used a route as far as Enthorpe. There is certainly use that can be seen as far as Wateringdike Lane (Yorkshire Wolds Way), some 315 metres in a north-easterly direction (Document O – Point G on Drg01 and photograph 11). There is a possibility that if the Order is successful a further claim could be made, therefore, the Order route may not be a cul-de-sac for cyclists and horse riders in the future.

Width

32. There is nothing within the UEF's to suggest that use of the Order route has been in conflict until 2017. The UEF's indicate use on pedal cycle and foot has occurred for many decades with no reports of accidents. The claimed width of the Order route as stated in the user evidence is inconsistent and varies between one to ten metres. Some users appear to have described the whole width of the disused rail bed whereas some have taken the width to be the visible trodden track. The trodden track is lined with trees and shrubs that have grown self-seeded over the last 50 years but not over the line of the track that has been in use. One user stated that a previous landowner had planted some trees along the path to be enjoyed by users. The retention of these pinch points, where the walked or cycled route is only narrow, would make the way unsuitable for even the narrowest of

horse-drawn vehicles. However, the rights have accrued with those limitations in place and there is no historical evidence to justify their removal should the Order be confirmed.

COMMENTS ON REMAINING OBJECTIONS

33. Mr Benson also objected to the Order on the basis that the Council previously confirmed there were no recorded official public rights of way over his land. This statement was made in response to a planning application made by Mr Benson in 2016, shortly after acquiring the property in 2015. The Council's response to the planning application making the statement was dated April 2017, several months before the Order route was brought into question and therefore before the Council received the Schedule 14 Application. The Order route was not and still is not recorded on the DMS but that does not infer the public rights are not in existence. Any action by subsequent landowners cannot prevent or remove the rights already dedicated.
34. Mr Benson and Mr Large further stated the Council had previously been offered the opportunity to purchase the land but the Council have not seen anything to validate this. The Council have explained to the objectors that it is not the Council claiming the Order route, instead the applicant has brought the claim to the Council's attention and under the WCA the Council have a statutory duty to investigate the claim.
35. A number of the objectors raised points regarding criminal, anti-social behaviour and privacy concerns. Biosecurity and potential future use of the Order route for commercial purposes were mentioned by one objector. A few objectors stated the wildlife would be disturbed and questioned who would be responsible for maintenance and provision of bins for dog waste. Several objectors also mentioned there are plenty of other public rights of way already in the area so the Order route is not needed and one objector states there is no disabled access. Although the Council understands the above issues are a source of contention for the landowners and those that live close to the Order route, they are not matters that can be taken into consideration when determining the Order under the WCA.

CONCLUSION

36. The Council conclude that the evidence submitted with the Schedule 14 application shows that there has been sufficient public use of the dismantled railway, as of right and without interruption, over the period of twenty years immediately prior to its status being brought into question in 2017. The evidence presented by the objectors regarding the landowners' actions during those years is insufficient to show that adequate overt acts were made to demonstrate a lack of intention to dedicate the Order route. It is the Council's view that the evidence appears sufficient on the balance of probabilities, as required by Test A in paragraph 16, that a restricted byway subsists, having being acquired under section 31 of the Highways Act 1980 between 1997 and 2017. The Council therefore respectfully requests the Inspector confirm the Order as made.