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## Order Decision

Inquiry opened on 20 October 2015

Site visit made on 19 October 2015

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 10 December 2015**

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### Order Ref: FPS/Q9495/7/32

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lake District National Park Authority Definitive Map Modification Order 2014, Footpath 511090, Bottom Section of Height Lane, Colton Parish.
- The Order is dated 28 July 2014 and proposes to modify the Definitive Map and Statement for the area by adding to them a footpath as shown in the Order plan and described in the Order Schedule.
- There were 2 objections outstanding at the commencement of the inquiry.

### Summary of Decision: The Order is not confirmed

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#### Procedural Matters

1. This case concerns the addition of a footpath following a track between Footpath 511067 and Footpath 511089 at Height Lane, High Stott Park. There are two objections to the Order made by Mr and Mrs Millership and Mr Georgiou, who live alongside the track.
2. I made an unaccompanied inspection of the Order route on 19 October. No-one requested that I make a further accompanied visit following the close of the Inquiry.
3. At the Inquiry the Lake District National Park Authority ('LDNPA') addressed an issue that had been raised on behalf of Mr and Mrs Millership previously, but in the event was not pursued. This concerned whether or not the Order had been correctly made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 1981 Act') rather than under Section 53(3)(b). It is often the case that an order relying on a presumption of dedication on the basis of public use is made under Section 53(3)(b). However, I see no reason why an order cannot, in the alternative, be made under Section 53(3)(c)(i), the 'discovery of evidence' that a presumption of dedication has arisen on the basis of public user, together, in this case here with the documentary evidence that has been adduced. I am satisfied that the Order is neither misleading nor flawed as had been suggested, and that it is appropriate that I determine it as made.

#### The Main Issues

4. As mentioned above, the Order has been made under Section 53(3)(c)(i) of 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 a balance of probabilities, that a footpath which is not shown in the

Definitive Map and Statement ('DMS') subsists, and that the Map and Statement should be modified.

5. The LDNPA relied on a presumption of dedication having arisen under Section 31 of the Highways Act 1980 ('the 1980 Act'). This requires the date to be established when the public's right to use the Order route was brought into question. The evidence can then be examined to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowner(s) to dedicate public footpath rights.
6. There is documentary evidence which may shed light on the ownership of the Order route and thus whether anyone had the capacity to dedicate a right of way, and whether or not it was subject to any private rights that may be relevant when considering claimed use.
7. Of particular relevance in this case are the location, wording and duration of signs along the route, which Mr and Mrs Millership argued rebut any presumption of dedication.
8. In considering the evidence and in reaching my decision I take into account relevant case law, including that adduced by the parties.

## **Reasons**

### ***When use of the claimed route was brought into question***

9. There are several possible dates to consider. There is the application to add the Order route to the DMS in 2013. It came about after Finsthwaite Parish Council had been made aware by local people that the owners of Easter How were unhappy about people, including their neighbours, walking past their property, and were turning them away. This was in 2010. However, Mr Millership stated at the Inquiry that they had done nothing different then to what they had done since purchasing the property in 1999.
10. Mrs Scott said she had been challenged by Mr Millership in 2005, following which she continued to use the Order route, but chose to use it downhill, at the end of her walk. Although Mr Millership did not recall this particular challenge, he had made other challenges to strangers when he had seen them using the Order route since 1999. These comprised enquiring whether walkers were lost, telling them there was no footpath, and redirecting them. I would not regard these challenges to strangers as events that brought the public's right to use the claimed route into question as it is unlikely, and indeed there is no evidence, that other members of the public using it were aware their use was being challenged. The challenge to Mrs Scott does not appear to have come to the attention of others either.
11. Then there is the issue of the signs. At my site visit, I observed two signs. Both face down the track towards point A on the Order plan. The first, located at point V, is in the verge to the right of the track and reads "Easter How Bungalow" and "Private Drive and Woodland". It is made from an older sign or signs and has, on the evidence, been at its present position since 2012, and prior to this within a couple of metres or so. Its wording appears directed more towards vehicular users rather than to pedestrian users, and I do not consider it brought the public's right to use the Order route into question.

12. The second sign, located at point W, is attached to a rock face, again to the right of the track, and reads, "Private Access No Public Right of Way". It is made of a durable material and is fixed onto the rock. Its wording and prominent position are a clear challenge to use. However, there is conflicting evidence as to how long it has been there.

*The "Private Access No Public Right of Way" sign*

13. The evidence falls essentially into two camps, from those witnesses who are clear that the sign had been in place from the 1990s (more particularly since 1993) and those who are clear that it was much more recent, or was not erected until around 2011.
14. Before Mr and Mrs Millership purchased Easter How it was owned by Mr Goulden (from 1993 to 1999). He did not attend the Inquiry, so his evidence remains untested, as does that of other former owners of both Easter How and Stag Lodge (formerly Burrow Croft). In his written evidence (including a sworn statement), Mr Goulden confirmed he had the sign made professionally (from the durable type material of "For Sale" signs used by estate agents) and put it up on the rock face himself in late February/early March 1993, and it was there when he left the property.
15. Mr and Mrs Millership's evidence is that it was in place when they purchased Easter How in 1999. Indeed, Mr Simons, a relative who carried out a survey of the property prior to their purchase recalled seeing it then (and the sign at point V). Mrs Kavanagh though, had not seen the sign on the rock face until her sister (Mrs Millership) pointed it out after purchasing the property. Both signs had stuck in Mr Carter's memory when he first visited Mr and Mrs Millership after they moved there, as it had been difficult to find the property. Mr Smith also clearly remembered the signs there from 1999 when he first visited. Mr and Mrs Millership had neither cleaned the sign at point W nor cleared it of vegetation, other than minor cutting back of brambles, since that time.
16. Mr Georgiou, the current owner of Stag Lodge, stated the sign was in place when he bought his property in late 2007, and had not been taken down or replaced since. Mrs Knowles had known the signs to be there from before 2008 and Mr McCrae since 2008.
17. Mr Croasdale, who lived at this property between 1991 and 2007, wrote that the sign was there for many years when he lived there. However, he was unsure whether there had been an earlier sign with similar words, although there was always a sign saying 'Private Access'. He also stated the sign at point V had not previously been on the rock, as one person claiming use had suggested.
18. As to those claiming use of the Order route, Mr Buck had known the route since 1975. He recalled two signs appeared a year or two after the track was widened<sup>1</sup>. The sign on the rock was not the one there now; he believed it was directed at vehicles. His recollection was the signs had less wording, and he was almost convinced they did not say 'no public right of way'. Mr Buck had been told by a local person that the route was a footpath to High Dam, and there was the footpath sign at the bottom of Height Lane where it met the

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<sup>1</sup> The original property had burnt down in the late 1980s and was then replaced by the present dwelling. At around the same time, the track accessing Easter How was widened.

- road. He had then told people staying at Stock Park Mansion about the path, suggesting it as a short, easy walk for a couple of hours.
19. Mrs Scott was unsure but thought she probably first saw the sign around 2005/6, but was aware of both signs around 2010. She recalled a sign on the rock face soon after the new house was built, though did not recall its wording, but believed it was similar to that of the sign now at point V in wording, typeface and appearance. Miss Russell believed there had always been a sign on the rock face, but that the wording was more like that of the sign at point V and did not say 'no public right of way'. She had first used the Order route in 1995. It was not until 2004 that she began to notice garden waste on the path (beyond point X) and the word "Private" painted on the wooden gate to the north-west of Easter How. Someone had told her in 2005 that the path was not a public right of way and she had then contacted the LDNPA. However, had the notice been there in 1995, she said she would not have waited 10 years to contact the Authority: the Order route had the appearance of a path being signposted at the bottom and well-trodden, with nothing to indicate otherwise.
  20. Mr Thurlow did not notice the sign until 2012. He said it may have been there before, but he had not seen it. Furthermore, as an outdoor activities leader, its wording would have pricked his conscience and he would have made enquiries, unlike the sign at point V which he took to refer to vehicles. He had used the route before 1993, then after 2004 as a running route, though less often. Mr Leafe acknowledged that his memory on this issue was vague. He thought there was something on the rock relating to the property, but nothing as clear in its message as the sign presently in place at point W. Whatever the sign said, he had not seen any conflict with his use of the lane, although he considered the position of the sign on the rock face meant it was difficult to interpret its meaning. He had used the Order route on a regular basis between December 2009 and September 2012.
  21. Dr Horsley, whose use began in 2001, believed that the sign appeared in the autumn of 2011 (and the sign at point V in 2012). Both, she said, were replacements for older signs at the same locations, and had been renewed following enquiries made by Mr Leafe with the LDNPA into the status of the route, and the Parish Council's involvement. The sign previously on the rock face she thought was an old metal sign, and the other a wooden sign. Like other users, she said she would not have walked past a sign saying 'no public right of way' without querying it. Mr Potts also said the sign appeared in 2011, and was certain that an earlier sign on the rock face had the same wording as the sign at point V. His use began in 2000, reduced in 2003/4 and increased again from 2007. Miss Martin mainly used the Order route downhill and had not noticed the signs. However, she indicated she had been uneasy about using the route in the 1990s.
  22. The untested user evidence is similar. The sign had not been seen, and the route would have been avoided if it had been thought that people were trespassing; it had been seen when people were using the Order route but they could not recall, or did not state, when it went up; and one person said it would probably have been ignored if seen, as they had always walked the path.
  23. Several of those claiming use had properties at nearby Stock Park Mansion, or had stayed there, and many referred to having first been told about the route

- by people there, including Mr Buck, as a way to get to High Dam. It was a convenient route that involved little road walking. It is possible, therefore, that a misunderstanding arose about Height Lane due to the fingerpost (referring to public footpath 511067) which people may have assumed indicated a route following the whole of the lane itself rather than turning to the south west at Stag Lodge, as they had been told by others they could use it. Consequently, the sign at point W may have been ignored or disregarded. Apparently the Horsleys had been told by Mr Stubbs-Moreton to ignore the signs. Equally, it is possible that as people had been told they could walk there, this implied a right to do so.
24. Some of the user evidence suggests that the sign was thought to relate to vehicular use rather than to pedestrians. Accordingly, the intention of the sign may have been misunderstood, especially as there appeared to be a well-trodden way beyond Easter How (from point X). Indeed, the evidence provided by Mr and Mrs Millership showing the existing footpath (FP 511067) crossing the field, in my view, shows a similar level of wear to that of the Order route beyond their property. The section from point X may have become more overgrown during the summer months for example, but the evidence of claimed use certainly in recent years is not that it was impossible to get through. However, users whose evidence was tested were adamant that the sign was not there until much more recently when the issue came to a head. Furthermore, many witnesses indicated they would not have used the Order route if they had felt they were trespassing, had no right to be there, or were doing something wrong.
25. The LDNPA had considered the age of the sign at point W by reference to its appearance, which looked too new to have been put up as long ago as 1993. I found it in good condition with no fading or wear and tear other than rust marks where screws attach it to the rock face. By contrast the sign at point V, in my view, has the appearance of being older, and this fits with Mr Goulden's evidence that it was there when he bought the property. Mr Broadhead believed it had been put up by Mr Pedder, a former property owner, although on what basis he suggested this is unclear. However, others believed it or a similarly worded sign was originally in place at W.
26. There had been some discussion by the LDNPA in the mid-1980s and into the early 1990s about paths in use around High Dam, although no mention was made about the Order route, other than regarding its ownership. A leaflet probably post-dating 1985 was produced for visiting youth and school groups and included a map of the area showing public footpaths and other paths linked to High Dam –including what is now FP 511089 – with the Order route shown. It does not suggest any status for Height Lane. However, it is possible that it was thought Height Lane was in use by the public at that time. This would be consistent with Mr Goulden's evidence that he put up the sign in 1993 "specifically to prevent anyone subsequently claiming a Right of Way", as he had encountered people occasionally walking up to or down from High Dam.
27. I find there is credible evidence on both sides as regards when the sign at W was put up, but that there is a material conflict of fact between what those in support of the Order, and those opposed to it say. The evidence is, in my view, evenly balanced, despite it having been heard and tested, and expanded on. There remains, as the LDNPA stated, no objective evidence either way.

### ***Use by the public***

28. Claimed use extends back to the 1950s, when it is limited in nature. Over subsequent years, claimed use is shown to increase, with anecdotal evidence of use by others referred to. The reasons given for using the Order route included for recreation and going for a walk, often to or from High Dam, and this is typical of use of a public right of way.
29. For any of the possible 20 year periods after 1993 the evidence is of between 14 and 24 users in any one year, with a monthly use ranging from 9 to 29 visits. This the LDNPA assessed as sufficient to give rise to a presumption of dedication if the other tests are met. However for the 20 year period prior to 1993 the evidence of use is much lower in numbers and frequency, with between 6 and 14 users a year, and monthly use ranging from 3 to 13 visits with a spike in 1992 giving an overall 24 visits a month for that year by users. Overall the LDNPA assessed this as a relatively low level of use, and whilst there may have been others using the Order route, such evidence had not been brought forward.
30. Witnesses spoke of using the route with friends and family. References were made to entries in Visitor Books at the flats at Stock Park Mansion which describe walks taken by visitors to High Dam, presumably via the Order route.
31. Mr and Mrs Millership suggested that some of their neighbours enjoyed private rights over the Order route to access their water supply for maintenance purposes by reference to a 1920 Indenture. None of those giving evidence spoke of exercising such a right, if it existed over the Order route, when using it. Mr and Mrs Millership said they had given permission to the Horsleys to use the route, although Dr Horsley did not agree this was the case. The evidence of the 1920 Indenture points to the lane not falling within the ownership of Easter How. Other documentation shows that Mr and Mrs Millership own the strip of land belonging to Easter How which was used for widening the lane following the fire at the property in the 1980s. Accordingly they could only grant permission to land over which they enjoy a right. No evidence was adduced that use prior to the Millership's ownership of Easter How was permissive, and it was said that previous landowners such as the Pedder's did not discourage use.

### ***The actions of the landowners***

32. The LDNPA pointed out that only the owner of the fee simple can demonstrate a lack of intention to dedicate. In the light of the 1920 Indenture, Mr and Mrs Millership own the new width of the lane at Easter How and may have a claim to own half the width of the remainder of Height Lane adjoining the property. However, they had no claim to ownership of the rest of the Order route. If the same situation applied when Mr Goulden owned the property, the LDNPA argued, and there is nothing in the evidence to suggest otherwise, then the sign at point W, whilst acting as a challenge to use could not also act as a lack of intention to dedicate, unless erected and maintained by or on behalf of the owner in fee simple. There has been a belief amongst the owners that the lane was a private access for the properties and/or was owned by them, but the available evidence does not support this view.
33. As regards challenges, it seems that several landowners over the years (including prior to 1993) had challenged or questioned people seen passing

their properties, asking if they were lost and redirecting them, including the Millership's. Several users confirmed that they had been challenged on occasion. Most landowners had not challenged their neighbours and people known to them in the interests of neighbourliness, although this could be regarded as acquiescence or tolerance of such use.

### ***Conclusions on presumed dedication***

34. Having regard to the above, I conclude that there is a conflict of evidence as regards the sign at point W which is material to when the public's right to use the Order route was brought into question, and that conflict cannot be resolved. It follows that, on the available evidence, the LDNPA has failed to make out a case that a public footpath subsists over the Order route. I therefore decline to confirm the Order.

### **Other matters**

35. The existence of nearby footpaths providing access to High Dam is not a relevant consideration in my determination as to whether or not a public right of way subsists over the Order route.

### **Conclusions**

36. Having regard to these and all other matters raised both at the Inquiry and in written representations, I conclude that the Order should not be confirmed.

### **Formal Decision**

37. I do not confirm the Order.

*S Doran*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Mrs S Rumfitt Rights of Way Consultant, instructed by the Lake District National Park Authority

who called

Mr N Thorne Countryside Access Adviser, Lake District National Park Authority

Mrs F Scott

Mr J Thurlow

Miss S Martin

Mr E Buck

Dr J Horsley

Mr R Leafe

Mr C Potts

Miss L Russell

### **For The Objectors:**

Mr A Dunlop *representing* Mr L J and Mrs G Millership

who called

Mr S Carter

Mrs V Kavanagh

Mr M K Simons

Mr D Smith

Mr G Georgiou

Mr D McCrae

Mrs L Knowles

## DOCUMENTS

1. Statement of Mr J Croasdale dated October 2015, and sworn statement of Mr T G Goulden dated 7 October 2015, submitted on behalf of Mr and Mrs Millership
2. Letter from Mr R Hull dated 30 September 2015, email from Mr J Russell dated 23 September 2015, email from Mr N Thompson dated 5 October 2015, email from Mr M and Mrs S Hawkard dated 9 October 2015, and two charts showing claimed usage since the 1950s, submitted on behalf of the Lake District National Park Authority
3. Bundle of maps and photographs concerning the Order route, submitted on behalf of the Lake District National Park Authority
4. Response to submissions made by Mrs Masters together with copies of *R v Secretary of State for the Environment, ex parte Bagshaw and Norton* 68 P. & C.R. and *R v Secretary of State for the Environment ex parte Simms and Burrows* [1990] 3 All ER, submitted on behalf of the Lake District National Park Authority
5. Statutory Declaration of Mr G Georgiou dated 14 October 2015, together with Exhibits A-D, Land Registry Title Number : CU93813 dated 11 August 1999, Deed of Declaration between Mr A R Pedder and Mr H Broadhead dated 3 April 1990, and Indenture between Mr G Dixon and Mrs A Briggs dated 31 August 1920, submitted on behalf of Mr and Mrs Millership
6. Closing submissions on behalf of Mr and Mrs Millership
7. Closing submissions on behalf of the Lake District National Park Authority together with a copy of *R v Secretary of State for Environment, Transport and Regions ex parte Dorset County Council* [1999] EWHC Admin 582