

North Yorkshire County Council

Executive Members

21 January 2022

Opposed Footpath No. 35.5/23 South Duffield Road to Sand Lane, Barlby with Osgodby, Selby Modification Order 2012

Report of the Assistant Director – Travel, Environmental & Countryside Services

1.0 Purpose Of 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).

A location plan is attached to this report as **Plan 1**. The route referred to, is shown by a bold dashed black line and is marked A-B-C-D on the plan attached to this report as **Plan 2**.

1.2 To request the Corporate Director, in consultation with the Executive Member for Access, to authorise that North Yorkshire County Council (NYCC), in its submission of the opposed Order to the SoS **will support confirmation of the Order**.

2.0 Background

2.1 The route was first brought to the attention of the County Council in 1977, when six user evidence forms were submitted to the authority, requesting the route to be added to the Definitive Map under the review process. At that time there was no facility to within the legislation to make amendments to the Definitive Map by application, and further investigations were deferred until the area was next subject to a review of its rights of way.

2.2 The current application was submitted by Barlby and Osgodby Parish Council in March 2007, to add the route to the Definitive Map & statement as a footpath and was supported by a further fourteen user evidence forms, giving a total of twenty forms for supporting the application, as well as documentary evidence consisting of six OS maps published between 1838 and 1959.

2.3 The evidence was supportive of use by the public at large and that use had been continuous through the relevant time-period (20 years preceding the date of the DMMO application).

2.4 Following the pre-order consultation, it appeared that on the balance of probabilities, public footpath rights existed along the application route and therefore the route should be recorded on the Definitive Map and Statement as a public footpath.

2.5 Attached to this report as **Appendix 1** is a copy of the report submitted to the Planning and Regulatory Functions Sub-Committee on 2 March 2012 in which the case for making a Definitive Map Modification Order to record a public footpath was outlined. The Committee approved the making of a DMMO.

2.6 The Order was made on 30 April 2012 and advertised 24 May 2012, attracting one objection which remains outstanding. The County Council cannot confirm a DMMO where there are outstanding objections; the Order must be forwarded to the Secretary of State for resolution.

3.0 Responses to the Sealed Order

3.1 One objection was made to the making of the Order, by the owner of the land crossed by the section A-B. His comments were that:

- The existence of two kissing gates is supposed to give provenance to the existence of a previous path. However, although the Order records a kissing gate at Point B, there is no kissing gate at Point B; the metal structure at B is a set of harrows placed in the hedge some years ago to plug a hole after cattle escaped and pushed a way through the hedge, following an act of vandalism to the barbed wire fence.
- Point B is inundated with water for most of the year.
- The wet conditions would not have encouraged anyone to walk the section B-C and if the path is granted there is a risk that the public will trespass onto neighbouring property in order to avoid the wet area.

3.2 Although the objector is disputing a means of crossing the fence at Point B, user evidence describes that historically there were apparently kissing gates at both A and B and that stiles were later installed at both locations: Five user statements describe 2 stiles on the route, and two of those statements provide enough information to identify Point B as the location of the second stile.

3.3 The section B-C is wet, as is the land around B: The Order route swings around to the west to avoid the worst of the wet area and in fact this route is shown on old OS maps, suggesting the wet area is of some antiquity. Eight user statements indicate that in order to avoid the wet area, users walked along the east side of the hedge between B and C and one witness stated that the east side of the hedge has been used in this way since 1982. Although this reduces the strength of user evidence, there remains sufficient evidence of use to support the Order route.

4.0 Representations made by the local member

4.1 No formal representations were received from the local councillor in response to the consultations regarding the Order.

5.0 Equalities

5.1 It is the view that the recommendations do not have an adverse impact on any of the protected characteristics identified in the Equalities Act 2010.

6.0 Finance

6.1 As the evidence submitted consists mainly of user evidence, it is probable that the Order would be resolved by Public Inquiry. There would be a cost to the Authority in preparing a submission to the SoS and responding to any queries raised by the SoS and these costs would be for officer time, which would be met by the respective staffing budgets. If the Inspector chose to hold a Public Inquiry, the costs of arranging, hosting and supporting the Inquiry would fall to the Council.

7.0 Legal

- 7.1 The opposed Modification Order would be determined by an Inspector appointed by the SoS and as stated above, determination will be by way of either a Public Inquiry or written representations.
- 7.2 The Inspector, on the basis of the evidence and legal criteria will decide whether or not to confirm the opposed Modification Order. If the Inspector decides to confirm the Order, the route will be recorded on the Definitive Map and statement in accordance with the details within the Modification Order.

8.0 Climate Change

- 8.1 The proposal is to record a right of way along an unrecorded route. The confirmation of this Order would have no positive or negative impact on climate change.

9.0 Current Decision to be made

- 9.1 In submitting an opposed Order to the SoS, the County Council needs to express whether, on the basis of available evidence, it;
- supports confirmation of the Order,
 - believes the Order should not be confirmed, or
 - considers the evidence is either so finely balanced, or is particularly unclear and wishes to take a neutral stance.
- 9.2 The current decision to be made is which stance the County Council is to take within its submission of this opposed DMMO to the SoS.
- 9.3 From all the available evidence, there is sufficient evidence of use and documentary evidence to support confirmation of the Order.
- 9.4 The objector has not provided sufficient evidence that would successfully challenge the Order.
- 9.5 The evidence submitted in 1977 includes a description of metal-framed kissing gates at Points A and B, although in 1977, both structures were overgrown with thorn bushes and path users climbed the adjacent fence to gain access to the path. It is not clear when the kissing gates were removed, but the metal gate attached to a cast iron gate post at Point A and seen on photographs dated 2009 and 2011, is similar in appearance to the type of gate typically seen in old metal-framed kissing gates elsewhere in the County.
- 9.6 Witness statements describe stiles at Points A and B. One witness describes the stiles being removed in Easter 2007. The landowner has stated that the harrows were placed in the hedge to plug a gap cut in the stock fence and although the landowner did not provide a date of this event, a witness has stated that this occurred in April 2007.

10.0 Conclusion

- 10.1 Overall, it appears there is sufficient user evidence to indicate that public footpath rights have been established along the Order route and on the balance of probabilities the route should be recorded as a public footpath on the Definitive Map. Therefore of the options outlined in 9.1 above, that in this instance, the Modification Order should be confirmed.

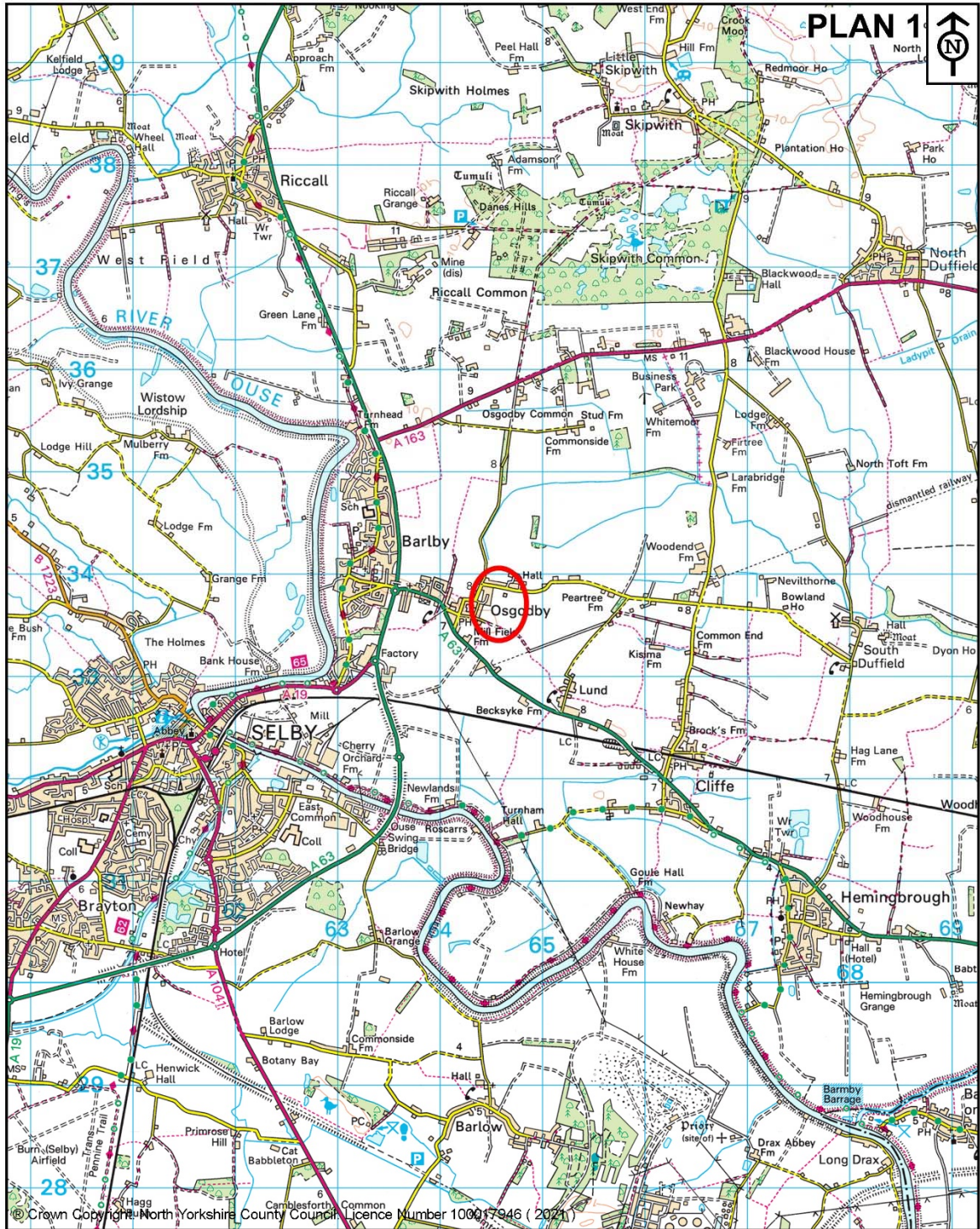
11.0 Recommendation



- 11.1 The application is supported by user evidence and additional historical mapping evidence which has not been countered by evidence from the objector provided to date, and which indicates that on the balance of probabilities public footpath rights exist.
- 11.2 It is recommended that the Authority support confirmation of the Modification Order in its submission to the Secretary of State.

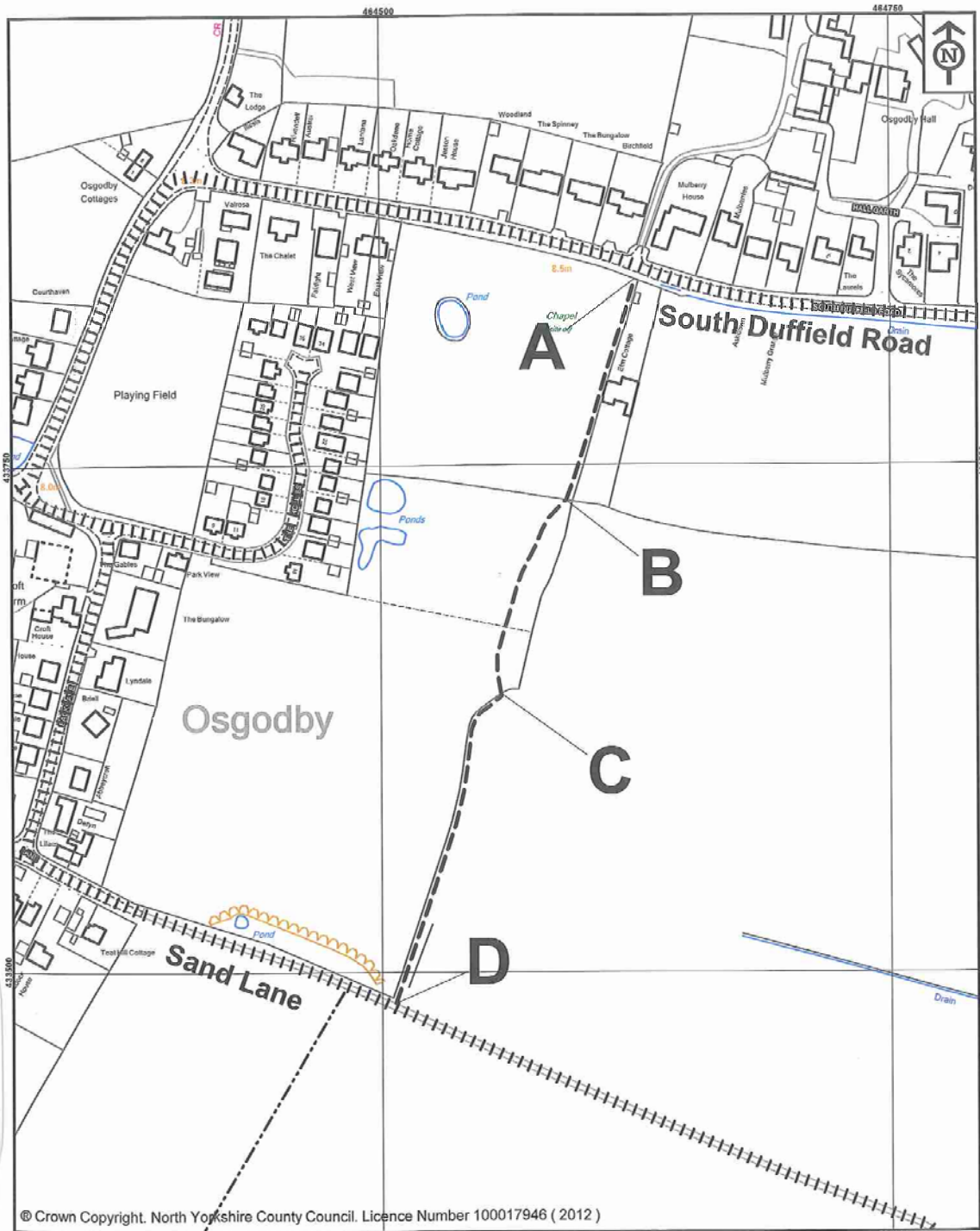
MICHAEL LEAH
Assistant Director - Travel, Environment and Countryside Services

Author of Report: Andrew Hunter


Background Documents: File Ref SEL/2007/07/DMMO



 <p>North Yorkshire County Council</p> <p>Public Rights of Way Waste and Countryside Services County Hall Northallerton DL7 8AH</p>	<p>Key: PLAN 1 Approximate location of route</p>  <p>Map drawn on 29 November 2021 Drawn by AWH Scale 1:50000</p>	<p>North Yorkshire County Council</p> <p>Location Plan Barby with Osgodby</p> <p>File Ref No. SEL/2007/07/DMMO</p>
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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>	<p>Key:</p> <p>Footpath to be recorded - - - - -</p> <p>Other footpaths - - - - -</p> <p>Maintained Highways </p>	<p>North Yorkshire County Council</p> <p>Wildlife and Countryside Act 1981 Section 53</p> <p>FOOTPATH NO. 35.5/23 SOUTH DUFFIELD ROAD TO SAND LANE, BARBY WITH OSGODBY, SELBY MODIFICATION ORDER 2012</p>
	<p>Map drawn on 13 March 2012</p> <p>Drawn by RJV Scale 1:2500</p>	<p>File Ref No. SEL/2007/07/DMMO</p>

NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE

2 MARCH 2012

**APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD A
PUBLIC FOOTPATH ON THE DEFINITIVE MAP AND STATEMENT BETWEEN
SOUTH DUFFIELD ROAD AND SAND LANE, OSGODBY, SELBY.**

Report of the Corporate Director – Business and Environmental Services

1.0 PURPOSE OF REPORT

- 1.1 To advise Members of an application for a Definitive Map Modification Order to record a public footpath from:

South Duffield Road to Sand Lane, Osgodby, Selby

A location plan is attached to this report as **Plan 1**. The route referred to, is shown by a bold dashed black line and is marked A – B on the plan attached to this report as **Plan 2**.

- 1.2 To request Members to authorise the Corporate Director of 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 law. The merits of a matter have no place in this process and 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 where a Highway Authority discovers evidence which (when considered with all the other relevant evidence available to them) shows that a right of way which is not shown in the Definitive Map and Statement “subsists or is reasonably alleged to subsist” then the Authority should make a Definitive Map Modification Order.
- 3.2 Further, under Section 31 of the Highways Act 1980 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. The period of 20 years is to be calculated retrospectively from the date when the claimed right of the public to use the way is brought into question.
- 3.3 At common law a route can be held to have been dedicated as a public right of way on the basis of evidence of use. There is no prescribed period over which it must be shown that use has occurred but an inference of dedication by a landowner must be capable of being drawn. The use relied on must have been exercised “as of right”, which is to say without force, without secrecy and without permission. The onus of proof lies with a claimant.

4.0 BACKGROUND TO THE APPLICATION

- 4.1 The route shown on Plan 2 was first brought to the attention of the County Council in 1977 when six evidence of use forms were submitted to the authority, requesting the route to be added to the Definitive Map under the review process. At that time there was no facility within the legislation to make amendments to the Definitive Map by application, and further investigations were deferred until the area was next subjected to a review of its rights of way.
- 4.2 An application dated 29 March 2007 was made under the Wildlife and Countryside Act 1981 for the same route as in the 1977 forms to add a footpath to the Definitive Map and Statement at Osgodby, by Barlby and Osgodby Parish Council. The application was supported by a further fourteen user evidence forms giving a total of twenty forms supporting the application.
- 4.3 It is not clear what spurred the application to be made in 2007 but the submission of an application can be viewed as bringing the route into question for the purposes of the Highways Act 1980. The date of challenge is important because it is from this date that the twenty year period is calculated back.

- 4.4 The claimed route lies along a reasonably well-defined track that runs across two fields between the two roads.
- 4.5 The land crossed by the application route is in the ownership of three land owners.
- 4.6 Following the initial consultation with other local councils, user groups, and land owners one objection was received.
- 4.7 Of the remaining two land owners one is the County Council, whose Asset Management Team have confirmed that they have no objections to the establishment of the path.
- 4.8 The third land owner has confirmed that he has no objections to the path if it is established on its historical route. However he has stated that he would object if the route was diverted from this historic way eastwards. The route indicated on Plan 2 attached to this report is on the historic route of the path as indicated by the old Ordnance Survey maps.

5.0 EVIDENCE IN SUPPORT OF THE APPLICATION

5.1 Evidence of Use Forms

- 5.1.1 A total of twenty evidence of use forms have been submitted in support of this application by nineteen witnesses. One person completed a user evidence form in 1977 and then a further form in 2007.
- 5.1.2 Reasons given for the use of the route are leisure walks and dog walking, which are bone fide reasons for using a public right of way.
- 5.1.3 The span of usage covered by the forms is from 1922 to 2006, the application being submitted early in 2007.
- 5.1.4 There is no mention within the Evidence of Use forms of any of the users being challenged whilst using the route, or of any actions having been undertaken to suggest to users that the route was not a public right of way.
- 5.1.5 Four witnesses report that, for many years, there were kissing gates giving access to the northernmost field crossed by the route.

5.2 Historic Evidence

- 5.2.1 The application was submitted with an old Ordnance Survey map. Further research shows that the route appears on both the 1892 edition and the 1907 edition OS maps. The route is shown as an unfenced track on these maps.

6.0 EVIDENCE AGAINST THE APPLICATION

- 6.1 Following the initial application and subsequent consultation one objection has been received. This is from a landowner whose property is crossed by the northern end of the application route. The land has been in his ownership since the mid 1970s.
- 6.2 The objection is on the grounds that there were no public rights across the field.
- 6.3 The land owner states that no permission has ever been granted for anyone to use the alleged route.
- 6.4 The land owner also states that when people have been seen they have been routinely challenged and turned back.
- 6.5 The land owner also denies any knowledge of any kissing gates or other means of giving access to the field, and states that his field next to South Duffield Road was wire fenced.
- 6.6 The land owner does acknowledge that there was a “stockman’s management tool” in the north eastern corner of the field. From the description given by the landowner, this appears to be somewhat similar to a stile, and has allowed access over the wire fence.

7.0 COMMENT ON THE EVIDENCE IN SUPPORT OF THE APPLICATION

- 7.1 The evidence of use supplied to support the application shows that the way has been in use for a period of twenty years and more, meeting the test set down under the Highways Act 1980.
- 7.2 Of the nineteen witnesses, two did not give dates during which they used the route. This means that their evidence cannot be used for the purpose of Section 31 of the Highways Act 1980.
- 7.3 One witness reports using the route to access their own land, meaning this use may have been under licence and therefore does not accrue public rights for the purposes of the Highways Act 1980. This evidence has also been removed from consideration.
- 7.4 In the light of the above there remain sixteen witnesses, and their evidence meets the twenty year use test set down in the Highways Act 1980.
- 7.5 The depiction of the route on the old Ordnance Survey map demonstrates that the route has physically existed for over 100 years, however this does not prove in itself that any public rights exist.

8.0 COMMENT ON THE EVIDENCE AGAINST THE APPLICATION

- 8.1 The evidence supplied with the objection consists of a long statement from the land owner stating his position.
- 8.2 The fact that people using the path had not sought permission and that the land owner had not granted permission confirms that the use set out in the evidence of use forms was “as of right”, meeting this requirement of the Highways Act 1980.
- 8.3 The challenging of people by the land owner is not corroborated by the evidence of use forms, none of the witnesses recorded that they had been prevented from using the route. Therefore, it is not possible to draw any conclusions on this matter.
- 8.4 The land owner denies any knowledge of any kissing gates on the route, however it is possible that any gates were not clearly identifiable by the time this landowner purchased the property. A couple of witnesses have commented that the remains of the kissing gates were still lying in the hedge in 2007. It is not possible to draw any conclusions on this particular issue.
- 8.5 As the stockman’s management tool (provided to give the stockman access to the field) appears to be the same as a stile, it may have allowed people to access the route. It was provided to allow the easy crossing of a barbed wire fence. The presence of barbed wire fences is corroborated by the evidence of use forms, but they do not appear to have prevented use of the route.
- 8.6 In summary, the objection makes relevant points suggesting that access has not been possible at all times due to fences, and that he has challenged people who have made use of the route, and therefore that public rights of way have not been established, they are not corroborated by the statements of the witnesses within the Evidence of Use forms.

9.0 CONCLUSION

- 9.1 Whilst the evidence is not clearly conclusive either in support of, or against the establishment of public rights, the information supplied with the application is sufficient to reasonably allege the existence of a right of way across the land.
- 9.2 The owner of the land over which part of the route runs has objected to the application but has not supplied sufficient evidence to satisfactorily rebut the reasonable allegation of the existence of the right of way.
- 9.3 The Selby Area Committee Meeting held on the 9 January 2012 made no comments on this matter.

10.0 RECOMMENDATION

10.1 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 power 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: Russ Varley

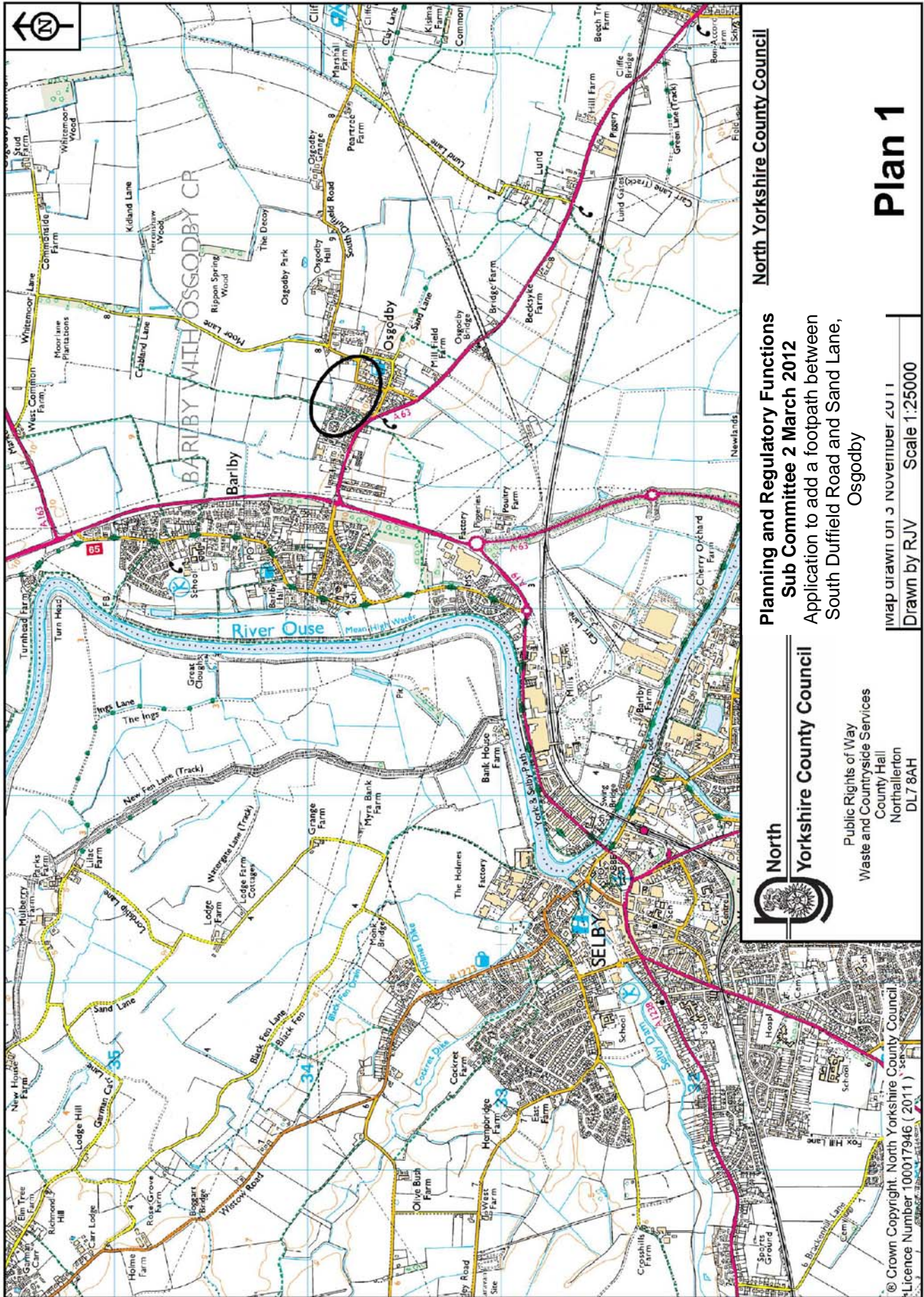
Background Papers: -

DMMO application dated 29 March 2007.

Evidence submitted in support of, and against the application.

The documents are held in a file marked:

“South Duffield Road to Sand Lane, Osgodby. Report to the Planning and Regulatory Functions Sub Committee, 2 March 2012 – Background Papers” which will be available to the Members at the Meeting.



North Yorkshire County Council

Planning and Regulatory Functions
 Sub Committee 2 March 2012

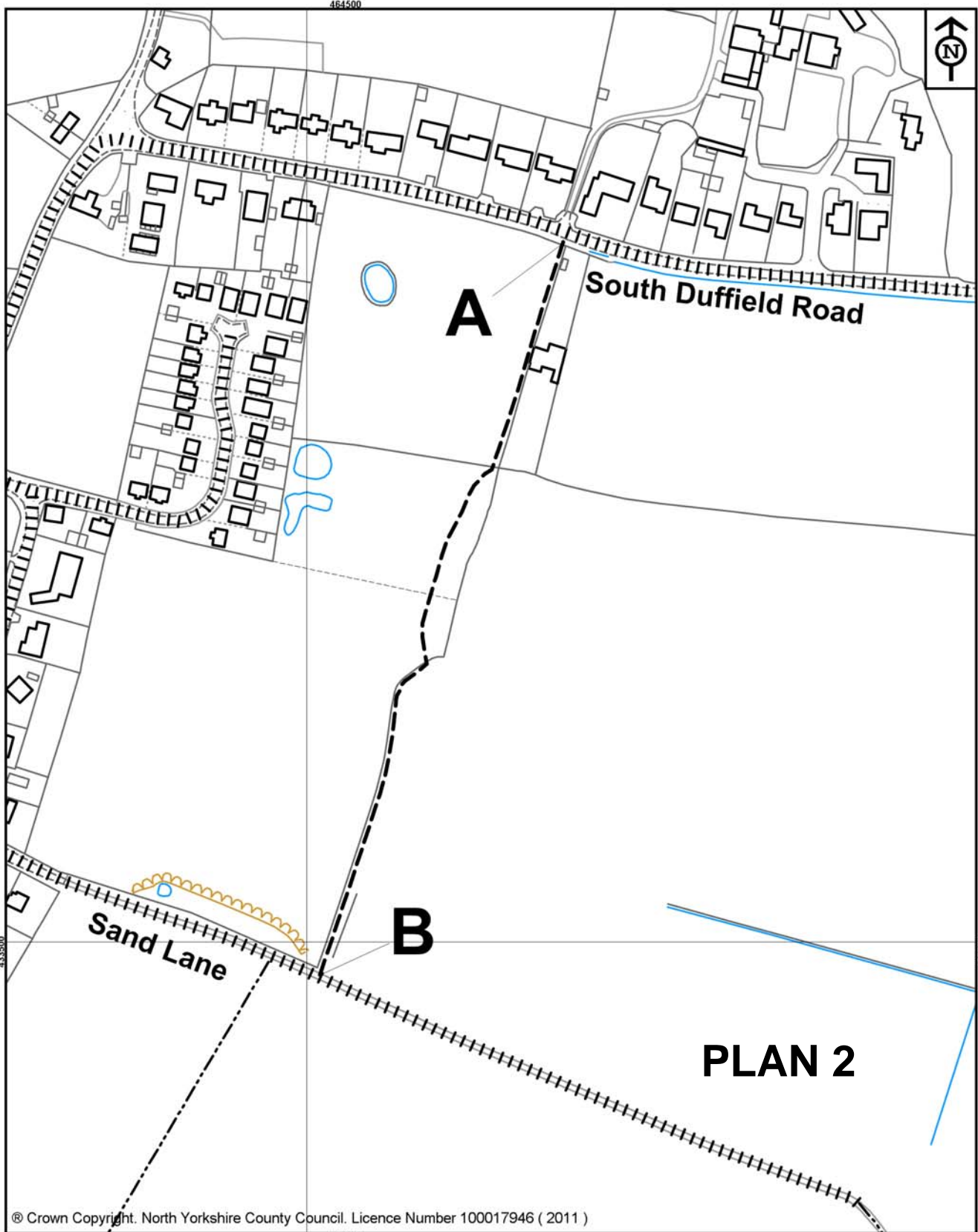
Application to add a footpath between
 South Duffield Road and Sand Lane,
 Osgodby

Plan 1


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

map drawn on 3 November 2011
 Drawn by RJV Scale 1:25000

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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>	<p>Key:</p> <ul style="list-style-type: none"> Application route Other footpaths Other bridleways Maintainable highways <p>Map drawn on 22 November 2011 Drawn by RJV Scale 1:2500</p>	<p style="text-align: right;">1</p> <p>Planning and Regulatory Functions Sub Committee 2 March 2012 Application to add a footpath between South Duffield Road and Sand Lane, Osgodby</p> <p>File Ref No. SEL/2007/07/DMMO</p>
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North Yorkshire County Council

Corporate Director - BES

21 January 2022

Opposed Definitive Map Modification Order:

**Footpath No. 35.5/23 South Duffield Road to Sand Lane, Barlby With Osgodby, Selby
Modification Order 2012**

Report of the Assistant Director – Travel, Environmental and Countryside Services

AUTHORISATION

I approve / do not approve the recommendation set out above

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ANY ADDITIONAL RECOMMENDATION or COMMENT:

.....

.....

Michael Leah
Assistant Director - BES

Signed:Date: