



## Appeal Decision

**by Sue M Arnott FIPROW**

**an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 06 July 2017**

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### **Appeal Ref: FPS/C2741/14A/1**

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of the City of York Council not to make an order under Section 53(2) of that Act.
- By application dated 11 January 2012 the appellant claimed that a footpath at Hoisty Field, Fulford, linking the highway at Landing Lane with Footpath No. 8 [5/8/10] (known as "the Nurses' Footpath") should be added to the definitive map and statement for the area as public right of way.
- The application was refused by the City of York Council on 14 July 2016 and the appellant was formally notified of the decision by email on 19 July 2016.

**Summary of Decision: The appeal is allowed.**

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### **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted with this case.
2. The appellant requests that the Secretary of State directs the City of York Council (YCC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record as a public footpath the route which is the subject of this appeal.
3. When YCC decided not to make the order requested by the appellant at a Decision Session for the Executive Member for Transport and Planning held on 14 July 2016, a report was submitted by the Director of City and Environmental Services (the Report). No formal plan was prepared by YCC to illustrate the claimed route but instead a copy of the application plan was attached as Annex 1. This sketch plan showed the northern end of the claimed footpath adjacent to the back entrance to Water Fulford Hall on Landing Lane, with the claimed route curving generally south westwards then south eastwards through Hoisty Field to join the Nurses' Footpath (a public path) close to lamppost no. 6.

### **Main issues**

4. Section 53(2) of the 1981 Act requires the surveying authority (in this case YCC) to make orders to modify its definitive map and statement in consequence of certain specified events set out in Section 53(3).
  5. Sub-section 53(3)(b) describes one such event as "*the expiration ... of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path*".
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6. Another event is set out in sub-section 53(3)(c)(i): "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows ... 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 ...*".
7. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) therefore comprises two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order<sup>1</sup> requested by the appellant.
8. The issue was addressed in the High Court case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1995]*<sup>2</sup> and later clarified in *R v Secretary of State for Wales ex parte Emery [1998]*<sup>3</sup>: when considering whether a right of way subsists (Test A) clear evidence in favour of the appellant is required and no credible evidence to the contrary. However when considering whether a right of way has been reasonably alleged to subsist (Test B), if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
9. For the purposes of this appeal, I need only be satisfied that the evidence meets the lesser test (B) although the higher test (A) would be applicable if the matter fell exclusively under sub-section 53(3)(b).
10. As regards the evidence of use by the public, Section 31 of the Highways Act 1980 (the 1980 Act) sets out the requirements for presumed dedication under statute. Firstly there must be sufficient evidence of use of the claimed route by the public, as of right and without interruption, over the twenty-year period immediately prior to its status being brought into question in order to raise a presumption of dedication. This presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the landowner during this period to dedicate the route as a public right of way.
11. Alternatively, if the case is not made out under statute, the evidence may be considered under the common law. In this case the issues to be addressed would be whether, during any relevant period, the owners of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owners, and whether there is evidence of acceptance of the claimed right by the public.

## **Reasons**

### **Background**

12. Whilst I have not seen the site, from the photographs and plans supplied by the appellant I understand that the appeal route followed what was at one time a defined path across a grassed field; three (undated) photographs show a worn trod with a bare-earth centre and grass at both sides.

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<sup>1</sup> The higher test would need to be satisfied to justify confirmation of an order.

<sup>2</sup> *R v SSE ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

<sup>3</sup> *R v SSW ex parte Emery* (QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83

13. In November 2011, following a change in ownership, a fence was erected across the claimed footpath making access thereafter impossible. This prompted the application which led to this appeal.
14. YCC carried out investigations before compiling the Report that was considered by the Executive Member for Transport and Planning held on 14 July 2016. The Report concluded that "*the user evidence supplied in support of the application by a very limited number of local people is insufficient to be regarded as use by the public*" and recommended that the Council decline to make the order on the basis that "*the application criteria has not been met*".
15. When the appellant was informed of YCC's decision to refuse to make the order requested by his application, the reason given was simply that the supporting evidence of use does not meet the application criteria.
16. In lodging his appeal against this decision, the appellant's grounds cover two main issues.
17. Firstly he criticises several aspects of YCC's Report. He questions YCC's reliance on the current addresses of the claimants to evaluate the evidence. He challenges YCC's interpretation of 'the public' in this context. He highlights the omission of other relevant evidence submitted with the application, including photographs showing the worn footpath, an old Ordnance Survey map dated (1889 to 1949) showing the old line of the path, and it failed to mention support for the application from the Ramblers' Association, from the Ward Councillor for Fulford and Heslington, and from Fulford Parish Council, all of whom, he submits, represent the public at large.
18. Secondly, the appellant challenges several points of fact in a statement lodged by Mr D R Jagger (landowner).
19. Both YCC and Mr and Mrs Jagger have made further submissions in response to this appeal.

### ***Presumed dedication under statute***

20. With the original application, 19 user evidence forms were submitted from claimants attesting to use of the route at issue as far back as the 1960s and until passage was blocked by the fence on 19 November 2011<sup>4</sup>. A further 5 forms were submitted with this appeal, the claimed use dating back to the 1940s.
21. It is the appellant's case that these written statements demonstrate that use by the public went unchallenged for well over twenty years before the blockage such that a right of way on foot should be presumed to have been dedicated by the relevant owner of the land concerned.
22. Presumed dedication under the 1980 Act (as set out above at paragraph 10) requires that the first matter to be established is when the public's rights were brought into question so that the relevant 20 year period can be calculated. It has not been disputed that the erection of the fence brought into question the status of this route (although there may have been other occasions).

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<sup>4</sup> I note that two of the claimants report being stopped by Mr Jagger shortly before completing their forms on 14 November 2011. Another claimant reports the fence being erected on 19 November 2011. Although the challenge to the two claimants effectively brings forward the date of challenge by a matter of days, I take both events to be a demonstration of the owners' lack of intention to dedicate the way to the public and the difference in days to make little material difference to the outcome.

23. Under the statutory scheme, examination of use of the way during the preceding 20 years is therefore required. In order to raise a presumption of dedication sufficient evidence is needed of use by the public, 'as of right' and without interruption, over the relevant twenty-year period, in this case 1991-2011. In brief, 'as of right' is usually interpreted as being without force, secrecy or permission.

*Evidence of use 1991-2011*

24. Whilst YCC's Report concluded that the evidence was not sufficient, it did not elucidate, other than to highlight the postal addresses of the claimants which it suggested revealed the limited range of individuals and that the user was not representative of the local community, especially given the proximity of the path to a large residential area.
25. In fact an analysis of the user statements indicates that 15 of the 24 claimants state that they used the route throughout the full 20 year period. Eight people used it for fewer than 20 years<sup>5</sup> but their use nonetheless contributes to the totality of the evidence.
26. However, other material provided hints that some of the claimants are related and that these people benefit from permission granted by the present landowners. Although there is no firm evidence to verify these relationships (and the granting of permission is challenged by the appellant), if confirmed this might rule out 5, possibly 7 people. In addition, one claimant (Mr Atkinson) was a tenant of the land until 2008 and therefore could not claim to be using the route himself 'as of right' during his tenancy; consequently his use may need to be discounted.
27. Family relationships do not necessarily negate claimed use 'as of right' but, even erring on the side of caution, there are still at least 16 people whose evidence could contribute to the establishment of a public right of way. Further, even if the personal evidence of the 8 people where there is doubt over the basis for their use is put aside, many state also that they saw other members of the public using the claimed route too.
28. When examining the statements of each witness there is a dearth of detail here and there are conflicts within the evidence<sup>6</sup>. Although YCC contacted some claimants by telephone, no formal interviews have been carried out or recorded, and there have been no follow-up statements to clarify aspects of the claimants' evidence.
29. From the evidence that is available, there is nothing to suggest that the claimed use was by force<sup>7</sup> or took place in secret. As I have noted above, permission *may* have been granted to certain users but this is a matter of contention.
30. YCC's Report attached a statement from the current landowner (as Annex 7). In this statement, Mr Jagger explained that he and his wife had been owners of Water Fulford Hall since 1997. In 2010 they purchased adjoining land that had been part of Lodge Farm which included the land over which the claimed footpath runs. It therefore seems clear that any permission granted to path users by Mr and Mrs Jagger must post-date this change in ownership.

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<sup>5</sup> One person claimed use between 1948 and 1982, thus ceasing use before the relevant period.

<sup>6</sup> For example, the form completed by Mr D Sherrin suggests he began using the route before he was born.

<sup>7</sup> Other than Mr M Bulmer who states that he continued to use the route after 2011 by jumping over the fence.

31. It is further submitted that the claimed use cannot be continuous because there was a period prior to 2009 when the field was inaccessible, it being overgrown as a result of having been "set-aside" land for "many years". This is refuted by the appellant who is adamant that pedestrian use continued. He also dismisses the proposition that use of the way is questionable because the gap beside the kissing gate at the Landing Lane end is too narrow because of a mature tree. [A photograph supplied with the application indicates that access was in fact possible although clearly restricted.]
32. In addition, between November 2010 and June/July 2012 Yorkshire Water is said to have temporarily closed the public footpath along the riverbank in order to undertake extensive civil engineering works. The Company reportedly used the field in which the claimed footpath lies to store its equipment. It is suggested that this may have prompted some people, unable to use the riverside path, to divert into the field particularly for dog walking.
33. In response, the appellant submits that the engineering works did nothing to deter use of the claimed route.
34. Whilst later submissions by and on behalf of the landowners claim that few, if any, people were ever seen using the claimed route and that any who were found to be lost in the field were re-directed, that does not necessarily mean that the path was not walked at other times or that the claimants are mistaken as to their use. Similarly, there is a conflict in the photographic evidence provided, with aerial photos provided by the landowners suggesting no path was visible at various dates in the past whereas the appellant has pointed to photos which show a worn trod on the ground.
35. In summary, there are conflicts within the evidence which cannot be resolved without further investigation. However no incontrovertible evidence has been produced which might show that the claimed use could not have taken place. Consequently I accept the evidence of use during the relevant period 1991-2011 supplied in support of the claimed footpath is sufficient to reasonably allege that a presumption of dedication as a public right of way is raised.

*Intentions of the relevant landowner(s)*

36. The next consideration is whether there is evidence to show that during the period 1991-2011 the owner(s) of the land demonstrated a sufficiently clear lack of intention to dedicate a public right of way over the claimed route.
37. The evidence provided indicates that the present owners, Mr and Mrs Jagger, have owned the land over which the claimed route passes since September 2010. Prior to that the land formed part of Lodge Farm.
38. No information has been submitted from the previous owner and no mention is made in any of the submissions of notices or signs deterring public use of the claimed path during his or her tenure. No reference has been made to any deposits or statutory declarations lodged with the surveying authority under Section 31(6) of the 1980 Act.
39. During the last of the relevant twenty years, Mr and Mrs Jagger state that permission was given to certain individuals to cross their land. They also provide a photograph (dated 2015) showing a "Private" sign at the back entrance to Water Fulford Hall but it is not evident whether this was present at any time during the relevant period. Neither is it entirely clear whether the

personal challenges to people using the claimed path that are mentioned in the landowners' submissions took place before November 2011<sup>8</sup>.

40. On balance I find no irrefutable evidence that would rebut a presumption of dedication.

*Other relevant evidence*

41. A letter dated 6 March 2015 from Fulford Parish Council expresses the Council's support for the application "*because the public has (until recently) been allowed unrestricted access over many years. No signs or barriers have ever been erected to inform the public that use of the path was not 'as of right'.*" The Council provided an aerial photograph dated 1991 which it claims shows the path in question although this is disputed by the landowner.
42. As noted above, the appellant submitted an extract from an old Ordnance Survey map said to show the old line of the path passing to the south west of farm cottages which have since been demolished at some unspecified date<sup>9</sup>. Largely through reliance on aerial photography, the landowners contend that the footpath now claimed does not match what is suggested to be the route used by some claimants in the 1940s, 50s and 60s. I suspect they may be correct, but that does not preclude the possibility that, during the relevant 20 years, a public path could have been established over the present claimed route.
43. YCC noted that this footpath was not recorded as a public right of way in the 1950s during the process which led to the preparation of the first definitive map and statement. This has no bearing on the claimed dedication of a public path between 1991 and 2011 although it may shed some light on the reputation of the path whilst the cottages were still in situ.

*Summary*

44. In reaching my conclusion on this appeal, I am mindful of the guidance offered by the High Court cases mentioned in paragraph 8 above. In particular, these advocate that where there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, the Secretary of State should find that a right of way is reasonably alleged to subsist and make a direction accordingly.
45. In the present appeal, I find there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist.
46. Within the constraints of the further information available to clarify the appellant's case and the evidence to support it, I find there is sufficient to raise a presumption of dedication during the period 1991-2011. Whilst the evidence provided by the landowners is credible and conflicts with elements of appellant's case, none of the evidence submitted is beyond dispute, nor does it unassailably demonstrate a lack of intention by the relevant landowner(s) to dedicate the way during the period in question.
47. To conclude, in my assessment, and within the limits of the details provided, I am satisfied that the evidence is sufficient to reasonably allege the existence of a public footpath along the appeal route as claimed.

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<sup>8</sup> I noted above that two claimants were challenged by Mr Jagger at the time the way was brought into question.

<sup>9</sup> The cottages are still visible on aerial photos dated 1965.

**Conclusion**

48. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

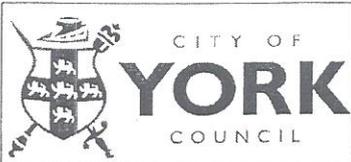
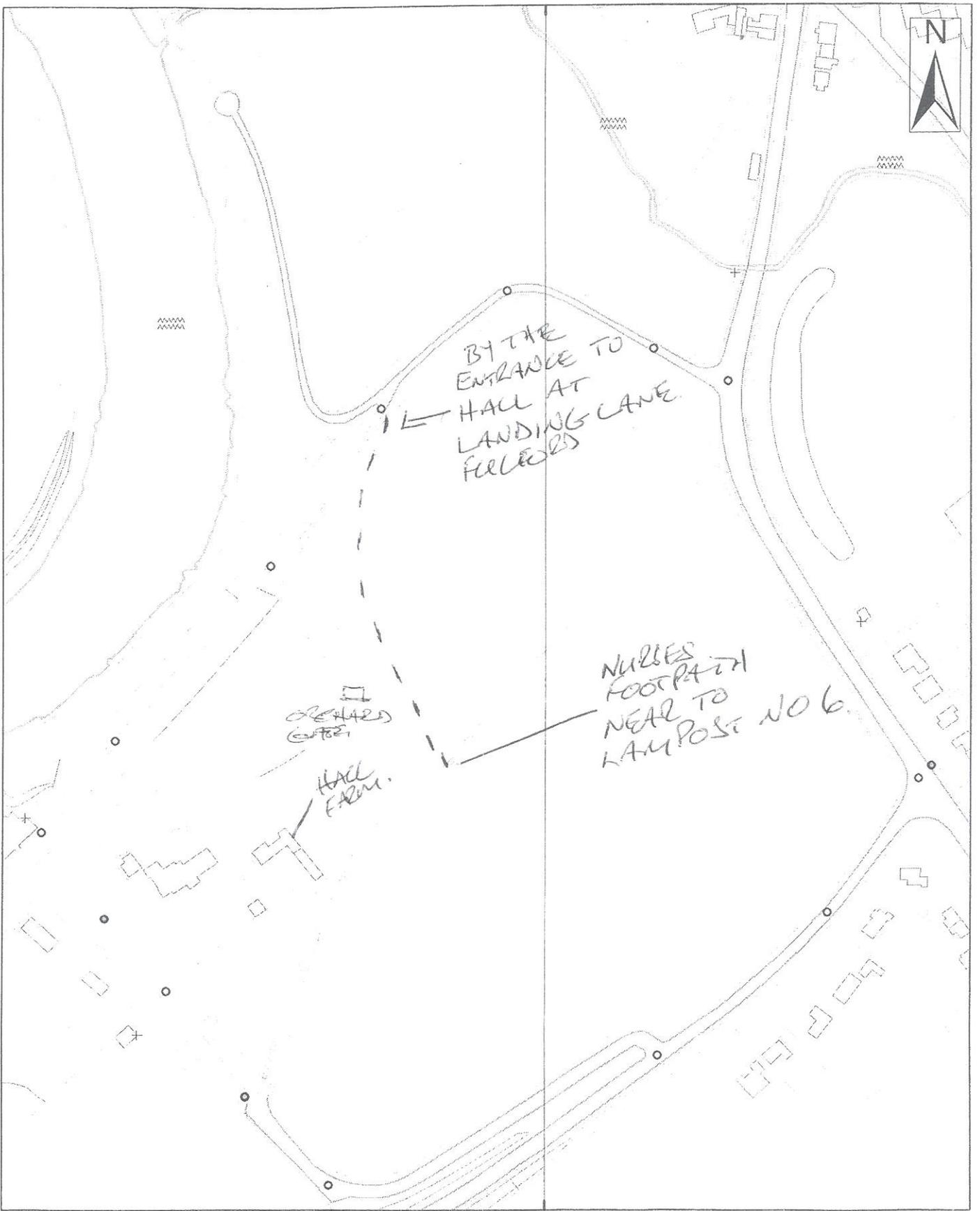
**Formal Decision**

49. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, the City of York Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by adding a public footpath between Landing Lane and the Nurses' Footpath as requested by the application dated 11 January 2012.

50. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Sue Arnott*

**Inspector**



### Alignment of claimed route - Fulford

Scale 1:2,500

Drawn By: JHC

Date: Oct11

Public Rights of Way

Reference:

Drawing No.

9 St. Leonards Place, York, YO1 2ET  
Telephone: 01904 613161

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