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| **Order Decision** |
| Site visit made on 15 June 2021 |
| **by Alan Beckett BA MSc MIPROW** |
|  **appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 05 August 2021** |

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| **Order Ref: ROW/3251646** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the North Yorkshire County Council Downgrading of Public Bridleway No 15.29/38 (Part) to Footpath, Monk Ing Road, Dacre Modification Order 2012.
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| * The Order is dated 23 March 2012 and proposes to modify the definitive map and statement for the area by downgrading to footpath that part of public bridleway 15.29/38 as shown in the Order plan and described in the Order Schedule.
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| * There were 5 objections outstanding when North Yorkshire County Council (‘the Council’) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed.** |
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Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I carried out an accompanied site visit on Tuesday 15 June 2021 when I was joined by Mr Allen of the Council, by Mr Marshall (the applicant for the Order) and by Mr Halstead (representing the objectors).
2. At the site inspection it was noted that the alignment of the bridleway shown on the Order plan did not accord with the route which was available for use on the ground. At a number of locations (at Corner House, through Monk Ing Farm and the land to south west of Monk Ing Farm, the available route deviated from the definitive line shown on the Order plan. These deviations were necessary to avoid obstructions presented by stone walls and vegetation cover. The available route was marked on the ground by waymark discs, some of these discs carried the Council’s name whereas some did not. Although it was not possible to walk the line shown in the Order plan, it was possible to determine where the Order plan alignment ran from various points along the route which was available.
3. That parts of the definitive line of the bridleway were unavailable for use at the time of my visit has no bearing upon my determination of the Order as the question before me is the status of the route, not its alignment. The question of whether the definitive line is obstructed at any point is a matter for the Council as the Highway Authority.
4. In 1981 that part of the route which is shown as running through the farmyard at Pasture Side was diverted under the provisions of the Town and Country Planning Act 1971.[[1]](#footnote-1) The Order plan does not reflect the re-alignment of the bridleway as the Council were not in possession of a copy of the 1981 diversion order when the current Order was prepared. Should the Order be confirmed, the Council has requested a modification to reflect the alignment of the route arising from the diversion made in 1981. However, the modification requested appears to be one which the Council (as Surveying Authority) is required to make under the provisions of section 53 (3) (a) (i) and (ii) and does not fall to be considered under the provisions of section 53 (3) (c) (ii) under which the Order has been made.
5. If the evidence adduced in this case demonstrates, on a balance of probabilities, that the Order route was incorrectly recorded as a bridleway when the definitive map and statement (‘DM&S’) was first compiled and ought to be recorded as a footpath, then the section of the path diverted around Pasture Side will also have been erroneously recorded as a bridleway and will also be downgraded to a footpath. The Council will therefore be able to modify the DM&S under the provisions of section 53 (3) (a) (i) and (ii) by means of a ‘legal event’ modification order.

The Main Issues

1. Section 53(3) (c) (ii) of the 1981 Act provides that an order to modify the DM&S should be made following the discovery of evidence which (when considered with all other relevant evidence available) shows that a highway of one description ought to be there shown as a highway of a different description. Section 32 of the Highways Act 1980 (‘the 1980 Act’) requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
2. In the *Trevelyan[[2]](#footnote-2)* case, Lord Phillips MR held that *“**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.”*
3. In *Trevelyan* the Court also quoted with approval guidance which had been published in Department of the Environment Circular 18/90. The guidance stated that it was for those who contended that there was no right of way to prove that the definitive map was in error and that a mistake had been made when the right of way was first recorded; it also stated that the evidence needed to remove a right of way from the record would need to be cogent, and that it was not for the Surveying Authority to demonstrate that the map was correct.
4. Circular 18/90 has been superseded by Defra Circular 01/09[[3]](#footnote-3). Circular 01/09 sets out that “*The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such* *a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.*”
5. “*Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence in rights of way disputes*. *Authorities are under a duty to make an order modifying the definitive map and statement where they have evidence that a public right of way should be downgraded or deleted. Notwithstanding the clear starting point in relation to the possible deletion or downgrading of ways…., the powers in section 53(3) of the 1981 Act include the making of orders to delete or downgrade rights of way shown on the definitive map and statement in cases where evidence shows that rights did not exist at the time when they were first shown on the map*.”
6. “*The evidence needed to remove what is shown as a public right 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.*

 *While all three conditions must be met they will be assessed in the order listed.”*

1. The main issues are therefore whether any new evidence has been produced and which had not been available or considered at the time the map was first produced and, if so, whether, when considered with all other relevant evidence, that evidence shows on a balance of probabilities that the way shown in the DM&S as a public bridleway ought to be there shown as a public footpath such that the DM&S require modification.

**Reasons**

###### *The process leading to the inclusion of the route on the Definitive Map*

1. As part of the preparation of the DM&S under the provisions of the National Parks and Access to the Countryside Act 1949 (‘the 1949 Act’), Parish Councils generally provided information to the Surveying Authority with regard to what were considered to be public rights of way within the parish. The initial information gathering exercise was therefore undertaken at the most local level possible.
2. The information received by the Surveying Authority was compiled into the draft map of public rights of way. On publication of the draft map, there was an opportunity for interested parties to object to the inclusion, omission, or incorrect recording of a route. Once any matters raised at that stage had been resolved, a provisional map was produced at which point affected landowners could make objections and representations at the Quarter Sessions. Once all such matters had been resolved, the Surveying Authority could publish the definitive map.
3. Although the parish survey of public rights of way within Dacre had been conducted in September 1950, the DM&S for this area was not published in its definitive guise by the West Riding of Yorkshire County Council (‘WRYCC’) until 1972. On the reorganisation of local government in 1974, responsibility for the DM&S was transferred to the Council.
4. The parish survey cards demonstrate that the parish council considered that what became recorded as bridleway 38 ran from Dike Lane in a generally north-easterly direction to Dacre Banks. This extensive route was separated into a number of sections with each section being the subject of a separate survey card. The survey card for the Order route records that it was surveyed on September 27, 1950 and was described as a footpath running from ‘*four lanes ends Lanesfoot’* to Dike Lane. The survey noted that the path was ‘*part metalled and part grass no particular width’* and that the ‘*stiles and gates*’ on the route were ‘*in order*’. The reason given for believing the route to be public was ‘*awarded Dacre Pasture award’*.
5. Of the four other sections of the route surveyed, the survey cards recorded three sections as being ‘road used as public path’ with one short connecting section being recorded as a footpath.
6. The definitive statement describes the route between Dike Lane and Dacre Banks as a ‘Bridleroad and footpath’ with that section of the route between Dike Lane and Four Lane Ends being shown as a bridleway on the definitive map and the entirety of the section eastwards from Four Lane Ends being shown as a footpath.
7. Copies of the draft and provisional maps published as part of the process have not been submitted and I understand that little of the background information regarding the definitive map process was transferred to the Council on local government re-organisation in 1974. There is no evidence before me that formal objections or representations to the depiction of the Order route as a bridleway were made at the draft or provisional stages, and it has not been suggested that the Order route had not been so depicted on the draft and provisional maps.
8. However, there is evidence in correspondence between Dacre Parish Council and the WRYCC in 1970 which demonstrates that the depiction of the Order route as a public bridleway was being questioned. A letter dated 5 December 1970 shows that Dacre Parish Council were in receipt of a copy of the provisional map and queried the status of what it described as ‘Footpath 38’.
9. The Parish Council noted that “*From Dike Lane to the intersection with No. 39 at Lanes Foot road, this right of way is incorrectly shown as a bridleway, whereas it should be a footpath throughout its entire length”.* Whilst noting the Parish Council’s views, the County Surveyor’s response was that “*the position is, however, that the only amendments which can be made to the Provisional Map at the present time are those brought about by appeals to Quarter Sessions. In due course a review will take place and then the points you raise can be investigated*”.
10. There is no evidence that the depiction of the Order route as a bridleway was raised at Quarter Sessions, nor is there any evidence that the 5 yearly reviews of the definitive map envisaged by the 1949 Act took place as the Order route continues to be shown as a bridleway on the definitive map first published in 1972.
11. The available evidence suggests that the procedures required prior to the publication of the definitive map were followed, and although there were opportunities for the status of the Order route to be challenged at the draft and provisional stages, no such challenges were made. In such circumstances, weight has to be given to the recording of the route as a public bridleway.

***Whether any new evidence has been produced***

1. The applicant has submitted a copy of the 1836 Inclosure Act and extracts from the Dacre Pasture Inclosure Award which was made under that Inclosure Act. Also submitted in support of the Applicant’s contention that the bridleway was incorrectly recorded was a copy of part of the 1852 Dacre Township plan; copy extracts from Ordnance Survey mapping of the area from the nineteenth and early twentieth centuries; a copy of the 1950 parish survey of public rights of way, extracts from the 1970 correspondence between Dacre Parish Council and WRYCC; photographs of stiles and gates along the route; and witness statements from individuals giving their personal testimony regarding the Order route from the 1930s onward.
2. The objectors to the Order have provided a limited amount of additional material, namely in the form of extracts of large-scale maps and commentary upon the documents adduced by the Applicant.
3. The absence or non-survival of documents relating to the process which led to the production of the definitive map and the depiction of the Order as a bridleway makes it difficult to determine what evidence was before WRYCC prior to the publication of the draft, provisional and definitive maps. Although the parish survey of the Order route appears to be at odds with what was shown on the draft, provisional and definitive maps, the parish survey cannot be considered to be ‘new’ evidence, as that was plainly before WRYCC.
4. Similarly, the 1970 correspondence between Dacre Parish Council and WRYCC is not ‘new’ evidence. Whilst that correspondence (see paragraphs 20 and 21 above) is evidence that the status of the route had been questioned at the provisional map stage (albeit not through the appropriate channel), that correspondence was before the Surveying Authority prior to the publication of the definitive map.
5. Whilst the parish survey recorded the reason for believing the way to be public was that it had been awarded under the Dacre Pasture Inclosure Award, there is no evidence to suggest that WRYCC had consulted the enabling Act of Parliament or the Award itself, which (see paragraphs 31 to 35 below), did not award any part of the Order route as a public right of way.
6. It is not known whether the Dacre Township map or large and small-scale Ordnance Survey maps had been consulted by WRYCC. It is unlikely that the personal testimony of the applicant’s witnesses would have been obtained or considered although local knowledge of those routes considered to be available for public use may have informed the Parish Council’s understanding of public rights of way within the parish. survey.
7. Overall, I consider that evidence has been put forward which is unlikely to have been considered when the definitive map was first prepared. The evidence adduced therefore satisfies the first test set out in paragraph 11 above. I will examine this evidence in relation to the other evidence which had been available.

**Documentary evidence**

*Dacre Pasture Inclosure Award 1844*

1. The Dacre Pasture Award was made pursuant to the provisions of the 1836 Inclosure Act which provided a mechanism whereby open and common fields could be enclosed by agreement if the consent of certain proportions of the freehold owners of those lands had been given. The 1836 Act appears to be concerned with the exchange of ownership and interests in land such that those interests can be rationalised and consolidated.
2. Section 52 of the 1836 Act incorporates into it the provisions of the 1801 General Inclosure Act and the Inclosure Act of 1820. The Inclosure Commissioners thus had available to them the powers to set out and appoint roads and ways as they thought necessary to enable the consolidation of landholdings envisaged by the 1836 Act.
3. The Dacre Pasture Award does not set out any public right of way over the Order route. The western end of the Order route between points F and G on the order plan was set out as part of an occupation road called Monk Ing Road which had its westerly extent at an ancient inclosure belonging to one Judith Hebden. The award also specifies those public roads, public bridle roads and public foot roads set out by the Inclosure Commissioners. Provision was made in the award for private accommodation roads set out to also carry a public right of way.
4. One example of a public footpath being set out over a private carriage road is the ‘*Lane Foot Foot Road*’ which ran over allotment 17 and along Northwood Road, turning north at the junction with Lane Foot Road and running to ancient inclosures north of the lands being inclosed. No public right of way was awarded over Monk Ing Road or the land crossed by the Order route.
5. The inclosure award evidence is therefore at odds with the reason given in the parish survey for believing that the Order route was a public way but does not preclude the creation or acquisition of such rights along the Order route subsequent to the date of the award.

*Dacre Township Map and map key 1852*

1. The key (‘Remarks’) to the Township map shows the means by which foot, bridle and occupation roads and highways and carriageways are identified. The Order route is neither marked by a single peck line (footpath) or by a double peck line (bridle or occupation road).

 *Ordnance Survey maps*

1. The 1854 6 inch to 1 mile map shows by means of a double peck line a track or way leading from Dike Lane to Pasture Side (on a slightly different alignment to the Order route) with a continuation of that double peck line feature running between Pasture Side towards Monk Ing to connect with the western end of the awarded Monk Ing Road. To the north from Pasture Side and Monk Ing are a number of routes depicted by double pecked lines and annotated ‘Foot Path’ or ‘Bridle Road’; The double peck line representing the Order route is not annotated. The ‘characteristics’ sheet for the 6-inch map does not indicate what was being conveyed by a double peck line.
2. The lack of any annotation on the Order route may suggest that this route was capable of carrying cart traffic as opposed to it being suitable for equestrian or pedestrian traffic. Given that the track shown provided a means of access to agricultural premises and a means of access to fields within the same land holding it seems likely that the Order route would have been put to such use.
3. My attention has been drawn to the depiction of how point D on the Order map was depicted on the 1854 OS map. At this point the map shows a gap between the east-west and north-south walls through which the Order route passes with the east-west boundary wall of the field labelled ‘Monk Crags’ being discontinuous with a splay and return in that wall clearly shown.
4. The objectors submit that whilst there is currently a stone stile in the wall corner at D, the 1854 map suggests that there would have been a gateway opening at this point and that the existence of the wall stile currently on site cannot be taken as evidence that it had not been possible for horses to pass along the Order route. It is suggested by the objectors that in 1854 there had been an opening at this location which could have accommodated equestrian and other traffic which has subsequently been filled in.
5. The contemporaneous Township map shows that the field labelled Monk Crags formed part of the holding surrounding Pasture Side; access between Monk Crags and the field to the north for agricultural purposes is therefore likely to have been required. Whilst a gap (or a gate) may have been present at D at some point in the past, this does not demonstrate that the route was in use by the public on horseback. Had a gap or gate existed at this point and was subsequently filled in (the wall at D immediately to the north having the appearance of repairs at some unspecified point in time), this may reflect changes in land ownership or agricultural practices.
6. The ‘gap’ shown in the wall at D on the 1854 map is not shown on the 1891 or 1909 OS maps. On these editions the wall boundaries at D and E are shown to run over the Order route. The Order route is depicted by double peck lines on both maps, the width of the peck lines between Pasture Side and Monk Ing being narrower than the remainder of the route, which may suggest a route not suitable for anything other than pedestrian traffic; this is reflected on the 1909 map with the Order route being annotated ‘F.P.’ between points D and E.
7. OS maps published in 1956 and 1976 both show the order route by means of double peck lines; the 1956 map carries the annotation ‘F.P.’ between points D and E, whereas the 1976 map labels the route ‘Path (um)’.
8. Whilst some of the OS maps depict a route which may have been capable of carrying vehicular and other traffic, the depiction of the Order route is not consistent; none of the maps considered indicate use of the route as a bridleway. Although the representation of the Order route on the 1854 map suggests a route capable of carrying more than just foot traffic, the map does not, by itself demonstrate the historic existence of public equestrian rights.

*Other maps – large-scale OS and commercial maps*

1. Extracts from a number of other Ordnance Survey and commercially produced maps were submitted. The 1859, 1898 and 1914 one-inch maps show by means of a double peck line a track running from Dike Lane to the western end of Monk Ing Lane. A double peck line is shown to represent an unmetalled road in the key to the 1898 map and an unfenced, unmetalled road on the 1914 map; descriptions which may be appropriate for an access track to property, but which do not indicate the status of the route shown.
2. The Geographia Road map of 1940 is a small-scale schematic map which shows the Order route by means of double solid lines in the same manner as other roads in the area. The key describes such routes as ‘Other roads, Footpaths (subject to a right of way)’.

*Witness statements*

1. Four witness statements were submitted in support of the application to downgrade bridleway 38. Two of the respondents had been born in the 1930s (1931 and 1934) and two in the 1950s (1950 and 1951); the respondents had been born at either Pasture Side or Monk Ing; their evidence was that during their lifetimes there had been stone stiles and cattle grids to be negotiated between Pasture Side and Monk Ing and that use of the route on horseback had not been possible.
2. The objectors consider that the understanding and experiences of these witnesses would not represent the views of the ‘oldest inhabitants’ of the parish at the time the survey of public rights of way was carried out on 1950, as two of the respondents had yet to be born and the memory of the other two could probably only run back to the early 1940s[[4]](#footnote-4). The objectors submit that those conducting the survey would have had access to those within the parish whose collective memory might run backward to around 1880.

**Assessment and conclusions**

1. Whilst there may have been parishioners alive in 1950 who were 80 years of age, had those ‘oldest inhabitants’ had an understanding and knowledge of the Order route as a public bridleway then it is highly likely that such knowledge would have informed those carrying out the parish survey. However, no evidence of such a reputation is recorded in the survey card. The belief and understanding at that time was that a public footpath subsisted by reason of it having been awarded under the Dacre Pastures Award.
2. That the parish council which conducted the survey is unlikely to have had knowledge of the route as a bridleway is reflected in the correspondence between the parish council and WRYCC in 1970 when the parish council questioned why the Order route had been shown as a bridleway on the provisional map. Although WRYCC was unable to undertake any revision of the map at that stage, the query raised by the parish council is reflective of its understanding of the status of the Order route at the time the 1950 survey was carried out.
3. The definitive map shows the existence of stiles at points D and E, with field gates recorded at A, B, C and mid-way between E and F. Although the parish council’s survey map has not survived, the annotations found on the Definitive Map are likely to have been derived from the survey map and accord with the description found on the survey card of ‘*stiles and gates*’ being present along the route.
4. Contrary to the entry on the parish survey card, the Order route was not set out as a public footpath by the inclosure commissioners. A public right of way is therefore likely to have come into existence as a result of long use by the public. It is not disputed by any party that the Order route is subject to a public right of way, the question is the nature of those rights.
5. Ordnance Survey mapping is consistent in showing that a route between Dike Lane and the western end of Monk Ing Road has existed since at least 1854. However, the depiction of the Order route by OS has not been consistent. Mid-nineteenth century mapping shows a route which appears capable of carrying more than foot traffic, whereas early twentieth century OS maps show the Order route annotated ‘F.P.’.
6. Whilst the maps considered do not provide evidence of the status of the route shown, the mapping throughout the twentieth century is consistent with the witness statements as to the physical characteristics of the route present from at least the 1930s. The twentieth century mapping is also consistent with the Parish Council’s view at the time of the 1950 survey that the Order route was a footpath and with the Parish Council’s correspondence with WRYCC 20 years later that the route had been incorrectly recorded.
7. Whilst it may have been possible to undertake a journey on horseback over the route shown in the 1854 OS map through the gaps in the walls shown on that map, the remainder of the evidence considered does not provide support for the Order route having the reputations as a public bridleway. Indeed, the evidence is consistent as to the order route having the reputation of a public footpath. There is no evidence before me of use of the Order route as a public bridleway and it appears that such use would not have been possible over the last 90 years at the least due to the stone stiles present along the route.
8. The balance of the available evidence is that the during the twentieth century the Order route had a reputation as a public footpath and leads to a conclusion that WRYCC erroneously depicted the route as a public bridleway when compiling the definitive map. There is a conflict between the original parish survey and what was depicted on the definitive map as compiled by WRYCC which is not satisfactorily explained by any of the evidence adduced. I consider that the new evidence submitted is of sufficient substance and cogency to displace the presumption that the definitive map is correct. It follows that I conclude that the DM&S require modification and that the public bridleway at issue ought to be there shown as a public footpath.

**Overall conclusion**

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

###### Formal Decision

1. I confirm the Order.

Alan Beckett

Inspector

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1. The Council of the Borough of Harrogate (Pastureside Farm, Dacre Top) Bridleway Diversion Order 1981; confirmed 18 June 1981 [↑](#footnote-ref-1)
2. *Trevelyan v Secretary of State for Environment, Transport, and the Regions* [2001] EWCA Civ 266 [↑](#footnote-ref-2)
3. Defra, version 2 October 2009 [↑](#footnote-ref-3)
4. Assuming that credible recollections of events might commence around 10 years of age [↑](#footnote-ref-4)