

North Yorkshire County Council

Business and Environmental Services

28 September 2018

Opposed Definitive Map Modification Order Abbey Road to Abbey Road via the bank of the River Nidd, Knaresborough

Report to the Assistant Director – Transport, Waste and Countryside Services

1.0 Purpose of the report

- 1.1 To advise the Corporate Director of Business and Environmental Services (BES) of the proposed submission to the Secretary of State (SoS) of an opposed Definitive Map Modification Order (DMMO).
- 1.2 To request the Corporate Director, in consultation with BES Executive Members, to confirm that North Yorkshire County Council (NYCC) will adopt a neutral stance in regard to the confirmation of the Order.

2.0 Background

- 2.1 Making of the DMMO in 2012
Attached to this report as Appendix A is a copy of the report submitted to the Planning and Regulatory Functions Sub-committee dated 13 April 2012 which outlined the case for making a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement in relation to a 151 metre length of footpath on land situated between the River Nidd and Abbey Road Knaresborough.
- 2.2 The Planning and Regulatory Functions Sub-committee approved the making of a DMMO which was subsequently advertised, attracting an objection from the landowner. Despite liaison with the objector he maintains his objection. The County Council cannot confirm a DMMO where there are outstanding objections; the Order must be forwarded to the Secretary of State for resolution.
- 2.3 Within the recommendations of the report it was stated that:
“In the event that formal objections are made to that Order, and are not subsequently withdrawn, the Committee authorise the referral of the Order to the Secretary of State for determination, and permit the Corporate Director, under powers delegated to him within the County Council’s Constitution, to decide whether or not the County Council can support confirmation of the Order.”

3.0 Current Decision to be made

- 3.1 In submitting an opposed Order to the SoS the County Council needs to express whether, on the basis of the available evidence, it;
- supports confirmation of the Order,
 - believes the Order should not be confirmed, or
 - has no clear opinion on the matter and wishes to take a neutral stance
- 3.2 The current decision to be made is what stance the County Council is to take within the submission to be made to the SoS.

- 3.3 The Definitive Map Officers have always considered this to be a weak application, based on the quality of the evidence contained within the Evidence of Use forms which were submitted in two batches, the first in 1995 and the second in 2011/2012. The claim is on the basis that the public have had use of a path for a period exceeding 20 years and that the use was without force, permission or secrecy. For rights to be clearly shown to have been established the evidence needs to demonstrate the public's use of a specific route.
- 3.4 The evidence of use forms submitted in 1985 are identical apart from the personal details and the length of time of use. All contain the same hand drawn plan which all show a route between two points starting and finishing on the road. Given that during the period claimed this area was unfenced, the claim that all users entered and exited the area at exactly the same points is questionable. Of the second batch of forms completed by 17 witnesses, 9 do not claim a specific route but indicate an area to which there was apparently general access.
- 3.5 The criteria for originally making the Order was a low threshold i.e. whether it had been reasonably alleged that the public has acquired a right to pass and repass, and that criteria was believed to have been met, hence the making of the Order. However in considering whether the order should be confirmed the criteria is stronger i.e. whether on the balance of probabilities the public have acquired a right of way.
- 3.6 Although it is also accepted that there is no clear evidence that any steps were taken by the landowner to prevent access by the public to this land, it is contended that the evidence has failed to establish clarity that the public utilised one specific route, entering and exiting the land at particular points without merely making use of the whole area to access the riverbank.

4.0 Recommendation

- 4.1 It is requested that due to the inconsistent and unconvincing nature of the evidence that the resolution be left to the SoS's processes for resolving such issues, and that the County Council's adoption of a **neutral** stance be approved in relation to this Order.

IAN FIELDING
Assistant Director Transport Waste and Countryside Services

Author of report: Ron Allan

Background papers: File Ref HAR/1985/01/DMMO

North Yorkshire County Council

Report to the Corporate Director – Business and Environmental Services

28 September 2018

Opposed DMMO Abbey Road to Abbey Road via the bank of the River Nidd, Knaresborough

AUTHORISATION

I approve / do not approve the recommendation set out above

.....

ANY ADDITIONAL RECOMMENDATION or COMMENT:

.....

.....

David Bowe
Corporate Director - BES

Signed: Date:

DRAFT

NORTH YORKSHIRE COUNTY COUNCIL**PLANNING AND REGULATORY FUNCTIONS SUB COMMITTEE****13 APRIL 2012****APPLICATION TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND
STATEMENT FROM ABBEY ROAD TO ABBEY ROAD VIA THE BANK OF THE
RIVER NIDD, KNARESBOROUGH****Report of the Corporate Director – Business and Environmental Services****1.0 PURPOSE OF THE REPORT**

- 1.1 To advise Members of an application for a Definitive Map Modification Order, the effect of which, if confirmed, would be to add a Footpath, which runs from Abbey Road to rejoin Abbey Road via the bank of the River Nidd in Knaresborough. A location plan is attached to this report as **Plan 1**. The route referred to is shown as A - B – C on **Plan 2**, which is also attached to this report.
- 1.2 To request Members to authorise the Corporate Director, Business and Environmental Services, to make a Definitive Map Modification Order.

2.0 THE COMMITTEE'S RESPONSIBILITIES

- 2.1 The Committee in considering the Modification Order application acts in a quasi-judicial capacity. It is fundamental that consideration and determination of an issue is based on the evidence before the Committee and the application of the law. The merits of a matter have no place in this process and so the fact that a decision might benefit or prejudice owners, occupiers or members of the general public, or the Authority, has no relevance to the issues which members have to deal with and address.
- 2.2 The Committee's decision whether to "make" an Order is the first stage of the process. If Members authorise an Order being "made", and there are no objections to the Order, the County Council can "confirm" the Order. However, if there is objection to an Order that is not subsequently withdrawn, only the Secretary of State would have the power to decide if it should be "confirmed". It would then be likely that a Public Inquiry would be held, and the decision whether or not to confirm the Order would rest with the Secretary of State.

3.0 LEGAL ISSUES

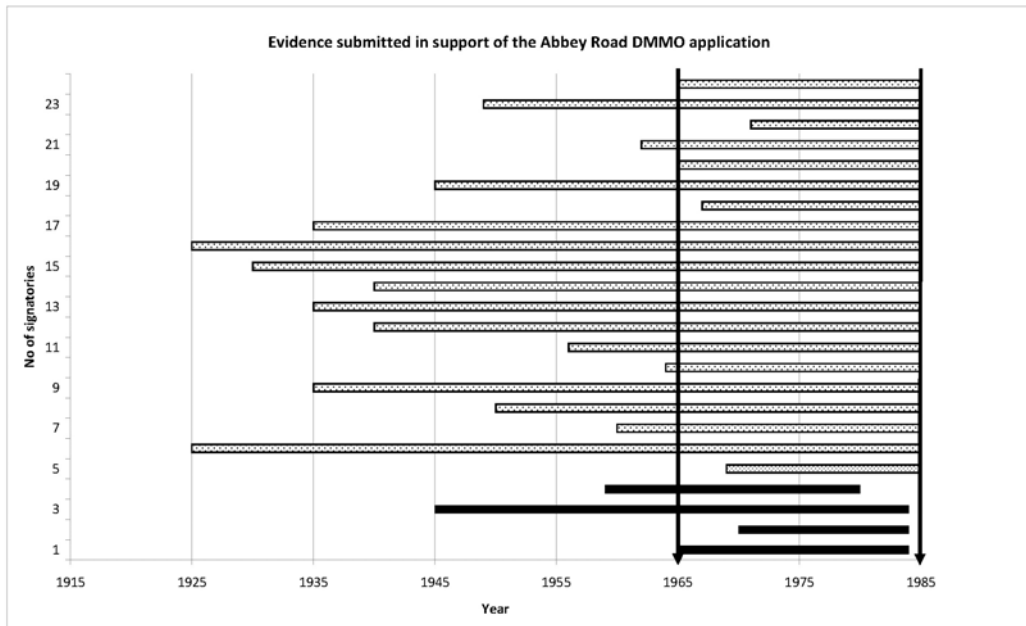
- 3.1 Under Section 53 of the Wildlife and Countryside Act 1981 the County Council has a duty to keep the Definitive Map and Statement under continuous review and to make a Modification Order to modify the Definitive Map and Statement where the discovery of evidence which, when considered with all other relevant evidence available to them, indicates that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist.
- 3.2 Under Section 31 of the Highways Act 1981 a statutory presumption arises that a way has been dedicated as a highway on proof that the way has actually been enjoyed by the public, as of right, and without interruption for a full period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it. That period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

4.0 BACKGROUND

- 4.1 The application was made by Knaresborough Town Council in 1985, and, is one of the last in the backlog of DMMO applications awaiting investigation, to date from the 1980's. The evidence in support of the application was of an insubstantial nature; consequently it has remained a low priority application which has attracted little support from the public.
- 4.2 In a recent review of outstanding files this application was re-examined in the light of the current prioritisation system. It was considered that on the basis of the limited strength of the supporting evidence there was a case for the rejection of the application. The applicant was advised of this, and was also advised that the circumstances of the use of the route suggested that an application for the land to be recorded as open space may be more appropriate than an application for footpath to be added to the Definitive Map. In response, the applicant provided additional evidence to support the original DMMO application.
- 4.3 The original application was made following permission being sought in 1984 by the previous landowner of the property known as "The Abbey", to erect a fence alongside Abbey Road. Permission was granted for the fencing by Harrogate Borough Council, and was erected in 1985 obstructing access to the land alongside the River Nidd.
- 4.4 The obstruction of the route at Points A and C constituted the challenge to the public's alleged right to use of the route and prompted Knaresborough Town Council to submit the application for a Definitive Map Modification Order to be made. Therefore, to meet the statutory test for establishment of public rights through usage it is necessary for the Applicant to demonstrate 20 years of relevant use between 1965 – 1985.

5.0 EVIDENCE IN SUPPORT OF THE APPLICATION

- 5.1 The application was supported by twenty proforma statement forms submitted in 1985, and further fourteen user evidence forms submitted in 2010 - 2012, which viewed together claim uninterrupted use of the route on foot only from 1925 until 1985.
- 5.2 The twenty proforma statement forms consisted of a sketch plan with a route already marked, and a standard statement that was then signed by the witness. As such, there is no individual information regarding each witness's own use of the route other than recording the number of year's usage.
- 5.3 The fourteen newly submitted modern user evidence forms provide much more information, and each form includes a plan marked by the witness.
- 5.4 On these plans four out of the fourteen signatories indicated that they had used a route on the same alignment as shown on the original application. However, of the other ten user evidence forms, seven of the signatories highlighted the whole section of the land indicating that these people used this land more widely rather than walking on a specific alignment, and three of the signatories showed that they had walked from Abbey Road to the bank on the River Nidd, but along significantly different alignments to the route claimed in the application.
- 5.5 Consequently, of the fourteen new forms, only four were supportive of the application, and the remaining ten forms, which are not directly supportive to the application, have been disregarded from the process.
- 5.6 Of these four signatories, one claimed that he had used the route up to ten times a year; the remaining three claimed that they had used the route more than ten times a year. The chart below shows the claimed use of the route "as of right", (i.e. "without secrecy, force or permission"). The bars shown dotted represent the early twenty user statement forms and the bars shown black represent the four modern user evidence forms. The bold vertical lines show the period of 20 years under consideration.



- 5.7 On the four modern user evidence forms, reasons given for using the route include access to, and views of, the River Nidd, and dog walking, which are bone fide reasons for using a public right of way.
- 5.8 On the twenty user statements indicated that the route in question had been used “by the people of Knaresborough from time immemorial”.
- 5.9 None of the 24 witnesses stated that they were ever stopped or challenged whilst using the route prior to the route being obstructed in 1985.
- 5.10 No historical documentary evidence was submitted in support of this application.

6.0 OBJECTION TO THE APPLICATION

6.1 During initial investigations into the application, an objection was received from Richmond Solicitors the legal representatives of the current owner of The Abbey. The objection is on the basis that:-

6.1.1 The application is imprecise due to the following;-

- as it apparently seeks to allow “free public access to the river” and if this were the case such “access” would constitute a trespass over and result in potential damage to the land and the riverbank.
- The application makes reference to a route which is “roughly the one taken by those who have made statements”

- It should be reasonable to assume that a “right of way” which has been enjoyed “from time immemorial” should be clearly defined on the ground, which it is indicated was not the case when the application was submitted.

6.1.2 The fencing off of the land between Abbey Road and the application route did not provoke any immediate response and objection to an apparent denial of the use of the footpath. This is confirmed by the then landowner’s solicitor who has no recollection of any such relevant response or objection.

6.1.3 The applicant did not “protect” its Application by registering notice of it against the title to the land and consequently successors in title to the current landowner who purchased the land without notice of the application.

6.1.4 The application was raised over 25 years ago, neither the applicant nor anyone on its behalf has pursued it, and any right of way that may have previously existed will have lapsed and be extinguished.

6.1.5 The objector claims that the application was not properly made because the applicant failed to serve notice on the landowner in 1985.

7.0 RESPONSES FROM OTHER LANDOWNERS AND INTERESTED PARTIES

7.1 During the informal consultation Knaresborough Town Council and Harrogate Borough Council confirmed that they were still in support of the application.

7.2 Harrogate Bridleways Association responded confirming that they were aware of this route being in existence until it was fenced off. They were not sure if they could confirm that the public used a specific alignment, as it has tended to be used as an open space. Indication was also given that horse riders and cyclists had used the land as well as the many casual walkers. Indication was given that members of the organisation had ridden over the land and jumped the tree trunks that were located in the area of land of the application route from the late sixties to the mid to late seventies.

8.0 COMMENTS ON THE EVIDENCE

8.1 It is difficult to estimate how much reliance can now be put on the evidence within the earlier proforma statement forms. As the sketch plan was completed with a route already marked, the witnesses who signed those forms were denied the opportunity to show the route that they had individually used.

- 8.2 It has been suggested that before the fence was erected that people entered this area of land at many points, and wandered freely. This possibility is supported by the submission of the fourteen modern forms wherein seven of the witnesses did not mark an individual route, but highlighted the whole area of land, indicating that they had walked freely across the area, and had not kept to a particular path. The recent submission, whilst trying to strengthen the original application, has in fact cast some doubt on the validity of the original evidence.
- 8.3 Notwithstanding the evidence of free access across the whole area of the land there are still four of the modern forms which indicate a particular route, which corresponds with the original application route. In addition there is the possibility that the witnesses who had signed the earlier proforma statement forms may have also walked the application route “as of right” between 1925 to 1985 in a manner which would satisfy the legal test as set out under Section 31 Highways Act 1980.
- 8.4 There is no evidence to show that prior to 1985 when the fence was installed, any action was taken to challenge the public’s claimed use of this route.
- 8.5 The objector considers that the route would have been visible on the ground in 1985 if so many people were using it. This is not disputed, but no evidence was produced to demonstrate whether the route was, or was not, visible on the ground at that time.
- 8.6 The objector comments that the fencing across the route did not provoke any immediate response or objection to an apparent denial of the use of the footpath. However, it is considered that the making of an application is a response to the obstruction of the alleged footpath, and it is understood that the Town Council made representations to the landowner at the time, and to Harrogate Borough Council, to request that the fence not be installed.
- 8.7 The objector claims that the application was not properly made because the applicant failed to serve notice on the landowner in 1985. However, the County Council has a copy of the notice that was served in the appropriate manner, on the then landowner. There is no legislative requirement for the applicant, or the authority, to subsequently serve further notice on any successor in title, prior to an application being determined.
- 8.8 The objector comments that any rights that may have existed have subsequently been extinguished because the public have not used the route for over 25 years. However, in the event that it were demonstrated a public right of way had been established by 1985, then it would not have been extinguished subsequently simply through lack of use.

9.0 HARROGATE AREA COMMITTEE COMMENTS

9.1 An information report was presented before the Harrogate Area Committee on the 15 March 2012. One of the members expressed his support for the recording of this public right of way, as it was beneficial to the local tourism of the area.

10.0 CONCLUSIONS

10.1 It is acknowledged that there is not a substantial body of clear evidence to support this application, and that it may not withstand the more stringent tests in the later stages of the Modification Order processes.

10.2 However, it is also acknowledged that no evidence has been presented to rebut the assertion that the route has been used by the public as described above, or to identify any actions showing an intention not to dedicate by previous landowners or tenants during the twenty year period prior to the erection of the fence in 1984.

10.3 It is considered overall that a public right of way is reasonably alleged to subsist, and that an Order should be made which can then be tested by the ensuing process..

11.0 RECOMMENDATIONS

11.1 It is therefore recommended that:-

The Committee authorise the Corporate Director of Business and Environmental Services to make a Definitive Map Modification Order for the route shown as A – B – C on Plan 2 of this report to be shown on the Definitive Map as a Footpath,
and,

11.2 In the event that formal objections are made to that Order, and are not subsequently withdrawn, the Committee authorise the referral of the Order to the Secretary of State for determination, and permit the Corporate Director, under powers delegated to him within the County Council's Constitution, to decide whether or not the County Council can support confirmation of the Order.

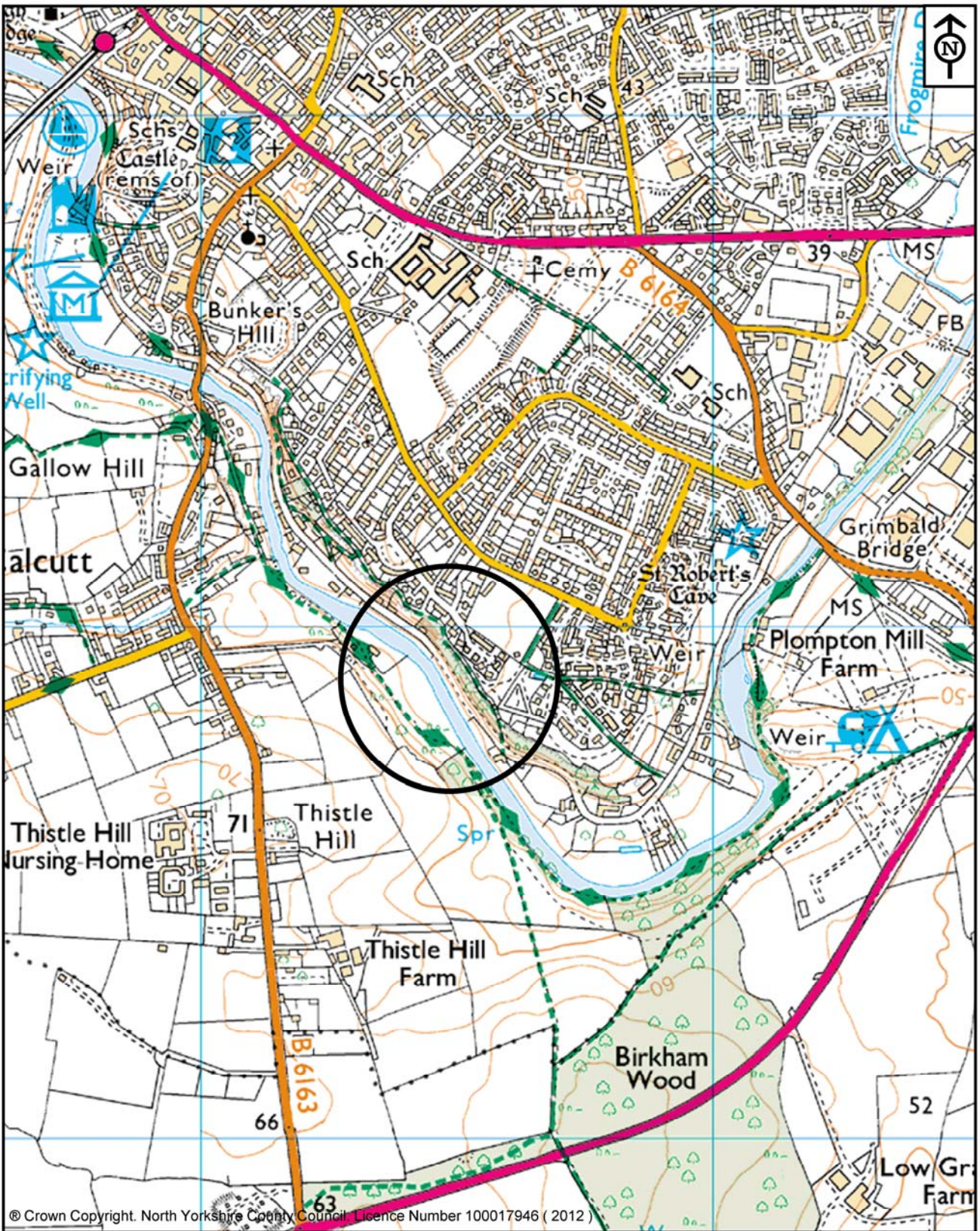
DAVID BOWE
Corporate Director Business and Environmental Services

Author of Report: James Perkins, Definitive Map Officer

Background papers

- DMMO application dated 20 February 1985
- Evidence submitted in support of, and against the application

The documents are held on a file marked: "County Council's Planning and Regulatory Functions Sub-Committee, 13 April 2012, Application to add a Footpath, which runs from Abbey Road to Abbey Road via the bank of the River Nidd in Knaresborough", which will be available to Members at the meeting.



North Yorkshire County Council

Public Rights of Way
Waste and Countryside Services
County Hall
Northallerton
DL7 8AH

Location Plan

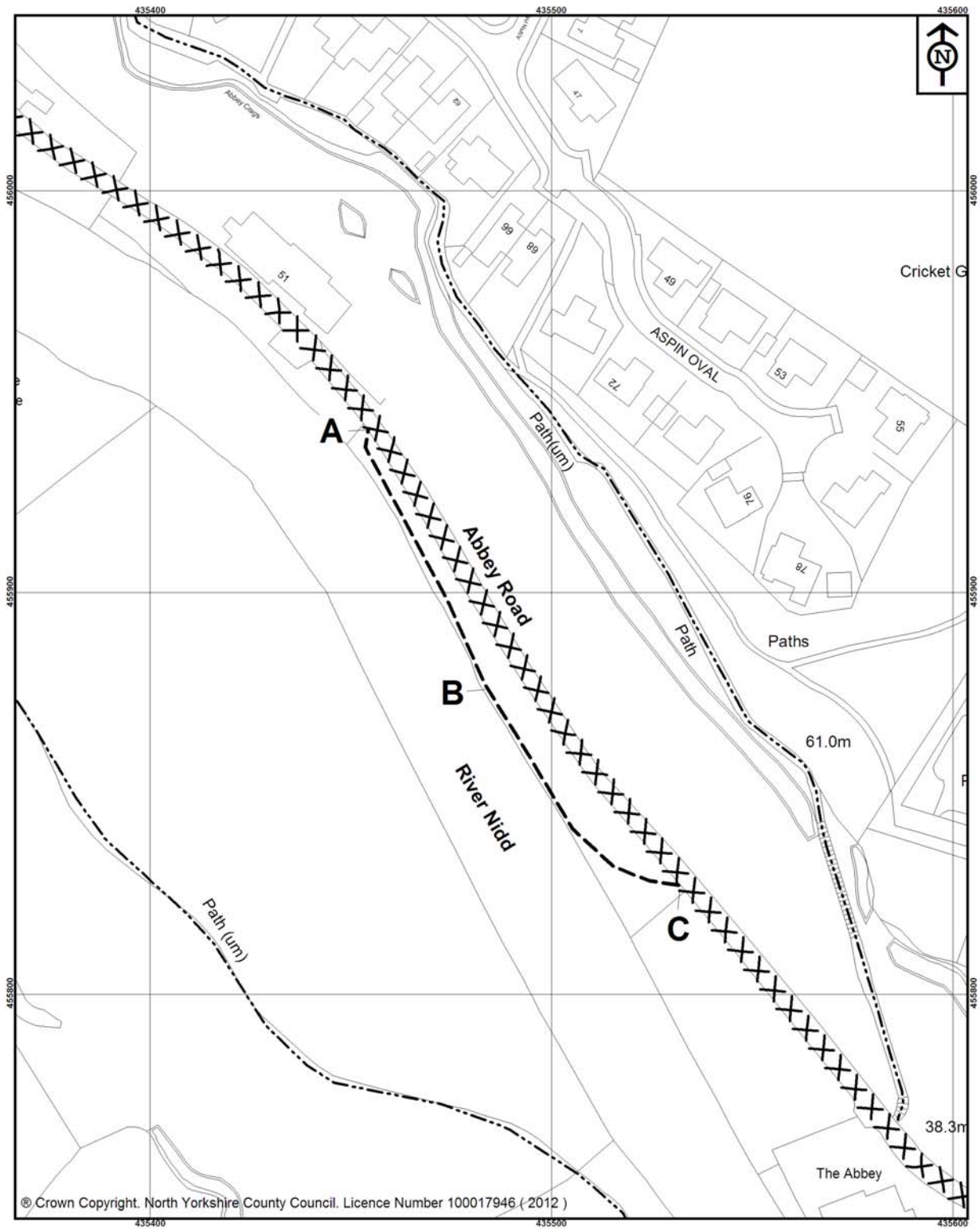
Map drawn on 24 January 2012
Drawn by JRP Scale 1:10000

North Yorkshire County Council






Plan prepared for the
Planning & Regulatory Functions
Committee
on 13 April 2012

PLAN 1

File Ref No. HAR/1985/01/DMMO



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 <p>North Yorkshire County Council</p> <p>Public Rights of Way Waste and Countryside Services County Hall Northallerton DL7 8AH</p>	<h2>PLAN 2</h2>		<p>Application to add a Footpath to the Definitive Map and Statement from Abbey Road to Abbey Road via the Bank of the River Nidd, Knaresborough</p> <p>Planning & Regulatory Functions Sub-Committee - 13 April 2012</p>
	<p>Key:</p> <ul style="list-style-type: none"> Application route  Other footpaths  Maintainable  Highways  	<p>Map drawn on 24 January 2012</p> <p>Drawn by JRP</p>	