



Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 17 JULY 2020

Appeal Ref: FPS/P2745/14A/6

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of North Yorkshire County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 24 March 2016 was refused by the Council on 8 January 2020.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by upgrading footpath 10.177/084 (A-B on the plan appended to this decision) and bridleway 10.177/085 (C – D on the appended plan) to Restricted Byways and by adding B- C 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 1981 Act.
2. This appeal has been determined on the papers submitted.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of the Courts in the *Bagshaw and Norton*¹ and *Emery*² cases.

Background

4. The appeal route connects two small settlements within the parish of Bilsdale Midcable known as Fangdale Beck and Low Mill. The appeal route is located to the west of the River Seph which is itself to the west of the B1257 which runs between Stokesley and Helmsley.
5. The appeal route is currently recorded in the Council's List of Streets as the U3121 which connects the settlement at Fangdale Beck with the B1257 east of Low Mill. The appeal route had been recorded as the U1850 at the time responsibility for the maintenance of public highways was transferred from Stokesley Rural District Council to the Council under the provisions of the Local Government Act 1929. Whilst that part of the appeal route B – C is not shown on the definitive map, section A – B is recorded as a public footpath, with section C – D being recorded as part of a public bridleway.

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

² *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

Main issue

6. Whether the documentary and other evidence discovered demonstrates that the appeal route is a public vehicular carriageway which should be recorded in the definitive map and statement as a Restricted Byway.

Legislative Framework

7. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the definitive map subsists is dealt with under section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence 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.

8. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities?

Test B. Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

9. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"
10. In this case, parts of the route at issue are already recorded in the definitive map and statement as a public footpath and as a public bridleway. The upgrading (or downgrading) of the status of a public right of way is provided for by section 53 (3) (c) (ii) of the 1981 Act. Section 53 (3) (c) (ii) provides that the definitive map and statement should be modified on 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*".
11. Under the provisions of section 53 (3) (c) (ii) there is no "*reasonably alleged to subsist*" test as is found in subsection (i). However, given that the appeal route forms part of a through link between existing public carriageways, I intend to give consideration to the appeal route as a whole and not to its separate constituent parts. If a conclusion is reached that it is reasonable for the Appellant to allege the existence of a public vehicular right of way over the appeal route as a whole, it would follow that it would also be reasonable to allege the existence of higher rights over A – B and C – D as otherwise B – C would be a vehicular cul-de-sac at either end. Such a route could not subsist at common law.

12. The appellant contends that the appeal route is a public vehicular highway. If that is the case, it appears that any right the public would have had to use the appeal route with mechanically propelled vehicles would have been extinguished on 2 May 2006 by virtue of the coming into operation of section 67 of the Natural Environment and Rural Communities Act 2006. Although section 67 also made provision for the retention of such public rights, none of the exceptions appear to be applicable in this case. Whilst the route could not therefore be recorded as a Byway Open to All Traffic, it could be recorded as a Restricted Byway.

Documentary evidence

13. The earliest depiction of the appeal route is found on Calvert's map of 1781-82. Field names are shown on the map and the section of the Appeal route to the south of Mill Field is shown as an enclosed track or way between defined boundaries with part of the track running on the western side of field 526 which is identified as 'Loaning'. The track continues north on the western side of Mill Field towards Low Mill. The B1257 is depicted in a similar manner, being partly enclosed by boundaries and partly running as an unenclosed track through named fields. No means of joining the B1257 at or near Low Mill is shown on the map.
14. The Tuke and Ayers map of 1826 shows the enclosed southern section of the route; the unenclosed northern section is not identified.
15. The first edition Ordnance Survey 6-inch to 1-mile map of 1857 shows a track leading from the B1257 to Low Mill and a track running from Low Mill to Fangdale Beck on the same alignment as the appeal route. A footbridge is shown over the River Seph at Fangdale Beck and a fording point of the river to access the track leading to the B1257 is marked.
16. Subsequent Ordnance Survey maps published during the late nineteenth and early twentieth centuries all show a route running from the B1257 to Low Mill crossing the river by means of a bridge. The track then runs through the collection of buildings at Low Mill turning south towards Fangdale Beck. A track is also shown running from the B1257 towards Fangdale Beck.
17. Low Mill is recorded as being part of hereditament 35 on the Finance Act 1910 plan; the southern section of the appeal route leading to Fangdale Beck is included within hereditaments 23, 25 and 26. A section of the appeal route is also shown as being outwith adjacent hereditaments and is uncoloured. Of the field book entries for these hereditaments, only hereditament 26 is recorded as having been granted a reduction in site value on account of a footpath being present. The Ordnance Survey base map used shows by means of a double peck line a track (annotated 'F.P.') running across hereditament 26 to connect with the appeal route.
18. The Appellant considers the depiction of part of the route as being excluded from claimed ownership as being evidence of the part of the route being a public highway. The Finance Act evidence however appears contradictory in that those enclosed parts of the appeal route leading to Fangdale Beck were included in hereditament 26.
19. The appeal route is recorded in the map prepared by Stokesley Rural District Council when it handed over maintenance responsibility for roads within its

administrative area under the provisions of the Local Government Act 1929. The appeal route was recorded as U1850 with the schedule describing the route as 'Low Mill on B1257 – Fangdale Beck'. The handover map was later altered with the U1850 being struck out; a marginal note reads 'Deleted February 1937'. The Council have found no authority for this deletion and the route was returned to the Council's List of Streets maintainable at public expense as the U3121 in or around 1994.

20. The Council acknowledges that the appeal route is one which is maintainable at public expense but submits that the inclusion of the appeal route on the List of Streets does not demonstrate the status of the route shown. The Council's position is that public rights over the appeal route must extend at the minimum to pedestrian traffic but that inclusion of a route on the List of Streets does not automatically mean that such a route carries a vehicular right of way. The determination of the existence of public rights higher than that of a footpath would have to be assessed on a route by route basis.
21. On the matter of the 1930 handover evidence Mr Sugden submits that Stokesley Rural District Council would have handed over responsibility for the vehicular highways which it had maintained at public expense. Mr Sugden submits that as part of the handover process, the County Council sought information regarding four classes of roads; classified roads, scheduled unclassified roads, other unclassified roads and *ratione tenurae* roads. It is submitted that the difference between scheduled unclassified roads and unscheduled unclassified roads was that the former had been eligible for improvement grants provided by central Government prior to 1930.
22. Mr Sugden submits that the purpose of the 1930 handover and the information sought from rural districts related to vehicular highways and not public footpaths or bridleways. Furthermore, the handover schedule listed the appeal route as 'S9' of the 21 scheduled unclassified roads the RDC transferred to the County Council. It is contended that the designation of the appeal route as 'S9' demonstrated that the appeal route had been or would have been eligible for improvement grants and was considered as a road of some importance at the time of the handover. It is submitted that the handover records demonstrate that the appeal route was not only a highway maintainable at public expense but that it was also a vehicular highway.
23. In the parish survey of public rights of way undertaken under the provisions of the National Parks and Access to the Countryside Act 1949, the parish council showed the bridleway leading to Fangdale Beck as terminating at its junction with the appeal route. This may have been because the parish council considered the appeal route to be a road and not a route required to be shown on the definitive map. The Council subsequently extended the line of the bridleway to a point where it met what was shown on the records of the time as a maintainable highway. In contrast, the footpath at Low Mill was shown by the parish council to run to the B1257.
24. The Appellant has submitted some commentary on a publication called '*Eight centuries of Milling in North East Yorkshire*' by John K Harrison and contends that of the 116 water driven corn mills identified, 77% had an access route passing a mill, either alongside or between the mill buildings. The appellant also notes that a blacksmith's shop, forge and plough works were located at Fangdale Beck and would have required a supply of pig iron and coal to

- operate. It is the Appellant's contention that the required raw materials were brought to Fangdale Beck by packhorse via the B1257 and the appeal route using the bridge at Low Mill as opposed to crossing the ford at Fangdale Beck.
25. The landowners affected by the application submit that there is no evidence of use of the appeal route other than on foot or as a private means of access between properties. Those resident at Low Mill since 1960 submit that there has been no use of the appeal route by horses for at least 60 years and requests for permission to do so have been rejected.
26. Those opposing the appeal contend that there is doubt over the validity of the designation of the appeal route as an 'unclassified' route; the highways records are shrouded in confusion and error with records being deleted and then re-instated without any supporting documentation to demonstrate why such amendments had been carried out. It is considered that the original inclusion of the appeal route in the handover records was made in error; the absence of a stopping up order and the deletion of the route in 1937 suggests that the highway authority of the day considered that the route was not public. Furthermore, there is no evidence of public expenditure ever having been carried out on the route; the replacement bridge at Low Mill having been paid for privately.
27. The objectors submit that the recording of the route in the List of Streets cannot be used to infer that anything other than public pedestrian rights subsist over the appeal route. The inclusion of a public footpath on the definitive map to connect Fangdale Beck and Low Mill would be welcomed.

Conclusions

28. It is the Council's case that the documentary evidence adduced in support of the application to add a restricted byway is weak and that the appeal should be rejected. Those opposing the appeal also consider the evidence to be inconclusive and does not demonstrate the existence of public rights higher than that of a public footpath.
29. Whilst it is common ground between the parties that the appeal route was part of the transfer of responsibilities from the rural district council to the county council in 1930, there are differences between the parties as to the inferences to be drawn from that transfer regarding the status of the route at the time of the handover. In my view, the conflict in the interpretation of that evidence means that the appeal fails against test A above. However, in the absence of evidence which demonstrates that higher rights could not subsist over the appeal route or that such rights had been extinguished at some point in the past, taking the evidence discovered as a whole, the Appellant could reasonably allege the subsistence of a public vehicular right of way. Accordingly, the appeal succeeds against test B.
30. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Exceptional circumstances

31. In ordinary circumstances, I would consider that the Council should be directed to make an order within three months of the decision on the appeal. However, I also consider that the impact of the current coronavirus outbreak on local authorities may limit the Council's ability to adhere to a three-month timescale.

32. Accordingly, and to give the parties some certainty that an order will be made in the near future, I consider it appropriate to allow the Council a period of 12 months for the order to be made.

Formal Decision

33. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the North Yorkshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within twelve months of the date of this decision to record as a Restricted Byway the appeal route A – B – C – D shown on the plan appended to this decision.

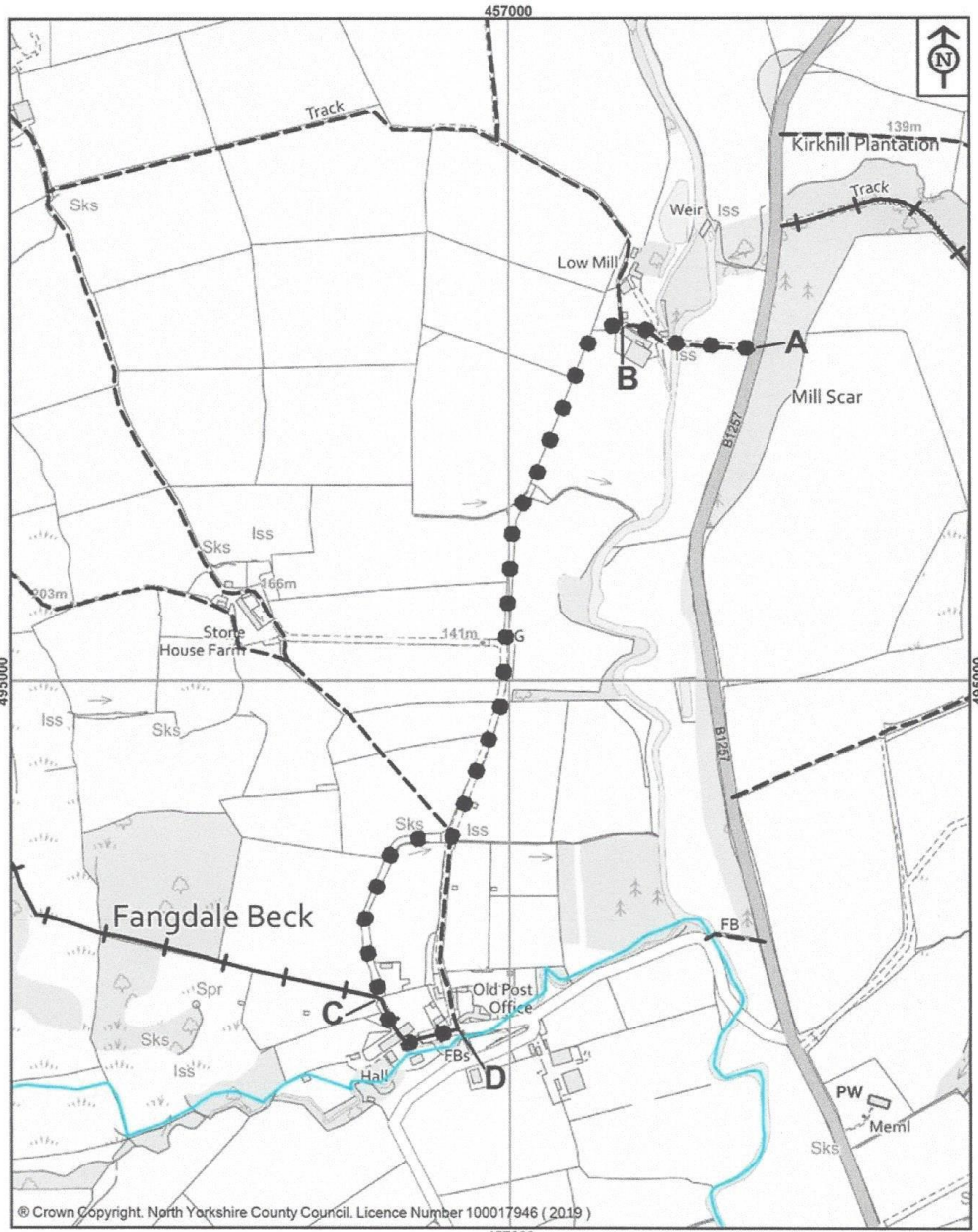
34. This decision is without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alan Beckett


Inspector

APPENDIX

Page 2



© Crown Copyright. North Yorkshire County Council. Licence Number 100017946 (2019)

 <p>North Yorkshire County Council 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 Footpaths Bridleways 	<p>North Yorkshire County Council Wildlife and Countryside Act 1981 Section 53 Application to record Restricted Byway from Low Mill to Fangdale Beck, Bilsdale Midcable</p>
	<p>Map drawn on 12 June 2019 Drawn by BB Scale 1:5000 File Ref No. HAM/2016/01/DMMO</p>	