



## Order Decision

Inquiry opened on 29 January 2019

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 17 JUNE 2019**

### Order Ref: ROW/3202859

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Kirklees Council (Huddersfield Public Bridleway 231 – Sandy Lane to Nether Moor Road, South Crosland) Public Path Modification Order 2018.
- The Order was made by the Council of the Borough of Kirklees ("the Council") on 24 January 2018 and proposes to downgrade a byway open to all traffic ("BOAT") to bridleway status, as detailed in the Order Map and Schedule.
- There was one objection outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision.**

### Procedural Matters

1. I held a public inquiry into the Order on 29 January 2019 to 1 February 2019 and 12 February 2019 at Brian Jackson House and the Hudawi Centre, Huddersfield. I made an accompanied visit to the site shortly after the close of the inquiry.
2. Following the close of the inquiry, I sought the views of the parties regarding whether the user evidence could support an inference of dedication at common law.

### Legal Context

3. The Order is made under Section 53(2)(b) of the 1981 Act and relies on the occurrence of an event specified in Section 53(3)(c)(ii) of the Act. Therefore, consideration needs to be given to whether there has been the discovery of evidence which shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description. In contrast, the objectors assert that there is no public right of way over land shown in the map and statement as a highway of any description in accordance with Section 53(3)(c)(iii) of the 1981 Act. The evidential test to be applied in each case is the balance of probabilities.
4. At paragraph 38 of the judgment in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions 2001* ("Trevelyan") Lord Phillips states "*where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a*

*finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake”.*

5. There is also guidance on the deletion and downgrading of public rights of way in Department for Environment, Food and Rural Affairs Circular 1/09 (“the Circular”). Paragraph 4.33 of the Circular states *“The evidence needed to remove what is shown as a public right of way from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with ‘higher’ rights to a way with ‘lower’ rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*
- The evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
  - The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.*
  - The evidence must be cogent.”*
6. Further, paragraph 4.35 of the Circular states *“In the case of deletions, earlier guidance indicated that a case for presumed dedication could be established on a way that had previously been recorded on the definitive map but which was found, subsequently, to have been recorded in error. This was based on the belief that user, between the time of the first recording of the way on the definitive map and statement and the time when it was determined that an error had been made could give rise to presumed dedication. The date of first recording means either the date of the original publication of the first definitive map; the date of publication of a review; or the relevant date of an order adding the path to the definitive map, whichever was appropriate. The date of first recording would have been the first point in time at which it could have been legally recognised that rights over the way were recorded in the form being challenged. Defra believes that this advice was wrong. Defra’s view is that use of the way in such circumstances cannot be seen to be as of right, as rights that cannot be prevented cannot be acquired. It [is] not possible for a right of way to be dedicated for the purposes of section 31 of the Highways Act 1980 when use of the way is by virtue of it having been shown on the definitive map but subsequently removed”.*
7. In terms of the dedication of a public right of way, the relevant statutory provision is found in Section 31 of the Highways Act 1980 (“the 1980 Act”). This requires consideration of whether there has been use of a way by the public, as of right<sup>1</sup> and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

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<sup>1</sup> Without force, secrecy or permission

8. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

### **Main Issues**

9. It is accepted that there has been the discovery of evidence in this case. The main issues to be determined from the documentary and user evidence is whether the Order Route should be shown in the definitive map and statement and, if so, what should be the recorded status of the route.

### **Reasons**

#### **Background**

10. The objectors (Mr and Mrs Bradley) made an application in 2009 to downgrade the Order Route to a bridleway. This application was amended in 2012 with the aim of downgrading the way to footpath status. They made another application in 2014 to record only a section of the route between the junction of Sandy Lane and Footpath 233 as a footpath. The earlier amended application was later withdrawn. Following consideration of the evidence, the Council resolved to make the present Order.
11. The objectors have referred to advice they received from Council officers. Whilst it is accepted that this issue is not relevant to my determination of the Order, it is asserted that I should consider the applications in the context of this advice and the objectors' lack of experience. Irrespective of the fact that the objectors have at times received independent advice, it may be the case that their applications were shaped by their understanding of rights of way matters. Nonetheless, the evidence contained in the witness statements previously submitted by the objectors should not be lightly set aside. I take the information in the letters and evidence forms to be a reliable recollection of each person unless other evidence is provided to show that this is not the case.

#### **Historical map evidence.**

12. The Order Route is first shown on a copy of an 1804 map of South Crosland that was originally surveyed by Johnson. It appears to be coloured in the same manner as other roads in the area, such as Sandy Lane and Nether Moor Road. Towards its eastern end there is a route leading south to a quarry.
13. Only a proportion of the Order Route is shown on an 1822 map of South Crosland. This may be due to the absence at that time of a boundary to the south of the section towards Nether Moor Road and other map evidence points to the existence of a through route. An undated estate map of land within South Crosland shows the Order route. The route is also shown on the 1848 tithe map for South Crosland in the same way as the connecting roads.
14. The early maps show that the Order Route is a feature of some antiquity, but they provide no indication of whether the route had public or private status. Although the tithe map shows the route excluded from the tithed plots of land, this only reveals that the land was unproductive and could be indicative of a public or private road.

15. Ordnance Survey ("OS") maps are generally taken to be a reliable indication of the physical features present on the date of the survey. They provide no confirmation regarding the status of the routes shown but may support other pieces of documentary evidence. The Order Route is shown on the OS maps of 1854, 1892, 1916<sup>2</sup> and 1929.
16. The 1905/06<sup>3</sup> and 1908 OS maps show that for a period of time the Order Route was diverted due to the extension of a quarry. It is shown reinstated on the 1916 OS map. There is an unidentified period between the survey for the 1892 OS map and the survey for the 1916 edition when a section of the route ran on an alternative alignment. Whilst this does not necessarily indicate that no public rights exist, the Council's expert witness (Mrs Rumfitt) acknowledges it is less likely that a vehicular highway would have been subjected to quarrying.
17. The Order Route<sup>4</sup> was located within the hereditaments numbered 4689 and 4690 on the map used in connection with the 1910 Finance Act. A deduction of £35 for "*Public Rights of Way or User*" is recorded for hereditament 4690 in the accompanying field book. However, Footpath 233 and Nether Moor Road were also included within this hereditament. No deduction was claimed in respect of hereditament 4689. It therefore cannot be said that the Finance Act evidence provides support for the Order Route being a public right of way.
18. The first matter for me to determine is whether an error occurred when the Order Route was originally included in the definitive map and statement and not whether a right of way subsists. I address how the definitive map and statement came about below. The evidence outlined above is fairly neutral in terms of the Order Route. Whilst it provides little evidence in support of the route having public status, this does not show that it was included in the map and statement in error.

***The production of the original definitive map and statement***

19. The Order Route was included in the draft schedule of rights of way alleged to exist on 1 September 1952. It is apparent that the route was walked in 1951 and had been found to be unobstructed. There is no surviving documentation to reveal the reason for the inclusion of the Order Route, but this does not indicate that an error occurred when the route was later added to the definitive map and statement. As outlined in *Trevelyan* there should have been some evidence to justify its subsequent inclusion in the map and statement. It is also apparent that no objection was made to the inclusion of the route. There is some doubt regarding whether a document is the draft map. The objectors' expert witness (Mr Carr) believes it may potentially be a working map. Nonetheless, this map shows the route by way of a purple line to denote a footpath and is consistent with the draft schedule.
20. In light of the lack of progress the surveying authority at the time<sup>5</sup> decided to start again. A new draft map and schedule were produced which had a relevant date of 20 April 1966. The Order Route was described in the draft schedule as a "*footpath (CRF)*". The letters 'CRF' are representative of the non-statutory term for a road mainly used as a footpath and they were

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<sup>2</sup> Surveyed 1913/14

<sup>3</sup> Surveyed 1903/04

<sup>4</sup> As shown on the temporarily diverted alignment

<sup>5</sup> The County Borough of Huddersfield

commonly recorded in definitive maps and statements as roads used as public paths ("RUPPs"). This route was depicted as a RUPP on the draft map. There is nothing to suggest that any additional evidence was considered at this time, but it is apparent that a fresh survey was undertaken. The draft schedule indicates that the route was walked on a further two occasions in 1965 and 1966. No objection was made to the inclusion of the Order Route on the draft map.

21. There is no stated reason for the change in the proposed status of the Order Route. It is possible that the physical nature of the route led the surveyor to record it as a RUPP rather than a footpath. This is supported to some extent by the advice outlined in a memorandum of 5 June 1974 involving the former West Yorkshire Metropolitan County Council. This contains the statement that "*The classifications of routes as between F.P. F.P. (CRF) & B.W. appear to depend purely on the physical characteristics with no regard to historical use either probable or actual*". I take this statement to indicate that routes could have been recorded with the incorrect designation, but it does not necessarily show that routes were included in the map and statement in error. The Order Route was included as a footpath (CRF) in the definitive map and statement that was finally published in 1975.

### **Settlement**

22. Dedication can only arise under common law where there is a landowner with the capacity to dedicate a public right of way. Settlement was a means of protecting the ownership of land for future generations. The land would typically pass to the eldest son as a tenant for life. Therefore, he only had a life interest and was not free to dispose of the land or grant rights over it without the agreement of the other interested parties or unless specific provision was made in the trust deed.
23. Conveyancing documents are indicative of the land crossed by the Order Route being in settlement from 1887 until some point between the death of the last tenant for life in 1948 and the sale of the land in 1954. It is apparent from the submissions of Mr Evans and Ms Stockley, on behalf of the Council and the objectors respectively, that it is difficult to reach a firm view on when the land ceased to be settled. Ms Stockley feels that the most likely date is 1950 when probate was granted and the vendors were given the power to dispose of the land. Mr Evans believes that the period would have ended in either 1948 or 1950.
24. The issue to be determined is whether an error occurred when the Order Route was first included on the definitive map due to the land being in settlement. The absence of user evidence for the period involved does not mean that an error occurred as it should be presumed there was some evidence at the time that warranted the inclusion of the route. It cannot be said that dedication under common law was impossible either before or after the land was in settlement. In particular, the Council draws attention to the retrospective effect of Section 1 of the Rights of Way Act 1932<sup>6</sup> which removed the barrier to dedication over settled land.

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<sup>6</sup> As amended by Section 58 of the National Parks and Access to the Countryside Act 1949



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**Whether an error occurred in respect of the inclusion of the Order Route in the original definitive map and statement**

25. Having regard to the balance of probabilities test that I need to apply when considering the evidence, I do not find that there is cogent evidence to show that an error occurred regarding the inclusion of the Order Route in the original definitive map and statement. I consider that the route has a minimum status of footpath. It cannot be determined whether any higher public rights existed as of the relevant date of 20 April 1966. Nor is it asserted that any such rights existed at that time. Reliance is placed on the recent user evidence in support of the route being a bridleway.

**The revised definitive map and statement**

26. The West Yorkshire Metropolitan County Council commenced a review of its RUPPs under Section 33 of the National Parks and Access to the Countryside Act 1949. It was initially proposed for the Order Route to be recorded as a bridleway before it was put forward as a BOAT. Those proposals that were not objected to were later included in an Order pursuant to Sections 53(2)(a) and 55(5) of the 1981 Act. The Council acknowledges that the Order Route was not included in this Order. It was nonetheless recorded as a BOAT in the revised definitive statement, which had a relevant date of 30 April 1985.
27. In the absence of a legal event to reclassify the status of the Order Route, as included in the original definitive map and statement, there is no basis for it to have been recorded as a BOAT. It cannot be determined why the route was proposed at the review stage to be reclassified as a BOAT and the evidential presumption outlined in *Trevelyan* does not apply at that point in time. Nor is there any evidence to support the route being a vehicular highway.
28. There is also a discrepancy in that the definitive map of 1985 shows the Order Route by means of a solid black line. This does not correspond with the notation in the regulations<sup>7</sup> for any class of public right of way shown in a definitive map. When looked at in conjunction with the definitive statement the most likely explanation is that the arrowheads that accompany a solid line to denote a BOAT were omitted in error when the map was produced. In terms of the position of the route there is no conflict between the map and statement.

**Conclusion from the above evidence**

29. I find the recording of the Order Route as a BOAT in the current definitive statement to be an error. Further, I have reached the conclusion that the route has a minimum status of footpath following its inclusion in the original definitive map and statement. The review process does not alter my view on this issue. In light of there being nothing to show that the route should have a higher status, the evidence considered above is supportive on balance of the Order Route being a public footpath.

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<sup>7</sup> The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1983

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**Consideration of the user evidence – statutory dedication**

*When the status of the Order Route was first brought into question*

30. The parties have different views regarding whether it was the application of 2009 or the later one of 2012 that served to bring the status of the Order Route into question. It is nonetheless accepted that nothing turns on this issue. The original application brought into question the rights that exist over the Order Route. It alleged that the route was a bridleway. Therefore, I consider it appropriate to take the application of 2009 as bringing the status of the route into question. This means the relevant period for the purpose of statutory dedication ("the relevant period") is 1989-2009.

*Evidence of use by the public*

31. Fifty-four user evidence forms ("UEFs") have been completed in support of use of the Order Route. I have discounted two forms that are not signed and contain a number of unanswered questions. Three other people have only provided evidence of personal use on foot. Ten people gave evidence at the inquiry in relation to their use of the Order Route and statements<sup>8</sup> or statutory declarations have been received from other users.
32. Although the objectors do not dispute that the Order Route has been used by pedestrians and horse riders, they question the level of use outlined in the UEFs. It is also alleged that people may have been persuaded to complete a form when they had not used the route. Further, they assert that the use was not as of right and was interrupted on occasions.
33. When taken at face value the UEFs provide evidence of personal use from forty-six horse riders and cyclists during the relevant period with the predominant use being by equestrians. From an assessment of the user evidence I find that twenty-eight of these people state that they rode the route at the beginning of the relevant period and thirty-nine of them say they were using it at the end of the period. This use is generally stated to have occurred fairly regularly, often on a weekly basis. The references to use by other named companions is indicative of the UEFs not representing the sum total of the use during the relevant period.
34. The objectors allege that people may have been pressurised into completing a UEF. This point relates predominantly to the actions of members of the Kirklees Bridleway Group ("KBG"). Mr and Mrs Corrigan of KBG gave evidence in relation to their personal use and the allegations made against them. In terms of Mrs Corrigan's use, an article was published in the magazine titled 'North Riding' in May 1995 which detailed her favourite ride known as the South Crosland Circular ride. This incorporated the Order Route and is contemporaneous evidence that she was riding the route in 1995.
35. The objectors' son (Mr J. Bradley) and his friend Mr T. Boothroyd gave evidence regarding a conversation between Mrs Corrigan and two ladies in relation to a KBG display at a horse show. The conversation took place in a horse trailer that was used according to Mrs Corrigan due to the windy weather. It is alleged that the two ladies were unsure whether they had used the route and Mrs Corrigan encouraged them to fill a form in anyway. It is uncertain from the evidence of Mr J. Bradley and Mr Boothroyd whether the

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<sup>8</sup> Twelve of the users were interviewed

- two ladies completed UEFs. Both Mr and Mrs Corrigan deny that attempts were made to persuade people to provide false information in relation to use of the Order Route.
36. Mr J. Bradley made a recording of the subsequent conversation he and Mr Boothroyd had with Mrs Corrigan and this was played at the inquiry. It was difficult to hear at times but there is no suggestion by Mrs Corrigan that they should complete a UEF even if they had not used the Order Route. It appears that they were asked to complete a form if they had cycled along the route. This casts doubt on whether they heard Mrs Corrigan ask people to fill in a UEF irrespective of their use of the route.
37. Another witness, Ms Bryne-Daniel, gave evidence regarding campaigns and petitions for an increase in the provision of routes for horse riders. She drew attention to pressure being applied to complete UEFs. This is stated to have occurred at meetings of a group of riders called the 'Marsden Moody Mares' and during a conversation with Mr Corrigan on the opening day of a festival<sup>9</sup> when she says he introduced himself as a representative of the British Horse Society. None of these incidents are alleged to relate to the Order Route.
38. Mrs Bennett confirms that she was the sole representative of the KBG at the festival and that Mr Corrigan was not present. This is supported by the KBG minutes supplied. In terms of the completion of forms, Mrs Bennett states that people are never told what information to include but are given advice on general matters. Mr Corrigan is not a representative of the British Horse Society but has been a member for around 3-4 years.
39. The evidence of the users at the inquiry is supportive of them using the Order Route. I find this to be the case irrespective of the failure of particular witnesses to recall certain features or events in respect of the route. For instance, people may have previously paid little attention to the boulders located towards Nether Moor Road given that they did not prevent horse riders using the route during the relevant period. People have signed the UEFs to certify that the information is to the best of the person's knowledge correct. The objectors were also aware that the route was used albeit they dispute the level of the use. I have no doubt that there is a desire by local horse riders for greater off-road routes in the area and this may prompt campaigns to increase access. There are conflicting testimonies relating to the gathering of evidence, particularly in respect of comments attributed to Mr and Mrs Corrigan. However, I am not satisfied from hearing the evidence at the inquiry that the user evidence in this case should be taken to be unreliable.
40. Additional evidence forms were submitted by relatives of the objectors and other people with longstanding knowledge of the Order Route. Fifteen forms were completed in total and thirteen of these people state that they considered the route to be a bridleway. One of Mr Bradley's three sisters (Mrs Clarke) states that she was told the Order Route was a bridle path. Although Mr Bradley says that she is mistaken on this point, Mrs Clarke was not called to give evidence and I must place some reliance on her written statement. For the most part these forms acknowledge that the route was used by walkers and horse riders. I address the assertion by the objectors that the Order Route is a permissive bridleway below.

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<sup>9</sup> The South Pennine Walk and Ride Festival held on 11 September 2011 at the Marsden Mechanics Centre



*Express permission*

41. The objectors submit that the Order Route was predominantly used with permission, dating back to a period when Mr Bradley's father and uncle ran the farm<sup>10</sup> (Messrs A. and H. Bradley). The witnesses called by the objectors testified to receiving permission to use the route and understanding that others used it by way of permission. There is nothing to suggest that any signage was placed on the route during the relevant period to indicate that use was by way of permission.
42. Mr Bradley has stated in correspondence that his father allowed horse riders to travel along the Order Route and he has done so as well. A distinction is drawn between permission granted for vehicular use. He asserted that people using the route in vehicles without permission would have been challenged. The statements made by Mr Bradley could point to the user being by acquiescence rather than permission. However, the word 'allow' could equally indicate that he viewed the user as being on a permissive basis. The issue of whether permission was granted to horse riders needs to be determined from the evidence.
43. A few people state in their UEF that they were given permission to use the route, one of whom mentions that this was obtained in connection with a group of walkers. Where there is a conflict between the relevant UEFs and the more detailed later statements, I consider that the latter should generally prevail. These provide further clarification on particular points. Further, in my experience, people sometimes conflate tolerated use with permission. This would appear to be the case for Mrs C. McCrorie from looking at her later evidence when she was interviewed. The written evidence of her daughter does not point to her receiving permission. It only indicates that she was never asked to not ride the route. The interview of Mrs S. Scott does not point to permission but only that "Old Mr Bradley" welcomed users.
44. It is accepted that Ms Liles was given permission in 2009 but it is disputed that this permission was also conveyed to her cousin Mrs Stewart. This permission was nonetheless granted in the same year that the relevant period ended. In respect of the alleged permission granted to Mrs Wilkinson when she was at school with Mr Bradley, she disputes that she sought permission and says her use commenced 5 years before she attended the same school as Mr Bradley. There is also a conflict between the parties as to whether Mrs Carter had permission to use the route.
45. Two other people<sup>11</sup> mentioned by Mr Bradley have not completed a UEF. In respect of the alleged permission involving the late Mrs Murray, her daughter (Mrs Johnson) says she was not aware of any such permission for her mother or their riding school to use the route. It cannot be determined that the references to permission being given by Mr J. Bradley to two people occurred during the relevant period and one of them did not start using the route until 2010.
46. Permission may have been granted on occasions and this is supported by the evidence in relation to Ms Liles. However, I am not satisfied on balance that I

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<sup>10</sup> The farm was purchased by them in 1954 and Messrs H. and A. Bradley passed away in 1986 and 2005 respectively.

<sup>11</sup> Ms Gledhill and Mrs Murray

can attribute any widespread permission in terms of those people who have provided evidence in support of use of the Order Route. I also have concerns about the inference by the objectors that the alleged permission would have automatically extended to other family members and friends. In my view, the use of the route and the potential granting of permission was brought into focus by the concerns regarding the use by motor vehicles, which ultimately led the objectors to question the status of the Order Route. There is no evidence of challenges being issued to horse riders during the relevant period who did not have permission.

*Implied permission*

47. The objectors submit that agricultural activities and motor cycle events are indicative of the public use being by way of implied permission.
48. A number of the users acknowledge that there were times when they had to wait whilst cows were being moved. At these times any gate in the area would be closed and poles were used to prevent cows from straying. They state that at other times gates were generally open and the poles were not across the route. They did not find that their use was prevented by farm vehicles or machinery. The evidence of the objectors is that the Order Route was obstructed for prolonged periods of time. Mr Bradley says that on one occasion Mrs Murray and her companions had to turn back due to agricultural operations.
49. I take the view that any exclusion of the public for the movement of cattle was for a relatively short period of time and the evidence points to users waiting whilst this took place. Further, it would be expected that someone would wait at a convenient point should a horse rider and farm vehicle meet. The real conflict arises out of the assertion that parked farm vehicles obstructed the Order Route. This is something not acknowledged by any of the users. There is scope for farm vehicles to park in a manner that obstructs or allows access over the route. It may also be the case that the position regarding the potential obstruction of the route has altered over time.
50. The Huddersfield Falcons Motor Cycle Club have organised events on the surrounding land on two or three Sundays a year since 1952-53. During the relevant period there were two entrances to the car park located in a field to the north of the Order Route with a section of the route taped off between 09:00 and 18:00 hours to stop vehicles going into the farm. Outside of these hours there would be nothing to deter access.
51. It should be borne in mind that since 1975 this route has been shown on the definitive map and there is nothing to suggest that any official closure was implemented. Some of the users were aware the event was taking place and chose not to ride in the locality to avoid spooking their horse. Ms Gillespie says that she rode along the route when one of the events was taking place and she was advised to take an alternative route into the neighbouring field before re-joining the Order Route. She did not recall seeing any tape across the route.
52. The responsibility for organising the events lay with the Huddersfield Falcons. Signage was in place advertising the event, but no signs were erected to say that the public could not use the route. Access may well have been discouraged on event days during certain hours. However, there is no evidence to show that people were stopped by the organisers from using the

route and no entry charge was in operation. The most likely reason for the lack of use during one of these events is that people chose to avoid the route.

53. Having regard to the matters outlined above I do not find on balance that permission can be implied from the temporary obstructions arising from agricultural activities or the motor cycle events that periodically took place in the area.

*Whether the user was by right*

54. A question arises out of the use of the Order Route during the time it was recorded as a BOAT. This was the case throughout the relevant period. Paragraph 4.35 of the Circular expresses the view that user cannot give rise in such circumstances to presumed dedication. The Council points to the case of *Powell and Irani v Secretary of State for Environment, Food and Rural Affairs 2014* ("*Powell and Irani*") in support of a contrary position being taken. Whilst I note the comment in a summary of cases held by the Planning Inspectorate, this statement has no legal standing.
55. In *Powell and Irani* a footpath had been legally diverted in 1967 and the stopped-up path was later claimed to be a public footpath following a subsequent period of user. The surveying authority had not updated its definitive map to show changes such as the diversion. When taken in isolation an inspection of the definitive map would have shown the claimed route as a public footpath. However, it was confirmed that people making enquiries to the surveying authority were informed of the correct position of the footpath. As outlined above, the circumstances in *Powell and Irani* were different to the present case. It may therefore be possible to reach a different conclusion from the facts in the present case.
56. I agree with Ms Stockley that the 'as of right' issue was raised in *Powell and Irani* on the ground that there was an additional element to the tripartite test of whether the quality of the user was such that a reasonable landowner could be expected to intervene to resist it. There was also a separate ground regarding the use of the way by stealth. It was in respect of these grounds that consideration was given to the Supreme Court case of *R (Barkas) v North Yorkshire County Council 2014* ("*Barkas*"). The judgment in *Powell and Irani* does not address the 'by right' argument.
57. The Order Route is recorded in the definitive statement with a relevant date of 30 April 1985 and I have accepted that there is an error with the notation on the definitive map. This means that a right of way for the public was recorded at the relevant date for vehicular and all other kinds of traffic. I note that some of the users have stated that they used the route because it was a public right of way.
58. In *Barkas* the land involved was in public ownership and allocated for recreational purposes. As outlined by Lord Neuberger at paragraph 21 of *Barkas* if the public had a statutory right to use the land it would be user 'by right' and not as a trespasser. The latter would enable the user to be 'as of right'. I therefore agree with the objectors that for the duration of the relevant period the user was 'by right'. This conclusion is reached for a different reason to the reasoning in paragraph 4.35 of the Circular, which predates these judgments.

59. In light of my conclusion above, statutory dedication fails as the user was not as of right. The evidence would not in my view support the dedication of a bridleway under statute for an earlier twenty-year period. This means that there is no need for me to consider whether the utility works undertaken in 2007 and 2008 and other activities served as an interruption to the user. Nor do I need to address whether the landowners demonstrated a lack of intention to dedicate a bridleway. Although this point was not pursued strongly by the objectors. I address below whether an inference of dedication at common law can be implied from the use of the Order Route prior to the relevant date of 30 April 1985.

**Assessment of the user evidence – common law dedication**

60. I have addressed issues arising out of the user evidence above. Around seventeen people<sup>12</sup> have provided evidence of regular personal use on horseback or a cycle<sup>13</sup> prior to 1985. There is also evidence of the Order Route being used with other named persons. The earliest evidence of use is stated to have commenced in 1955, but the use predominantly occurred during the 1970s and 1980s.
61. This user evidence is bolstered by the evidence contained in written statements provided by the objectors where it is acknowledged that the route was used by horse riders. In terms of the family connections identified by the objectors, it appears that five people were either blood relatives or are now related through marriage. However, I do not consider this prevents the user as a whole being taken to be representative of use by the public. The evidence of use is what could be expected for a right of way in this location.
62. There was a landowner with the capacity to dedicate throughout the period covered by the user evidence. I do not accept that there was any widespread permission granted by members of the Bradley family in connection with this use. Nor have I found that implied permission can be taken to arise from the agricultural activities or motor cycle events. Further, I find it unlikely that they would have served as a significant interruption to the user.
63. It is evident that the level of use was sufficient to make the landowners aware that the Order Route was used by horse riders prior to 1985 and there is nothing to suggest that action was taken to challenge this use until relatively recently. Overall, the evidence points to an acquiescence by the landowners to the public use. This is particularly apparent from the evidence regarding the actions of the late Mr A. Bradley. Some of the users mention passing the time of day with him and how he removed the poles or opened gates to help riders pass. It is acknowledged that he was fond of horses and liked to see them. However, an incident involving a dog is alleged to have occurred after the relevant date of the current definitive map and statement and there is no need for me to make a finding on this matter.
64. For these reasons I conclude on the balance of probabilities that the dedication of a public bridleway at common law can be implied from the evidence of use and the conduct of the landowners prior to the relevant date of the current definitive map and statement. Having regard to my other conclusions I find

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<sup>12</sup> Three additional people first used the route in 1985

<sup>13</sup> Only one of these people was not a horse rider

that the Order should be confirmed in accordance with Section 53(3)(c)(ii) of the 1981 Act.

### **Limitations**

65. The objectors have provided details of structures that have existed at times on the Order Route. In terms of the dedication of bridleway rights, this should be taken to be at or before the beginning of the relevant period of user.
66. It is apparent that a wooden gate was in place until the early 1970s near to the objectors' present house and that this was replaced by a gate further to the east between the farm buildings. A photograph provided by Mrs Bradley shows the gate in place at the time of the survey of the route in 1951. Given the period when the user commenced, the Order should specify that there is a limitation of a gate at the original location rather than the site of the replacement structure.
67. A number of people have referred to poles or bars that were placed across the Order Route when cows were moved within the yard and a plan provided by the objectors' records these being present at two specific locations. On balance, I accept that the removable bars should also be recorded as limitations.
68. The boulders and additional gates post-date the dedication of bridleway rights and cannot be recorded in the Order. It may be that other structures will be permitted, but this would be a matter for the objectors to pursue with the Council. The modifications to the Order will allow the objectors to place specific structures at certain locations should they wish to do so.

### **Overall Conclusion**

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

### **Formal Decision**

70. I confirm the Order subject to the following modifications:
  - Insert underneath the column headed "*General*" in Part 2 of the Order Schedule, "*Limitations of gate (point X on the Order Map) and two removable bars (points Y and Z on the Order Map)*".
  - Insert "X", "Y" and "Z" at the identified points on the Order Map.

*Mark Yates*

**Inspector**





7. Statement of Ms Gillespie
8. Statement of Mrs Johnson
9. Minutes from meetings of KBG
10. Site photographs
11. Photograph supplied by Mr J. Bradley
12. Statement of Mrs Bennett
13. Supplementary proof of Mr E. Bradley
14. Location map
15. Closing submissions on behalf of the objectors
16. Closing submissions for the Council
17. Post inquiry submissions regarding common law dedication

ORDER QUASHED - CONSENT ORDER ISSUED 27/11/2019