



Appeal Decision

by Barney Grimshaw BA DPA MRTPI (Rtd)

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

Decision date: 07 December 2016

Appeal Ref: FPS/P2745/14A/5

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of North Yorkshire County Council not to make an Order under section 53(2) of that Act.
- The Application dated 9 June 2013 was refused by North Yorkshire County Council on 29 March 2016.
- The Appellant claims that a route running from Low Easby Lane, Easby to Bank Side, Kildale, North Yorkshire should be added to the definitive map as a Restricted Byway.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. I attach a copy of a map showing the claimed route for reference purposes.

Main issues

4. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered which, when considered with all other relevant evidence available shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

Test A: Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

5. Some of the evidence in this case relates to usage of the claimed route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually 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. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
6. Common law also requires me to consider whether the use of the paths and the actions of the landowner have been of such a nature that the dedication of the paths by the landowner as a bridleway can be inferred.
7. As this Appeal is concerned with a possible unrecorded vehicular route, it is also necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which extinguished rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions.

Reasons

8. Both documentary and user evidence has been submitted in this case and I deal with the different types of evidence separately.

Documentary Evidence

Commercial Maps

9. Maps published by Cary (1794), Greenwood (1817), Tukes (1818) and Fowler (1834) all show a road running northwards from Easby ending as a cul de sac near Point A. They do not show the claimed route but the applicant argues that there would be no reason for a road to terminate at Point A.
10. Horne's Tourist Map, a Geographia map, Philip's map and a Bartholomew map all published around the 1920s show a road similar to the western part of the Order route as far as Copper Hall (Point D). Later maps published by Geographia in 1948 and Johnston and Bacon in 1955 also show a similar road.
11. The applicant suggests that as these maps were sold to be used by the public, the routes shown were likely to have been available for public use. However, these maps do not provide a reliable indication of the existence of public rights over routes shown.

Tithe map

12. Under the Tithe Commutation Act 1836, tithes were converted to a fixed money rent. In most areas this required detailed surveys to be carried out in order to apportion the amount of tithe payable among the landowners of a parish. Tithe documents that were prepared had the sole purpose of identifying titheable or productive land. They are statutory documents which were in the public domain but were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of routes.

13. In this case I have not seen the tithe documents but the county council has stated that they only show a way between Points A and B and do not indicate public rights.

Ordnance Survey (OS) maps and documents

14. OS maps published from the mid-19th century onwards appear to show a through route along the line of the claimed route although this is not clearly discernible throughout its length on some of the copies that I have seen.
15. On a map published 1889-95 the route is annotated 'F.P.' (footpath) between Points H and J and on a 1928 map similarly annotated between Points F and G as well as H and J.
16. The applicant draws attention to the fact that Bench Marks are shown on the claimed route on some OS maps and that it was common to use public roads for such marks. However, they were also placed at other points, some of which were not on roads of any sort.
17. The applicant also notes that the 1954, 2½" map appears to show the eastern end of the claimed route as being more important than the current public road which it joins at that point.
18. OS maps provide good evidence of features present on the ground at the time they were surveyed but, prior to relatively recent times, they did not purport to indicate the existence of public rights over routes which are shown. In fact, many of the maps referred to will have included a specific disclaimer to the effect that routes shown were not necessarily public rights of way.

1910 Finance Act

19. The 1910 Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.
20. In this case, the claimed route is not excluded from the hereditaments it crosses in the way that public roads often are. However, relatively large deductions from the value of two hereditaments are made in respect of public rights of way although it is not clear which routes these relate to. In another smaller hereditament, no deduction is made for public rights of way. Accordingly, the Finance Act documents are of little help in determining the correct status of the claimed route.

Highway Records

21. In the 1930 Handover Map, prepared to show the roads that were handed over to the former North Riding County Council following the Local Government Act 1929, the claimed route is recorded as a through route numbered U1862. The associated schedule describes the route as "*Mill Bank Wood-Burrows Green-Railway*" but the map has been annotated by hand "*County Road ends here*" at Point A on the Order map. The council state that the annotation is presumed to

- have been added in about 1960. It is not known by whom or on what basis the annotation was added.
22. In a pre-1974 highways map and List of Streets, the Order route is also shown as a continuous through route but numbered SY/16/18. The associated schedule describes the route as "*Easby Church-Railway Bridge-Burrow Greens-Bank Side House, Junction SY/15/10*" but the schedule has been altered by hand so as to state that the route terminates at *Entrance gate to Burrows Green Farm*" rather than continuing to Bank Side House. Again, the basis for the alteration is not known.
 23. A post-1974 plan of maintainable highways does not include the Order route but includes a route from Easby to Burrow Green which terminates at Point A. A 1976 small scale map of maintainable highways also does not show the Order route. The route is not recorded in the current List of Streets.
 24. Correspondence in the 1960s between landowners and the county council indicates that the county council acknowledged that the route had not been maintained by the council and was not likely to be in the future. It was suggested that it be removed from the highway maintenance records and considered for inclusion in the definitive map, presumably as a route of a lower status than county road. The review of the definitive map that was then envisaged did not in fact take place and no change was made to the map although the route was subsequently removed from highway maintenance records.
 25. The current owner of the Kildale Estate has objected to the proposal to record the claimed route as a Restricted Byway and maintains that any public use of much of the route which was a private carriage drive to Kildale Hall was by permission through a ticket arrangement used until 1939. Evidence in support of the objection was provided in the form of copies of correspondence, statements and affidavits from people who managed or were familiar with the route and copies of tickets used to permit access, although these refer to admission to Kildale Woods rather than specifically the claimed route.

Definitive map

26. In the survey of rights of way for Easby Parish, which was carried out in around 1950 in connection with the preparation of the first definitive map, the section of the Order route in that parish (Points A-G) is recorded as part of 3 paths. Path 2 (roughly Points E-G) is described as a footpath but for Path 5 (Points A-B) and Path 13 (Points B-E) the type of path is not specified. The council states that the route was subsequently annotated on the map by the Area Surveyor as 'CC' (County Council road) but this is not legible on the copies I have seen.
27. In the survey for Kildale Parish, the section of the Order route in that parish (Points G-M) was not claimed but was coloured yellow on the map in the same way as other county roads. Again the map was subsequently annotated 'CC' by the Area Surveyor.
28. The Order route was not subsequently recorded as a right of way on the draft, provisional or final definitive map, possibly reflecting the fact that it was regarded as being a county road.
29. Two other footpaths terminate at the claimed route. Easby Footpath 5 at Point B and Easby Footpath 1 at Point E. This would suggest that part of the claimed route at least was thought to carry public footpath rights, if not higher rights.

Otherwise these footpaths would be cul de sac paths terminating at points where there would appear to be no feature to attract the public.

Conclusions regarding documentary evidence

30. The route has existed since the late 19th century at least.
31. Much of the available documentary evidence does not provide support for the claimed public rights over the route although it does not necessarily indicate that no such rights exist. However, the 1930 and pre-1974 highway records do appear to indicate the existence of public rights and this is to some extent reinforced by the parish surveys and the subsequent annotations added.
32. It is possible that the route was mistakenly included in highway records and that this error was subsequently corrected but the documentary evidence that is available does not in my view necessarily demonstrate this. Furthermore, even if the route should never have been recorded as a publicly maintained vehicular road, this would not preclude the possible existence of public rights over it.
33. On balance, it is my view that the documentary evidence that is available suggests that it is reasonable to allege that on the balance of probabilities that a public vehicular right of way subsists over the claimed route.

Statutory Dedication

Evidence of public use

34. Six User Evidence Forms (UEFs) were submitted in support of the application to record the route. These forms describe use of the route from 1970 until 1994 on horseback and to a lesser extent on foot, although over a longer period in one case.
35. The frequency of use claimed was twice per month or less in all but one case. That user claimed to have ridden part of the route twice per week. Nobody claimed to have used the route for a continuous period of 20 years.
36. On behalf of landowners it was stated that any use of the route by the public had been by permission rather than as of right and that gates had been locked across the route since the 1980s to prevent use of the route by motorcyclists. One person who completed a UEF also referred to gate near Point M being locked in around 1984.

Conclusions regarding statutory dedication

37. On balance, the limited evidence of public use is not sufficient to raise the presumption that the route has been dedicated as a public right of way of any sort in accordance with the provisions of the 1980 Act.

Common Law

38. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
39. In this case, there is no specific evidence of action by landowners which would indicate their intention to dedicate a public bridleway. Such evidence of landowners' actions that is available, for example relating to the issuing of

tickets for access and the locking of gates, would suggest that there was no intention to dedicate a public right of way of any sort. In these circumstances it would not be reasonable to infer dedication of the route at common law. However, in the light of my previous conclusions, this does not affect my decision.

The 2006 Act

40. As mentioned before, this act extinguished rights of way for MPVs subject to certain exceptions. In this case none of the exceptions apply so, if rights for MPVs had been established along the Order routes they would have been extinguished as a result of the 2006 Act.

Conclusion

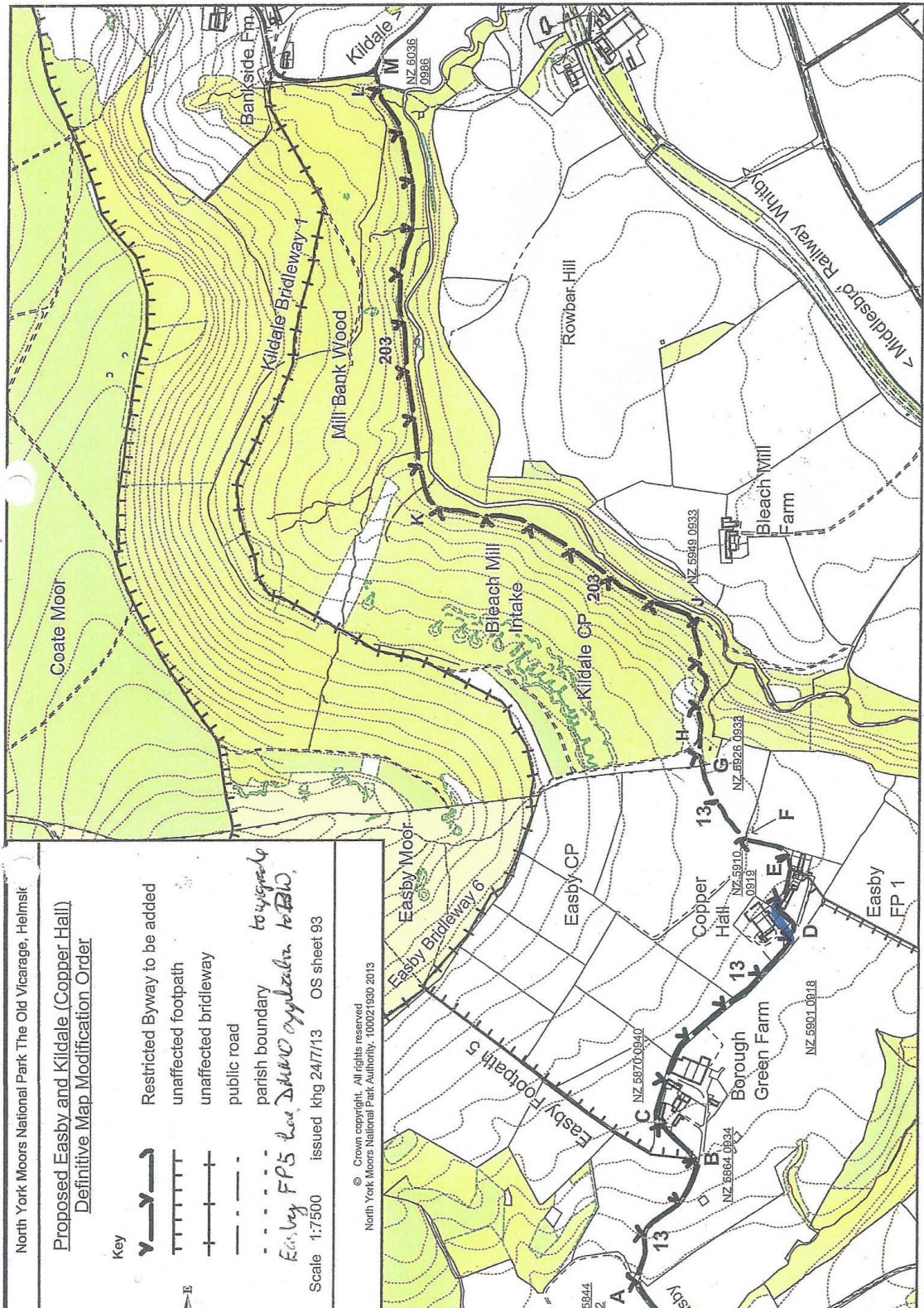
41. Having regard to these and all other matters raised in the written representations I conclude that the evidence shows that it is reasonable to allege that the claimed route is a Restricted Byway and an order should be made to modify the definitive map and statement so as to record it as such.

Formal Decision

42. The appeal is allowed and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act North Yorkshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement to add a Restricted Byway, as proposed in the application dated 9 June 2013. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Barney Grimshaw

Inspector



Map not to original scale