



Order Decision

Inquiry opened on 17 April 2012

Site visit made on 18 April 2012

by Susan Doran BA Hons MIPROW

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

Decision date: 7 June 2012

Order Ref: FPS/E2001/7/13

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981 and is known as the East Riding of Yorkshire Council (Swanland No.3) Definitive Map and Statement Modification Order 2010.
- The Order is dated 16 June 2010 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath between Main Street and Tranby Lane, Swanland as shown in the Order plan and described in the Order Schedules.
- There were 105 objections and representations outstanding at the commencement of the inquiry.

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

Procedural Matters

1. Of the some 105 objections and representations received by the East Riding of Yorkshire Council ("ERYC"), a dozen expressed support for the Order. Two of the statutory objections received have since been withdrawn.
2. The Order had been made following a Schedule 14 Appeal and direction by the Secretary of State. ERYC opposed confirmation of the Order and appeared as the principal objector to it at the Inquiry.
3. ERYC pointed out that the Order plan marked point D to the north of its correct position. I am satisfied that point D is more properly located where the path turns from a southerly to a south-south-easterly direction, as described in the Order Schedule. I do not consider that the public has been prejudiced by this error and should I decide to confirm the Order I shall modify it accordingly.
4. I was invited to consider modifying the Order in respect of the status of the section A-B from Main Street, Swanland, adjacent to the pond; and with regard to the width and alignment of the Order route between points C and E, Tranby Lane. I consider these issues below.
5. Immediately following the close of the Inquiry, I visited the Order route accompanied by supporters of the Order including Mr Jackson the Ramblers' Association ("RA") representative, and Mr Hotham, together with objectors including a representative of ERYC, and Mr Woodward, Head Teacher of Swanland Primary School.

The Main Issues

6. The Order was made in consequence of the occurrence of an event specified in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), which requires me to consider whether the evidence discovered (when considered with all other relevant evidence available) is sufficient to show, on the balance of probabilities, that a footpath which is not shown in the Definitive Map and Statement subsists, and that the Map and Statement require modification¹. The evidence adduced is of claimed use by the public. This requires me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ("the 1980 Act"), or by implied dedication under common law.
7. Section 31 of the 1980 Act provides that where a way over land, other than one which is of a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. I must therefore consider the date on which the right of the public to use the claimed footpath was brought into question; whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date on which their right to do so was brought into question; and whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowner to dedicate the claimed footpath.
8. Should these tests not be met, I shall consider the evidence under common law. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, secrecy or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.
9. There is also some documentary evidence to consider. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
10. The test that I must apply in reaching my decision is on the balance of probabilities.

Background

11. The ownership of the land between points A-B on the Order plan is unknown. Since 1928 the land between points B and C has been owned by (what is now known as) the James Reckitt Memorial Trust ("the Trust") together with the

¹ The Secretary of State directed that an order should be made further to an Inspector's Report which concluded that there was a reasonable allegation that a right of way subsisted over the Order route at common law.

land between C and E where a Memorial Hall was built around 1929. The land as a whole was held in trust as a recreation ground for the inhabitants of Swanland. In 1963 the land crossed by the Order route C-E was sold by the Trust to the East Riding County Council ("ERCC") and the Memorial Hall was converted to a school.

12. The Order plan shows a building named as the Public Library, between points B and C. This was the original Primary School up until the 1960s/70s. In my decision I refer to this building, which also houses the present Village Hall, as the "former School".
13. Swanland County Primary School now occupies the land between points C and E and the original Sir James Reckitt Memorial Hall. For the purposes of this decision I refer to Swanland County Primary School as "the School", and to the original Sir James Reckitt Memorial Hall as the "former Memorial Hall". The Sir James Reckitt Memorial Hall now occupies a site between the former and present Schools, and I refer to it as the "present Memorial Hall".

Reasons

Documentary evidence

The Order route between points A-B

14. The earliest evidence available to me is a 1694 indenture relating to Christ Church which describes its land abutting 'Town Street' implying the latter was regarded as a public highway at the time. Similarly, the 1837 Swanland and Ferriby Inclosure Award shows the land here forming part of the highway network; and the 1910 Finance Act plan shows it excluded from adjacent land holdings. This section formed the access to the former School. Whilst there is evidence in the late 19th century that access to this building was required over the private road between points B-C, there is nothing to suggest that Christ Church, the former School, nor the Trust who own or owned the land from B-E, or ERCC who purchased the land south of point C in 1963, were granted private access rights over it. All these factors point towards this section of the Order route enjoying full public highway rights, arguably an 'ancient highway' maintainable at public expense.
15. During the 20th century, neither the Parish nor County Councils at the time seemed sure of its ownership or maintenance liability. In 1931 ERCC adopted the road on the east side of the village pond, although it was subsequently adopted again in 1960. The Parish Council appears to have taken on some maintenance responsibilities before, during and after the Second World War, and the County Council undertook work on it in 1960. By 2005, although ERYC was still uncertain about maintenance responsibilities, the route had been tarmacadamed and marked out with parking bays and other highway signage consistent with a vehicular highway.
16. I conclude on the basis of the documentary evidence that the section A-B, between boundaries, the pond to the west and Christ Church to the east enjoys public vehicular rights.

The Order route between points B-E

17. Late 19th and early 20th century Ordnance Survey ("OS") maps consistently show a bounded track from point B passing the former School towards point C.

By 1968-1970 the present Memorial Hall is shown occupying land south of the former School, and the Order route is shown continuing, bounded on the east side, as far as point C where it enters the School site. Here the map shows a double pecked line marked 'path' commencing slightly to the west of point C and running across the school playing field to a pecked line beside the former Memorial Hall. This route is consistent with the recollections given by witnesses at the Inquiry (which I consider below) of a worn path leading to a surfaced area beside the former Memorial Hall. This path is similarly shown on OS base mapping used in contemporary conveyances and Land Registry documents. At Tranby Lane, two entrances are shown to access the front of the building. Again this is consistent with the recollections of witnesses.

18. Later OS mapping (1978 and 1997), also used as base mapping in land registry documents, shows a path running roughly half way along the eastern boundary of the School land from point C on the Order plan, then turning towards the School to an area identified in evidence as the hard surfaced playground.
19. In itself, the OS mapping does not provide evidence as to the status of the path, but is good evidence of its physical existence so far as it is shown. I turn next to consider the user evidence.

Presumed dedication under Section 31 of the 1980 Act

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

20. There are a number of dates to consider. I do not regard 1963 when the vendor of the land crossed by the Order route C-E advised ERCC that there was no public right of way, or 1991 the date of an internal Council memo querying a path here, as bringing into question the public's right to use the way as these documents were unlikely to come to the attention of users. Neither do I regard 1965 when 'trespassers will be prosecuted' signs, or 1971 when bollards were put up (to prevent horse riders and motorcyclists) as events which users would have considered challenged their right as pedestrians to use the way, albeit it is not clear where the notices were erected.
21. I consider that 1996 when notices were put up at the School gates to restrict use; 1999 when building works obstructed the Order route between points D-E; and 2004 when the School gates were locked for various periods are likely to have brought the public's right to use the way into question. However, this is subject firstly to the issue of which route or routes was being challenged as the order route was not physically available after 1999 and, secondly, that there would be no qualifying 20 year period due to an event in 1992.
22. In 1992, the Head Teacher attempted to stop or restrict public access over the School grounds, and this resulted in an application being made by the RA for the Order route to be added to the Definitive Map and Statement. I therefore take 1992 as the date on which the public's right to use the claimed footpath was brought into question, although I acknowledge use across the land continued after that date. The 20 year period for me to consider is 1972-1992.

Evidence of use by the public

23. The evidence demonstrates that the public have been in the habit of crossing the land in both directions between Main Street and Tranby Lane. There is nothing to suggest that such use during the 20 year period was with force or

- with secrecy. However, whether or not use was permissive over the section B-C was disputed. In addition, the user evidence must demonstrate use of a defined route for the relevant period, in this case 1972 to 1992. Here, it was acknowledged by the parties and by users that various routes had been used across the School land.
24. When the application was made, users completing evidence forms were not required to provide maps showing the route they had used, and the plan provided by the Applicant to show the route was unclear due to its scale. Although many forms describe a route between the two roads passing through the School site, the detail is insufficient to establish its actual alignment, in particular between points C-E. It may be presumed that users followed the route A-C as shown on the Order plan since the section A-B is defined by Christ Church to one side and the pond to the other, and B-C follows a defined track bounded on both sides for much of its length. Six maps of the route gathered in 2004 by ERYC, including from some of the original claimants, showed a route on the eastern boundary of the School. However, a map apparently provided by the Applicant in October 1992 showed the Order route.
25. From point C, which I understand was gated in 1989, the Order route crosses the school playing field before joining a hard surfaced area at the northern end of the School building then passes alongside it before exiting the site at E. East of the School building lay the hard surfaced playground. In 1971, a hard surfaced path was installed partway along the eastern boundary of the site for parents and children accessing the School, and in 1973 a kissing gate and fence were installed along the southern edge of the playground, the kissing gate positioned west of the Order route towards the front of the building.
26. I heard evidence of use of the Order route and of a route following the path on the eastern boundary. Users spoke of crossing the playground, sometimes around a mobile classroom, and exiting via the kissing gate. Several users spoke of preferring the eastern route when it was wet thus avoiding the muddy playing field. Its use was also confirmed by Mr May. I heard that various other routes were used across the School site, for example to reach the corner of Tranby Lane and Kemp Road (linking Tranby Lane and Main Street), but that users took the shortest route depending on where they were going. The current Head Teacher spoke of 8 routes of which he believed were in use, although his own recollections date from 1990 towards the end of the relevant period under consideration.
27. With two main routes available and which the public used, the RA placed reliance on the *Wimbledon* case². This concerned a private right of way or easement over a common between fixed points, accessed sometimes by one route and sometimes by others, the judgement concluding that this did not prevent a right of way between the two points being acquired. In addition, Mr Hotham invited me to recognise the various routes walked by the public³ across the School site by recording a width of 20 metres in the Order to reflect the 'corridor' of land that had been used. However, I do not consider the *Wimbledon* case is applicable to these circumstances nor do I consider it appropriate to modify the Order to record such a width as suggested. The

² *Wimbledon and Putney Commons Conservators v Dixon* [1875] 1 Ch 362

³ The Order route, the route along the eastern boundary, a route proposed in 1995 along the full length of the eastern boundary across to the wicket gate to exit at point E, and another proposed in 1998 along the full length of the eastern boundary, continuing around the boundary of The Cottage to a point on Tranby Lane east of E

evidence is of at least two routes having been used during the 20 year period, with minor variations according to where people were going. I do not find such varying routes reflect a single defined route in use by the public for the 20 year period sufficient to raise a presumption of dedication, nor do I consider they can be added together and attributed to use of a single route.

28. Mr Needler suggested that a right of way had been granted over B-C when the land was sold by the Trust to ERCC in 1963. However, I prefer ERYC's interpretation that the conveyance granted a private right of access over the strip of land to the Council and its successors in common with the trustees and others having a like right. Without such a right being granted, the Council would not have been able to access its land from the north. Arguably use of the land between B-C by the public could be 'by right' rather than use as of right since local people had the right to use it for recreational purposes (paragraph 11). However, given that claimed use was of a through route between Main Street and Tranby Lane to reach the shops, bus stop, to go dog walking or to visit friends and family along these roads, I am not convinced that this is the case. I accept that use to access buildings along the route or just to access the land retained for recreational use itself would be exercise of a private right and therefore not use as of right.
29. I conclude that the public has been crossing the School land throughout the relevant 20 year period as part of a through route between Main Street and Tranby Lane. However, a public right of way cannot arise from use of various routes across the land and the evidence supports the use of different routes. Furthermore the use of different routes makes it difficult to establish the extent to which the Order route itself was used compared to any other route or routes taken by users, as evidenced above. As a result I find there is insufficient evidence to demonstrate continuous use of any single route for the relevant 20 year period.
30. It follows that I am not satisfied that use of a defined way, be it the Order route or any other route, has been established during the relevant 20 year period 1972 to 1992, and on that basis a claim under Section 31 of the 1980 Act must fail.

Whether any landowner demonstrated a lack of intention to dedicate the claimed footpath

31. There is no evidence during the 20 year period of any actions by the landowner to suggest to the public that there was no intention to dedicate a public right of way over the land. Former Head Teachers, as tenants, had apparently acquiesced in use of the land by villagers as a short cut, although in the early 1990s there were growing concerns expressed about access by the public. Nevertheless, that there is no evidence of a lack of intention to dedicate does not overturn the conclusion I have reached above (paragraph 30).
32. I turn next to consider whether a way can be shown to subsist at common law.

Implied dedication at Common Law

33. In 1998 planning permission was granted for the extension of the School to the east and the Order route between points D and E became obstructed. Since the Order route was no longer available after 1998 and since I have concluded above that more than one route was in use across the School land from 1971

onwards (paragraph 27), I shall consider the evidence in relation to the period prior to 1971.

Evidence of use by the public

34. The evidence of use and the recollections of the older inhabitants of the village are of a footpath across the land which was used by the public both before and after its sale to ERCC in 1963.
35. There was a high degree of consistency in the descriptions of the Order route by those giving evidence of use. Originally A-B was gravelled and B-C a cinder track. The diagonal route crossing the field commenced just to the north of point C on the Order plan. The route itself was a well defined deeply worn track across the field which "everyone used" and users only diverged from it to walk alongside when it was muddy. The worn track met an area of hard standing alongside the former Memorial Hall which was used for car parking as well as a path onto Tranby Lane. Many witnesses referred to their own and others use of the Order route to access the former Memorial Hall to attend functions such as dances or the doctor's surgery which were held there. Some used the route to access the former School whilst attending as pupils. They acknowledged their route changed when the eastern boundary path was established by the School (1971) and when later expansion of the School obstructed the route (after 1998). However, all the witnesses spoke of their previous use of the Order route as a through route between Main Street and Tranby Lane.
36. Mr Hopper referred to use of the Order route from 1935 when he attended the former School, and subsequently as a through route to the village or to Tranby Lane. Mrs Wilson had used the Order route from 1947 onwards and used it to visit a friend on Tranby Lane. Mr Burman's recollections date from around 1948/49 when he became a pupil at the former School. He, his family and friends used it between Main Street and Tranby Lane to attend garden fetes at Tranby Lane and Kemp Road, as part of circular walks around the village or as a short cut via Kemp Road when walking to North Ferriby. Between 1958 and 1961 Mrs Tyler had used the Order route regularly as a short cut to Tranby Lane to get a lift to work, and as part of a dog walking route. From 1961 she would use the Order route on family walks when visiting. Mr Johnson had used it as a short cut all his life⁴ to visit relatives on Tranby Lane and to get to work when haymaking. A colleague had used it between Tranby Lane and the bus stop on Main Street to get to work in the early 1960s and he knew others used it too. I heard that Mr Needler's aunt, whom he had spoken to about the route, had used it regularly from 1935 to access the shops on Main Street and to walk her dog.
37. Mr Mcfarlane had used the route between 1948 and 1954 to access Christ Church which at the time was a school. He commented that it was well used by villagers at this time, and he believed up to 1964 when the School was established. He also referred to two other paths across the land to the west of the former Memorial Hall, one through the tennis courts and one across to the corner of Tranby Lane and Kemp Road. There was hearsay evidence of this latter route used by workers who met to catch a bus to work.

⁴ He was born in 1943

38. Of the untested user evidence, the RA calculated that 4 people had used the Order route prior to the land being gifted and the Trust established.
39. That a well worn path on the line of the Order route (points C-D) was established on the ground through use is corroborated by the OS mapping (paragraph 17). Whilst there is witness evidence that other routes were in use over the land, none were significant enough to be mapped other than the Order route. Witnesses spoke of using the path to access the former Memorial Hall, use which I regard as the exercise of a private right, and some of the footfall which led to the mapping of this route must be attributed to such use. There is further documented evidence that in 1963 residents and children were in the habit of taking short cuts across the land to and from the former School, although no public or other rights of way affecting the land were noted, as the solicitor for the vendor (the Trust) advised the Council prior to their purchase. This fits with the other evidence of private use by the public.
40. Nevertheless, I heard direct evidence of what I would regard as a high level of use of the Order route between Tranby Lane and Main Street from at least 1935, and of its reported use by others. I consider this to be public use of the Order route. None of those giving oral evidence spoke of using other routes across the land themselves prior to its sale in 1963, only of the Order route. The untested evidence suggests such use as a through route dates back to the 1920s. The user evidence also confirms the continued use of the Order route, but later of other routes across the School site up to 2004.
41. Thus I agree with Mr Needler that a right of way may have come into existence through long use of the Order route across the land held by the Trust until 1963; and after the establishment of the School on the land between C-E, at least up to 1971 when an alternative path was created (for the use of pupils and parents) on the eastern boundary. However, for such an inference to be drawn it would be necessary to consider the actions (or inactions) of the landowners and to establish whether they had the capacity to dedicate a public right of way.

Capacity to dedicate: the Trust

42. The Trust was established in 1924 when an area of land abutting Tranby Lane and Kemp Road was provided *“as a recreation ground for the use of the inhabitants of the village of Swanland”*⁵. The Trustees were enabled to make such rules and regulations regarding the management and control of the land as considered appropriate, and to sell the land. A further parcel of land, crossed by the Order route between points B-E, was purchased and conveyed to the Trustees in the same terms in 1928. In 2003 a new ‘scheme’ identifying the objectives of the charity was established under the Charities Act 1993 and replaced the two former trusts.
43. My attention was drawn to Section 29 of the Charities Act 1960 which placed certain restrictions on the disposal of charity property, requiring in certain instances an order of the court or of the Board of Charity Commissioners (“the Charity Commissioners”); and to Section 36 of the Charities Act 1993 which similarly placed restrictions and conditions on the disposal of land held by a charity, unless they were an excepted charity.

⁵ The indenture continues “and other persons hereinafter appearing”. I interpret this as referring to other persons named in the indenture, being any Committee or Committees appointed by the inhabitants of Swanland or by the Trustees to manage the recreation ground, or any person or persons appointed as their agents to manage the land

44. In 1963 the Charity Commissioners approved the sale by the Trust to ERCC of a large part of the land on which the former Memorial Hall had been built, including land crossed by the Order route between points C- E.
45. It seems to me that, as ERYC argued, from 1960 onwards any disposal of land required the approval of the Charity Commissioners. The evidence shows that permission was obtained to sell the land to ERCC in 1963. There is no evidence of any request to, or order of, the Charity Commissioners to dedicate a public right of way over the route B-C under the 1960 or 1993 Acts, or of the route C-E under the 1960 Act, or that the Trust is an exempt charity to which granting permission would not apply. However, I have no evidence before me of such a requirement prior to the 1960 Charities Act. ERYC argued that the 1924 and 1928 indentures restricted the Trust to selling land and not to dedicating it as a highway without receiving money, and accordingly the Trust had no capacity to dedicate a public right of way. However, the indentures do not specify that a public right of way may not be dedicated and such a dedication in itself would not require the sale of the land since it would involve the granting of a right over it. It is my view that, under the 1924 and/or 1928 trusts, the Trustees were able to sell land⁶ and therefore had the capacity to dedicate, as argued by the RA. Accordingly I consider that the Trustees were not prevented from dedicating a public right of way. There is no evidence that they did so expressly, but such a dedication may be inferred by their actions or inactions with regard to public use over the land. Indeed, the establishment of a public right of way over the land would not be incompatible with the purpose of the Trust.
46. It was suggested that use by the public was by right rather than as of right because the land was held for recreational purposes (paragraph 28). Whilst there is evidence, as described above, of the public accessing the land to visit the former Memorial Hall, which I consider to be by right, there is clear evidence of use by the public of the Order route between Main Street and Tranby Lane for such purposes as going to the shops, the bus stop or to visit friends, without force, secrecy or permission, which I conclude is use as of right.

Conclusions

47. I find that a case at common law is made out for the period prior to 1960 and that a public footpath subsists over the Order route, subject to a slight modification of its alignment north of C as detailed above (paragraph 35).

The Order route C-E after 1992

48. In 1995 Humberside County Council ("HCC") approved the making of a legal event order to add a public footpath over the School grounds. It seems that HCC wished to dedicate a right of way in recognition of the route claimed by the RA as having been in long use, but which would be compromised by the need to extend the School premises. However, the route considered as used by the public followed a line part way along the eastern boundary of the School site, crossed the playground to the wicket gate then to point E, a route in use from 1971 (paragraph 26) and one which in 1992 documents show was considered a threat to pupils as it crossed the playground. The route proposed

⁶ A Parish Council Minute of 1958 notes at a meeting with the Parish Council that the Trust Solicitors could sell their land

- followed the eastern boundary to The Cottage along its northern boundary and across to the wicket gate. Neither of these routes followed the Order route. When HCC was abolished on 1 April 1996, no order had been made.
49. In 1996 further to problems of anti-social behaviour and vandalism at the School site, by agreement with the Head Teacher, Swanland Parish Council installed two signs (one at point C, the other at the end of a brick path made for use by parents and pupils beside the western boundary of The Cottage) requesting the public not to enter the site or "use the footpath" during school hours. There is evidence that some members of the public were still adhering to this request in 2004 when the School gates were locked during school hours, overnight, at weekends and holidays.
50. When planning permission was granted in 1998 for the School's extension across the line of the Order route, a 'replacement path' was to be created by ERYC as part of the planning conditions. This path ran along the eastern boundary then alongside the northern boundary of the Cottage and down its western boundary along the brick path to the opening in the hedge at Tranby Lane (created in 1996). However, with concerns over security and with no onward dedication thus resulting in a cul-de-sac path, ERYC deferred the matter pending resolving its continuation to Main Street.
51. In 2006/7 ERYC carried out consultation on a concurrent definitive map modification order and public path diversion order as it was considered that a path could not be dedicated when there was a claim outstanding for a path on a different route which might result in two paths existing. However, it was considered the requirement of a single defined path had not been met.
52. However, it was ERYC's view that the Council as landowner had no capacity to dedicate a public right of way over the land since it has a duty to safeguard pupils. Furthermore, in view of the proximity of the path to the School buildings and playground, the safety of staff and pupils and the security of the property would be compromised as evidenced by the problems of vandalism and anti-social behaviour experienced in the years prior to the site having been secured by fencing and gating. On the other hand, the RA argued that the landowner had taken into account these factors when concluding in 1995 and again in 1998 that it was not incompatible for a footpath to cross the School site, and had effectively dedicated a footpath.
53. In view of these events, the RA invited me to consider modifying the Order to record what they regard to be a more preferable route along the eastern boundary of the School site as proposed to be dedicated by ERYC in 1998.
54. An inference of dedication at common law can arise where there is an intention to dedicate a way and there is acceptance of that dedication by the public. There is evidence before me concerning the actions of the landowner and of use by the public. I note that the route sought by the RA was the subject of a definitive map modification order application in 2004 which the Council rejected on the basis that the evidence submitted was inadequate to sustain the making of an order. This route is an entirely different one between points C-E from that shown in the Order as made. In view of my findings above and the conclusion reached that the Order should be confirmed on the basis of the evidence prior to 1960, I decline to give further consideration to the modification sought by the RA.

Points A-B and the effect of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act")

55. I have concluded above that public vehicular rights subsist over this part of the Order route (paragraph 16). However, as a result of the 2006 Act such rights were extinguished, subject to certain exceptions. I will need to consider whether any of these exceptions apply in order to establish the status of A-B.
56. Section 67(1) of the 2006 Act states, "*An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement (a) was not shown in a definitive map and statement, or (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway*". Thus any existing public rights for mechanically propelled vehicles ("mpv") that may have existed over this part of the Order route prior to the commencement date of the 2006 Act (2 May 2006) would have been extinguished, unless preserved by any of the exceptions set out in subsections 2 and 3 of the 2006 Act. Where a route is found to carry public vehicular rights and no exceptions apply then it may be recorded as a restricted byway.
57. Subsection 67(2)(a) excepts ways that have been lawfully used more by motor vehicles than by other users in the 5 years preceding the commencement date, and it is on this basis that ERYC argues that vehicular rights have been preserved. The only information I have to support this view is a reported comment from the area highways engineer that use has been mainly by motor vehicles for the required period as both a through route and a valuable on-street parking facility. The evidence I heard at the inquiry was of use on foot. No assessment has been provided as to the levels or volumes of use by mpv compared to that by pedestrians. I am not satisfied on the available evidence that mpv use for the relevant 5 year period exceeded non-mpv use and therefore I am unable to conclude that this exception applies and must assume that public rights for mpv have been extinguished.
58. Subsection 67(2)(b) excepts ways that are both recorded on the list of streets maintainable at public expense and are not recorded on the Definitive Map and Statement as a public right of way. This section of the Order route is not already recorded in ERYC's Definitive Map and Statement. However, I understand that it is not shown on their current list of streets. It follows that since one only requirement is met, this exception does not apply, and I must conclude that mpv rights have been extinguished.
59. There is nothing to suggest that any other exceptions engage. Accordingly I conclude that the section A-B should be recorded as a restricted byway and the Order modified accordingly.

Other matters

60. Some written submissions referred to the safety of pupils and the security of the property. I understand these concerns, but in considering the Order I must apply the tests as set out in the legislation (paragraphs 6-10) in deciding whether or not to confirm the Order. I am also mindful that the Order route passes through the School site and is presently obstructed by the School building. Nevertheless, in the event that the Order is confirmed there is different legislation available to address such matters.

61. Issues were raised about the manner in which the matter had been dealt with by the various County Councils. I understand the frustration expressed that it has taken many years to reach this point. However, the way in which the matter has been handled is not relevant to my decision as to whether or not, on the evidence, a public right of way subsists.

Conclusions

62. Having regard to these and all other matters raised both at the inquiry and in written representations, I conclude, on the balance of probabilities, that the Order should be confirmed with modifications.

Formal Decision

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

- In Part I of the Schedule to the Order, under the 'Description of path or way to be added', in line 1 replace "Footpath" with "Restricted Byway"; in line 2 replace "leading along the footway" with "running between the Pond to the west and Christ Church to the east as shown on the plan attached to the Order"; in line 4 insert "as a Footpath" between the words 'continuing' and 'in'
- Under the heading 'Width of path or way to be added', in line 2 replace "1.6 metres" with "the full width between the Pond to the west and Christ Church to the east as shown on the plan attached to the Order"
- In Part II of the Schedule to the Order, in the third column add "RB &" in front of "FP" ; and in the fourth column delete "along a footway" in line 2; and in the fifth column replace "1.6 metres" "the full width between the Pond to the west and Christ Church to the east"
- On the plan attached to the Order modify the line A-B by adding small arrowheads so as to denote a restricted byway; modify the line at C by deleting the existing line and adding a line slightly west of its current position; and realign the arrow of point D to the point where the path turns from a southerly to a south-south-easterly direction, as described in the Order Schedule.
- In the 'Legend' on the plan attached to the Order insert a broken line with small arrowheads and the words "Restricted Byway to be added"

Since the confirmed Order would show as a highway of one description a way which is shown as a highway of another description in the Order as submitted, and would affect land not affected by the Order as submitted, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 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.

S Doran

Inspector

APPEARANCES

Supporters:

Mr M Jackson	<i>representing</i> The Ramblers' Association
Mr M Needler	Trustee, James Reckitt Memorial Trust
Mr C Hotham	Local resident
Mrs I Nurse	Local resident
Mrs A Wilson	Local resident

Interested persons supporting the Order:

Mr W M Burman	Local resident
Mr G Hopper	Local resident
Mr K Johnson	Local resident
Mr R I D Macfarlane	Local resident
Mrs P Tyler	Local resident

Objectors:

Mr P Atkinson	Solicitor <i>representing</i> East Riding of Yorkshire Council
who called:	
Mr R Carr	Expert witness
Mr M May	Local resident
Mr R V Woodward	Head Teacher, Swanland Primary School Academy Trust
Mr G Loncaster	Local resident

DOCUMENTS

1. Paginated copies of the two bundles of documents submitted by the East Riding of Yorkshire Council
2. Copy of newspaper advertisement and confirmation of the posting of site notices regarding the Public Inquiry, submitted by the East Riding of Yorkshire Council
3. Summary Proof of Evidence of Mr R Carr, submitted by the East Riding of Yorkshire Council
4. Copy of Order Decision FPS/P2745/7/32 submitted by the Ramblers' Association
5. Copy of authorisation for Mr Jackson to present the case on behalf of the Ramblers' Association, submitted by the Ramblers' Association
6. Letter and enclosure dated 28/11/06 from East Riding of Yorkshire Council to the Applicant, submitted by the Ramblers' Association
7. Photograph showing the eastern elevation of the Memorial Hall, Swanland, submitted by Mr Hotham
8. Bundle of documents concerning the 1998 Planning Application at Swanland Primary School, submitted by Mr Needler
9. Statement of Mrs Tyler
10. Statement of Mr Johnson
11. Letter dated 22/07/10 from Mr Macfarlane to East Riding of Yorkshire Council
12. Statement of Mr Loncaster
13. Outline closing submissions of East Riding of Yorkshire Council together with the following extracts, Section 29 of the Charities Act 1960, Section 36 of the Charities Act 1993, Section 175 of the Education Act 2002, and DfES guidance 4127/2006 on Safeguarding and Promoting Welfare
14. Closing remarks of Mr Hotham
15. Closing remarks of Mr Jackson on behalf of the Ramblers' Association, together with legal submissions and extracts from the Rights of Way Act 1932 and National Parks and Access to the Countryside Act 1949