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| **Order Decision** |
| Inquiry Held on 14 & 15 September 2021Site visit on 17 September 2021 |
| **by Paul Freer BA(Hons) LLM PhD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 10 November 2021** |

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| **Order Ref: ROW/3242334** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Path Number 15.70/54 Arrowfield, Kirkby Malzeard, Modification Order 2019.
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| * The Order is dated 2 August 2019. It proposes to modify the definitive map and statement for the area by adding a public footpath linking Back Lane with Main Street, in the Parish of Kirkby Malzeard, Laverton and Dallowgill, as shown on the Order map and described in the Order schedule.
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| * There was one objection outstanding when North Yorkshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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| **Summary of Decision: The Order is confirmed with a modification, as set out in the Formal Decision below.**  |

**Main Issues**

1. The main issue here is whether the evidence is sufficient to show that in the past the Order route has been used in such a way that a public footpath can be presumed to have been established.
2. The Order was made under the Wildlife and Countryside Act 1981 on the basis of events specified in sub-section 53(3)(c)(ii). If I am to confirm it, I must be satisfied that, on a balance of probability, the evidence shows a public right of way on foot subsists along the route described in the Order, such that the Order route should be recorded as a public footpath on the Definitive Map.
3. The case in support is based primarily on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to have occurred, there must have been use of the claimed route on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question, thereby raising a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.

 Reasons

1. North Yorkshire County Council (NYCC), the Order Making Authority (OMA), made this Order in response to an application dated 27 April 2018 from Kirkby Malzeard, Laverton and Dallowgill Parish Council (Parish Council), supported by twenty-five forms giving evidence of use. One of those user evidence forms (UEF) indicated that permission had been granted to use the route by the previous landowner. I have therefore considered the claim on the basis of the remaining twenty-four user evidence forms.

*Bringing into question*

1. The objectors purchased Arrowfield on 27 October 2017 and shortly thereafter locked the gate that opens onto Back Lane. That prevented use of the Order route. I consider that the status of the Order route was brought into question by the locking of those gates. Consequently, I need to examine use by the public during the period between October 1997 and October 2018.
2. In this case, the sequence of events that led to the status of the route being brought into question is itself significant. The gates opening onto Back Lane were vandalised shortly after being locked. Although that act of vandalism cannot in any way be condoned, there must, Mrs Hercock accepted, have been a reason behind it.
3. Furthermore, there was also another immediate, and this time legitimate, reaction from residents of Kirkby Malzeard, two of whom promptly made a complaint to the Parish Council. The Parish Council reacted quickly and on 20 November 2017 sent a letter to the objectors. The Parish Council initially invited the owners to enter into a Creation Agreement but on 17 December 2017 the owners declined to do so. This led to the application being submitted in April 2018.
4. One obvious explanation for the above sequence of events would be that users of the route were seeking to assert their right to use a footpath which they had used in the past, and which until that point in time they had been free and able to do so. The objectors point to the fact that the complaints to the Parish Council was made by only two individuals, the implication being that the use of the route was not recognised by the wider public. Nevertheless, the complaints were taken up and acted upon by the Parish Council representing the wider community. Consequently, when looked at in the round, the sequence of events and the relatively short timeframe in which they occurred suggests that they are indicative of a strongly held belief by some members of the public of the existence of the claimed route.

*User evidence forms*

1. The twenty-four relevant UEFs cover the period from 1928 until 2018, and therefore include the period of time between the use of the Order route being brought into question in October 2017 and the UEFs being completed. I have only had regard to the period of time until use of the Order route was brought into question in October 2017. Fifteen of those UEFs indicate 20 years or more use of the route. Five respondents state that they have used the route daily, with fourteen indicating that they used the route on a weekly basis and four indicating that they used the route every few months.
2. Some of the respondents provide detailed and accurate descriptions of the route, including features on the route such as stiles and gates. The stile towards the middle of the route (Point C on the Order Map) is not easily visible from Main Street or Back Lane, and reference to it in some UEFs suggests knowledge of the route itself. Some of the UEFs also set out cogent reasons for using the route, such as accessing the footpath that continues northwards from Back Lane from their property on the south side of Main Street, and seeking to avoid the junction with Long Swales Lane due to perceived safety concerns.
3. Aside from the locking of the gate in or around October 2017 that eventually led to status of the route being brought into question, there is no reference in the relevant user evidence forms to suggest that those completing them were ever challenged whilst using the path, by notice or otherwise, or that they used the route in secret or with express permission[[1]](#footnote-1).
4. The objectors have approached the UEFs on the basis of households represented rather than individuals. In that context, they point out that four of the twenty-four relevant responses are from members of the same family, and that there are three households from which two user evidence forms have been received. The objectors seek to put that into context by stating that, even if approached on the basis of a headcount, that represents just twenty-four valid statements from a population of circa 900 residents of Kirkby Malzeard. The objectors calculate this to represent approximately 2.7% of the population of the village. They also point to the absence of UEFs from organised groups such as the Ramblers Association. This leads the objectors to question whether the level of response received is truly representative of the ‘public’ for the purposes of section 31(1) of the 1980 Act.
5. It is not entirely clear whether all properties in Kirkby Malzeard received a copy of the UEF. In giving his evidence, Mr Noble explained that he is a resident of Kirkby Malzeard but that he had not received a copy of the UEF. He went on to confirm that he would have completed a UEF documenting his use of the route had he had the opportunity to do so. I therefore cannot discount the possibility that there are other residents of Kirkby Malzeard in a similar position to Mr Noble, in that they would also have returned a UEF if they had had the opportunity to do so. It follows that the level of response, both in absolute and percentage terms, could have been higher in that scenario.
6. Furthermore, although a relatively low number in both absolute and percentage terms in relation Kirkby Malzeard as a whole, the level of response must be looked at in the context of the location of the route within that village. Kirkby Malzeard is a linear village that largely follows the line of Main Street, with a shorter frontage to Church Street at the eastern end. The majority of the facilities within the village are or were located towards its eastern end, between Long Swales Lane and Church Street. These include St Andrews’ Church, the primary school, the village hall, the former post office and a public house.
7. The route is located just to the west of the centre of the village. All of the above facilities are located to the east of the Order route, such that there would be no reason for residents living at the eastern end of the village to use it in order to access those facilities. Similarly, residents living at the western end of the village could access all of these facilities by travelling along Main Street, and would have no need to use the Order route to do so.
8. Of the remaining facilities, the doctors’ surgery, the tea rooms and the playing fields are all located to the west of the Order route. The former face onto Main Street itself, whereas the playing fields are located to the south of it. Residents of the village would have no need to use the Order route in order to avail themselves of those facilities.
9. Looked at in this way, the majority of the residents of Kirkby Malzeard would have no reason to use the Order route. It is therefore unsurprising that those residents did not respond to the request to complete UEFs, or that those UEFs that were returned are from a limited cohort of the population of Kirkby Malzeard: for example, those living at The Green or in St Andrew’s Gate, to the south of Main Street and directly opposite the route. The use of the route for dog walking and to access the footpaths leading northwards from Back Lane would be entirely logical for those residents. This is the use of the route described in several of the user evidence forms.
10. The courts have held that use by the inhabitants of a locality counts as public use[[2]](#footnote-2). The ‘locality’ for this purpose is the eastern part of Kirkby Malzeard close to the Order route. I am therefore satisfied that, whilst limited in numerical and percentage terms, the user evidence forms are representative of the ‘public’ for the purposes of section 31(1) of the 1980 Act.
11. The objectors criticise the evidence in the UEFs as being unreliable. Human memory is fallible and errors in recollection can occur, particularly over a long period of time. I also accept that an element of exaggeration may creep into the responses provided. However, even if the level of use has been overstated in the UEFs to some extent, that would not alter my overall conclusion. The UEFs point to an ongoing use of the Order route throughout the 20-year period and beyond by multiple individuals. Maybe not frequent use in many cases, but continuous use nonetheless.
12. I note also the objectors’ view that the evidence in the UEFs is biased against them, as was the way in which that evidence was sought. I acknowledge that a few of the UEFs contain inappropriate personal remarks about the objectors. However, those comments do not invalidate the factual evidence given in those few UEFs, which I accept as being genuine and honestly given. Moreover, the vast majority of the UEFs contain no such personal remarks and cannot be considered tainted in any way.
13. The UEF itself is of a standard type, is neutrally worded and explains to the respondent what they need to do in completing the form. The UEFs appear to have included unmarked extracts from Ordnance Survey (OS) maps, including one on which the Order route is not shown. But that does not lead the respondents: nor does it undermine the veracity of the responses. I am therefore not persuaded that there is any significant flaw or bias in the way in which the initial information was collected.

*Other user evidence*

1. At the Inquiry, I heard from a number of people who have used the route over time. Some, but not all, of these individuals had completed UEFs and were providing additional detail on their use of the route.
2. In his evidence, Mr David Robinson explained that he has used the Order route sporadically since he moved to Kirkby Malzeard in 1991, but was not able to be more precise than that. He used it for leisure purposes to access the footpaths that lead northwards from Back Lane towards Grewelthorpe and beyond. He considers it “common knowledge” that the path is there and on occasions passed other people using it. Mr Robinson confirms that he was never stopped from using the path.
3. Ms Claire Walker indicates that she first used the path in 1998 when visiting her parents, who moved to Kirkby Malzeard at around that time. During those visits, she would use the route two or three times a week as part of local walks. Following a period living abroad, those visits resumed in 2005 and then became weekly once she moved to the village herself in 2011. She was never stopped from using the path.
4. Mr Croome explained that he has lived in the village since 2012 and began using the route almost immediately after he moved in. He indicates that he uses the route up to four times a day. Mr Croome lives in a house on the south side of main and on occasion used the route to access the footpaths leading north from Back Lane. Mr Croome also explains that he used the route to avoid using Long Swales Lane which, because of impaired hearing, presents particular difficulty for him.
5. In her evidence, Ms Tracey Cole-Brownlee indicates that she has used the route since 2004, mostly with her two daughters and her dog but sometimes on her own. She gave the reason for using the route as being the only safe access to the network of footpaths to the north of Back Lane.
6. Mr David Noble explained that he has lived in Kirkby Malzeard since 1995. Between that date and 2000, Mr Noble lived in a house on Main Street some 50m from the route. During that period, his young children would stay with him on a regular basis. He describes the route as his “de facto” means of reaching Back Lane and the fields beyond because it was too dangerous to use the main roads. From 2000 onwards, Mr Noble moved to another part of the village and thereafter has no cause to use the route.
7. In addition to the above oral submissions, a letter from Mr Brian Wensley was also handed in during the Inquiry. In his letter, Mr Wensley confirms that he has lived in Kirkby Malzeard for over forty years but does not indicate any personal use of the Order route.
8. The objectors suggest that this evidence is to some extent borne out of antipathy towards them, and accordingly invite me to treat it with a degree of caution. I was certainly able to detect an undercurrent of antipathy towards the objectors in the evidence given, both in answers during cross-examination and in questions to the objectors themselves. Nevertheless, my decision must be based on actual evidence of use during the twenty-year period beginning in October 2017. The objectors completed purchase of Arrowfield on 27 October 2017 and moved into the property during December of that year. Prior to purchasing it, the objectors had no connection with the property known as Arrowfield or the Order route itself. I have no reason to believe that the facts given in the evidence in terms of use of the route over that 20-year period are in any way tainted by the subsequent events (i.e. the locking of the gate) that may have given rise to any antipathy towards the objectors. I therefore consider that the above evidence provides a reliable description of use during that period and the reasons that underpinned that use.

*Intentions of the landowner*

1. The objectors make the point that the use of the footpath is very obvious from within their property. The corollary must be that any use of route when the property was occupied by the previous owner would have been equally obvious to her. Indeed, several of the respondents refer in their user evidence forms to conversing with the previous owner. There was every opportunity for the use of the Order route to be challenged by the previous owner, but there is no evidence that it ever was. I am therefore satisfied that the previous owners did not demonstrate or communicate that they did not intend to dedicate use of the route, and that the use was therefore as of right.

*Documentary evidence*

1. The Ordnance Survey (OS) maps dated 1909 and 1929 clearly show a footpath (marked FP) passing through Arrowfield. The 1892 version of the 25-inch map also shows a line in this position in a style consistent with similar paths marked FP elsewhere on the map. In each case, the footpath appears as a continuation of a footpath extending northwards from Back Lane. By the time of the 1929 map, the land now forming the curtilage of Arrowfield is shown as being in two separate parcels. The footpath is shown as crossing both parcels.
2. By contrast, the 1857 and 1895 OS maps both show the footpath extending north of Back Lane as terminating there and not crossing Arrowfield. The 1952 OS 1:25,000 map similarly does not show a footpath crossing Arrowfield, but does show the footpath extending northwards from Back Lane. Similarly, the 1838 Tithe Map does not show the route although it would be very unusual for footpaths to be shown on tithe maps unless the traffic or character of it meant that it could not have been productive land for the purpose of tithe payments.
3. It is evident that the route is not shown as a footpath on every OS map, and I have taken that into account. However, it is shown as a footpath on several versions of OS maps published between 1892 and 1929, which at least suggests that a footpath appeared as an observable feature on this alignment at those times. Furthermore, as Ms Noake opined, a possible explanation for the absence of the footpath from some maps is that the larger scale maps are of more assistance as they show greater detail. These are typically the maps where the footpath is present in this case.
4. The OS maps do not provide any indication of the status of any routes shown. They do, however, record the physical presence of those routes. In this case, the OS maps show that a footpath on the same alignment as the Order route has been physically present as far back as 1892, and as recently as 1929. The inferences that may be drawn from OS maps is well established by the courts, and to that extent it is reasonable to rely on the repeated (albeit not universal) inclusion of the footpath OS map as evidence of the long-established physical presence of the route[[3]](#footnote-3).
5. The objectors point to other documents in which the reference to the Order route is notable by its absence: specifically, the Kirkby Malzeard Village Design Statement and a document entitled “Kirkby Malzeard 1850 to the present day”. In addition, there is a document entitled “Easy walks around Kirkby Malzeard”, a full copy of which became available during the course of the Inquiry.
6. The Kirkby Malzeard Village Design Statement (Design Statement) was produced in 2012 by the Parish Council in conjunction with Harrogate Borough Council. There is a specific section in the Design Statement on highways, including public footpaths and bridleways. There is no mention in that section of the Order route itself but equally none of the other footpaths in and around the village are specifically named there. For that reason, I do not consider the omission from that section of text to be significant.
7. Of more significance is the omission of the Order route from a map of footpaths in and around Kirkby Malzeard at page 16 of the Design Statement. It shows footpath FP. No. 15.70/41/1 leading north from Back Lane, but does not show the footpath crossing Arrowfield.
8. The omission of the route from that map must, however, be viewed in the context of the purpose for which the Design Statement was produced. The latter is a Supplementary Planning Document that has been adopted pursuant to the Town and Country Planning (Local Planning) (England) Regulations 2012. Its primary and express purpose is as a material consideration in planning decision making. It is not intended as a guide to footpaths in the area, or as definitive statement of the existence of such footpaths.
9. In preparing that map, it is more likely than not that the authors took the presence of footpaths from the Definitive Map which, obviously, does not show the route now in question. In that respect, it is unsurprising that the Order route does not feature on the map. Annotations on the document suggest a level of knowledge beyond just the Definitive Map. Nevertheless, even if the authors had been aware of the Order route, it would have inappropriate (the OMA suggest unlawful) to have elevated it to the same perceived status as footpaths included on the definitive map by including it on the map in the Design Statement. Consequently, whilst the omission of the route from the map in the Design Statement clearly weighs in favour of the objectors, the weight attached to it is limited by the intended purpose of the document.
10. The document entitled “Kirkby Malzeard 1850 to the present day” was written by Mr Ian Corfield and also published in 2012. Within the chapter headed “The Parish Council” there is a section on footpaths and rights of way. Reference is made there to a short link between Main Street and Back Lane, but which from the description is clearly not the Order route. No other footpaths that could be a reference to the Order route are described there. Here, then, is a section of a document specifically covering public rights of way in the village but making no mention of the Order route. It is not clear what information was available to Mr Corfield when he wrote his book, or whether he was aware of the Order route and deliberately excluded it because he believed it not to be available to the public. Nevertheless, this omission of the Order route from Mr Corfield’s book weighs in favour of the objectors.
11. The document entitled “Easy walks around Kirkby Malzeard” is undated but presents a selection of walks in and around the village. It makes no mention of the Order route, but given that this is a selection of short walks it was clearly not intended to be a comprehensive guide to footpaths on the area. This document therefore does not weigh in favour of or against the objectors.

*The Definitive Map Process*

1. The objectors point to the procedure that had to be followed when the Definitive Map and Statement was prepared as being a detailed one in which the County Council/surveying authority was required to prepare a draft map indicating all footpaths. The Definitive Map was produced in conjunction with the Parish Council and following a process of public consultation. The objectors consider that is simply inconceivable that the Order route was simply overlooked when the Definitive Map was prepared. The reasonable inference to be drawn, in the objector’s view, is that the Order route was not included on the Definitive Map and Statement because it was not – and is not –a public right of way.
2. Support for the objector’s position in this respect is provided by the inclusion of footpath FP. No. 15.70/41/1 on the Definitive Map: this is the footpath situated directly opposite the northern end their property, and which extends northwards toward Grewelthorpe. It is, as the objectors say, striking that this footpath was included on the Definitive Map whereas the Order route was not. It is also striking that of the ten routes leaving Kirkby Malzeard depicted on the 1909 OS map and annotated there as ‘FP’, the Order route is the only one not recorded on the Definitive Map.
3. The OMA respond by pointing out that many routes across the county were overlooked in the preparation of Definitive Maps and Statements following the implementation of the National Parks and Access to the Countryside Act 1949. Many of those have subsequently been subject to DMMO applications and have been added to the Definitive Map and Statement as a result. In that context, I note that the objectors have not relied on any documentary evidence to suggest that the Order route was deliberately excluded from the Definitive Map and Statement at the time, rather than being simply overlooked. Nonetheless, the omission of the Order route from the Definitive Map and Statement is also a consideration that weighs in favour of the objectors.

*The sales particulars*

1. The sales particulars for Arrowfield when the objectors purchased the property state, under the section headed ‘Notes’, that there is a “pedestrian right of way along the edge of the garden and paddock”. The note goes on to indicate that the house and garden hold separate title to the paddock and barn.
2. The route is on the alignment set out in the sales particulars: i.e. along the edge of the garden and paddock. There is no dispute that the right of way described in the note is a reference to the Order route. The Note does not indicate that it is a public right of way, but neither does it state that it is a private right of way.
3. The previous owner of the property is not now in a position to explain exactly what she believed the status of the route to be, and the objectors did not pursue the matter with her directly when purchasing the property. Nevertheless, whatever its status, the mention in the sales particulars of the pedestrian right of way is unlikely to have enhanced the attractiveness and value of the property being offered for sale. If anything, reference to the pedestrian right of way across the property is more likely to have reduced the attractiveness of the property to prospective purchasers and detracted from its value. Reference to the pedestrian right of way is therefore not something that the previous owner would have done lightly and without genuinely believing that such a right of way existed.
4. The reference to the Order route in the sales particulars is good evidence that a pedestrian right of way of some description exists across the garden and paddock to Arrowfield. It is not conclusive evidence of a route used by the public as of right, far from it. It is, however, entirely consistent with the possible presence of a route used by the public as of right. For that reason, it cannot be completely discounted and must be weighed as part of the overall balance.

*The Stiles*

1. There are two stiles on the order route itself: one at the southern end (point D on the Order map), and one towards the centre (point C on the Order map). The objectors consider that the presence of these stiles is entirely consistent with private use for entry and exit into enclosed spaces and to prevent the escape of livestock. That possible explanation is made less likely because the objectors’ conveyancing solicitor discovered no private right of way across Arrowfield when the property was purchased.
2. One other explanation, and in my view the most plausible one in this case, is that the stiles are there to allow the public to use the footpath. This is particularly so in relation to the stile at point C which links two parcels of land that the objectors accept have been in separate ownership at some points in time. The most obvious reason to have a stile in such a location would be to allow the public to have access across the boundary enclosure. I concur with the OMA in that, if there were no footpath used by the public, it is difficult to see what the explanation for a stile in this location would be.
3. My view in this respect is reinforced by the presence of the stile at the southern end of public footpath FP. No. 15.70/41/1 that extends northwards from Back Lane directly opposite the Order route. That stile is of similar appearance to those on the Order route, and therefore of being contemporaneous with those on the Order route. The presence of stiles on both footpaths is in my view unlikely to be a coincidence, and tends to support the proposition that all three stiles are part of a continuous footpath used by the public that crossed Back Lane and then Arrrowfield, ultimately terminating at Main Street.
4. That would also be entirely consistent with the OS map dating to 1929, which indicates the physical presence of a footpath on that very alignment that crosses both parcels of land on Arrowfield. A stile at the position now shown at point C on the Order map would be a logical solution to crossing a boundary between two parcels of land in different ownership particularly, as in this case, where one of those parcels may have been a paddock used for keeping livestock in. It would not, as the objectors contend, be an obstruction to the right of way: on the contrary, it would facilitate that right of way by providing access over an obstacle across the right of way.

*The line of trees*

1. The middle section of the curtilage of Arrowfield contains a line of trees that are likely to have been planted by the previous owner of the property to provide screening from the adjoining development known as Pinfold Court. The trees were not planted tight to the eastern boundary of property. Rather, they were planted parallel to the boundary wall but a metre or so back from it. The effect is to create a corridor between the trees and the boundary wall.
2. The trees were planted when Pinfold Court was constructed and therefore many years before the objectors purchased Arrowfield. Their explanation that the trees were planted away from the boundary in deference to the amenities of the adjoining properties is therefore purely speculative and not supported by evidence. In my view, the more plausible explanation is that the trees were planted back from the boundary wall by the previous owner of the property in order to segregate the pedestrian right of way referred to in the sales particulars from the remainder of the garden.
3. The corridor created by the line of trees is an obvious route for a footpath. It is on the very alignment of the footpaths shown on OS maps dated 1892, 1909 and 1929. It aligns with the stile at point C of the Order map. At the time of my site visit, there was a very shallow, but still discernible, depression in the surface along the line of this corridor. That depression in the surface is also visible in photographs provided by the objectors, and is consistent with use as a footpath over a considerable period of time.

*Photographic evidence*

1. The objectors provide a series of photographs taken at ground level 2018, 2019 and 2020 respectively. In none of these photographs is there any evidence of wear along the line of the Order route although, as indicated above, a shallow depression is discernible in the corridor formed by the space between the trees and the boundary wall. The objectors then compare that with photographs taken during the early months of 2021, in which there is clear evidence of wear along the line of the Order route.
2. The objectors put this difference down to varying levels of use during those periods. Between 2018 and 2021, the objectors observed only occasional use of the Order route. By comparison, during the early months of 2021 the objectors observed more frequent use of the Order route, including by individuals they had not previously observed using it. By their own admission, the use of the Order route then declined again after the early months of 2021.
3. The conclusion drawn by the objectors is that, if the use of the Order route had been taking place without interruption at the sort of level stated in the user evidence forms over a period of 20 years, then wear to their garden would have been evident in the photographs taken in 2018, 2019 and 2020.
4. The difficulty with the objectors’ evidence in this respect is that the photographs all date to a time outside of the relevant 20-year period (the earliest of these photographs is dated June 2018). Taking the latest of the objectors’ photographs as a datum (May 2021), the level of wear evident in that photograph was not evident at the time of my site visit in September 2021. This was only some four months after the use of Order route declined after a period of intensive use in the early months of the year. Consequently, even if the level of use over the previous 20 years had given rise to an equivalent level of wear to that evident in 2021, in all likelihood the surface would similarly have regenerated by the time the objectors’ photographs were taken in 2018, 2019 and 2020, such that no evidence of wear would appear in those photographs. For that reason, I find the objector’s photographs to be of little assistance.
5. The other point is that the level of use indicated in the UEFs appears to have been less frequent and less intense than the level of use described by the objectors as taking place during the early months of this year. Because the objectors’ photographs all date to a time outside of the relevant 20-year period, I cannot be certain that the level of use during that period ever did give rise to the level of wear evident in the objectors’ photographs. I cannot discount the possibility that the level of use was such that at did not result in a significant level of wear to the surface at all. That would be consistent with the objectors’ photographs taken during 2018, 2019 and 2020, which show no evidence of wear but which were taken during a period when by the objectors’ own admission the Order route was used only occasionally.
6. The objectors have also provided images of the front of their property taken from Google Streetview. Of the four images from Google Streetview, only the two taken in June 2011 shows any real evidence of wear to the grass area in front of Arrowfield. Those photographs show some distinct patches of wear leading up to the stile at the front of the property and it is difficult to escape the conclusion that this wear was caused by people using that stile. It is my understanding that the main gate directly adjacent to the stile was always left open by the owners of the property at that time, which begs the obvious question of why walkers would use the stile. That would also explain why there is no evidence of wear in the other two Google Streetview images. For that reason, I attach little weight to this evidence.
7. In addition, the objectors have provided two images from Google Earth. In the earliest of these, taken at some point in the early 1990’s, the Order route is in deep shadow and it is not possible to discern any details, including any evidence of wear. There is some doubt about the date of the second Google Earth image. It purports to date from January 2002, but the trees are evidently in full leaf which casts doubt on that date. In any event, whilst the line if the Order route is clearly in view and not in shadow, the resolution is not of sufficient quality to discern any details on the ground. I therefore do not attach any weight to either of these Google Earth images.

*The sign*

1. A few of the completed UEFs refer to the possible existence of a sign on Main Street indicating the presence of the Order route, albeit most who did admit to being uncertain about that. One of those respondents does describe it as being a wooden finger post sign containing the words ‘Public Footpath’. In his evidence to the Inquiry, Mr Robinson also “felt sure” that he could recall a sign saying ‘public footpath’ there but could not be certain. On the other hand, one respondent clearly states on their UEF that there was definitely not a sign in this position. In view of the uncertainty surrounding the presence of this sign, I have afforded it no weight.

***Overall balance***

1. The UEFs and the descriptions of actual use given at the Inquiry itself are sufficient, on the balance of probability, to indicate a continuous use of the order route as of right over more than twenty years. The sequence of events leading up the Order being made further indicate the genuine belief of some local residents that the Order route could be used by the public as of right.
2. The OS maps dating to 1892, 1909 and 1929 tend to support the user evidence, and point to the physical presence of a footpath extending from Main Street, crossing Arrowfield and then Back Lane before continuing northwards. The most obvious explanation for the presence of stiles of contemporaneous appearance on both the Order route and the footpath extending northwards from Back Lane is that they facilitate use of the footpath shown on the OS maps. The alignment of that footpath is marked on the Order route itself by a line of trees forming a corridor between them and the boundary wall, with a shallow depression of the surface providing evidence of use over a considerable period of time. This in turn is supported by the sales particulars for Arrowfield which clearly allude to an existing pedestrian right of way across the land. One possible explanation for the inclusion of this reference in the sales particulars, and in many respects the most obvious one, is that the vendor of the property believed this to be a right of way enjoyed by the public.
3. On the other hand, I recognise that the Order route is not shown on some OS maps and that in any event the inclusion of a footpath on an OS map is not indicative of the status of that route. It is not shown on the 1838 Tithe Map but, for the reasons set out above, it is very unusual for footpaths to be shown on tithe maps. The Order route is not mentioned in the Design Statement or in the document entitled “Kirby Malzeard 1850 to the present day”. I also recognise that the Order route was not included in the Definitive Map following the extensive survey of footpaths and public consultation that took place as part of that process. The pedestrian right of way mentioned in the sales particulars for Arrowfield could equally be a reference to a private right, albeit the objectors have not been able to identify that any such private right exists.
4. The photographic evidence is largely inconclusive, and I attach no weight to the possibility of a sign marking the presence of the Order route. Those matters are effectively neutral in the overall balance.
5. In weighing that balance, I am drawn to the comments of Lewison L.JJ. in *Fortune*, extracts from which were quoted in the closing submissions of the OMA:

*One obvious area for evidence is the nature of the way over which the public right of way is claimed. If the way leads from one recognised highway to another, or from one inhabited settlement to another, the inference may be relatively easy to draw. If, on the other hand the way leads nowhere, the inference may be more difficult to draw.*

1. In this case, the Order route connects Main Street in Kirkby Malzeard itself with a footpath recorded on the Definitive Map that extends northwards towards the settlement of Grewelthorpe. To my mind, it is relatively easy to draw the inference that the Order route forms part of that longer footpath. The user evidence, some of the OS maps and physical features on the ground tend to support that inference. None of the objector’s evidence is of sufficient weight, individually or collectively, to lead me to a different conclusion. I am therefore satisfied that the evidence is, when taken as a whole and on the balance of probability, sufficient to raise a presumption that the route in question had been dedicated as a public footpath.

*Human Rights*

1. The objectors argue that the proposed updating of the Definitive Map to include a public right of way through the garden of Arrowfield would constitute an interference of their rights under the European Convention of Human Rights (ECHR), as enshrined into law in this country by the Human Rights Act 1998 (HRA). The objectors contend that updating the Definitive Map would have disproportionate consequences for their rights under Article 8 (the right to respect for Private and Family Life) and Article 1 Protocol 1 (the protection of property). The objectors argue that the relevant legislation found in section 53 of the Wildlife and Countryside Act 1981 must be interpreted in such a way so that the obligations of the OMA are limited such that the Definitive Map can only be updated to the extent that doing so does not interfere with their rights under HRA.
2. In support of that argument, the objectors cite amongst others the judgment of the European Court of Human Rights in *Smirnova v Ukraine* of 6 March 2017 (Final) (App. No. 1870/05). Although extreme on its own facts, the objectors rely on this judgment as a useful re-iteration of some relevant principles in relation to Article 8.
3. The OMA, on the other hand, has put forward the case that because there is mandatory obligation under section 53 of the Wildlife and Countryside Act 1981 to update the map, section 6(2) of the HRA applies. The requirement for a public authority to act in a way which is incompatible with a convention right does not therefore apply in this case.
4. In relation to the interpretation of legislation, section 3 of the HRA states that:

*(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

1. In relation to acts of public authorities, section 6 of the HRA states that:

*(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

*(2) Subsection (1) does not apply to an act if—*

*(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

*(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

1. Section 53 of the Wildlife and Countryside Act 1981 provides that there is duty for the surveying authority to keep the definitive map and statement under continuous review and update the map and statement accordingly following the occurrence of any of the events set out in section 53(3) of that Act.
2. The key to considering the scope of the requirement under section 3 of HRA is that the interpretation of legislation must be compatible with convention rights must be done ‘so far as it is possible to do so’. The scope of what is possible was addressed in the leading House of Lords case of *Ghaidan v Godin-Mendaza* [2004] UKHL 30. While that case points to there being a relatively broad scope for interpreting legislation so that it is compatible with Convention rights, there are limitations. Paragraph 33 of that judgement states:

*Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, ‘go with the grain of the legislation’. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.*

1. The objector has not cited a precedent court decision in UK law that sets out an interpretation in line with their representations. In the absence of precedent supporting the objector’s preferred interpretation, on balance I find the interpretation put forward by the OMA to be persuasive. It is clear that section 53 of the 1981 Act mandates that a definitive map is produced and updated, and that this must reflect the facts of the circumstances. Not doing so would be in breach of the surveying authorities’ legal obligations. This view is compatible with the current guidance in PINS Note 19 and I see no reason to deviate from that guidance.
2. Consequently, I consider that confirming the Order would not be in breach of the objector’s rights under the HRA and would not be unlawful.

*Width of the Order route*

1. The OMA have defined the route as 1.5m wide as it considers this to be the width commonly used to allow individuals travelling in opposite directions to pass each other. Where the width is estimated on the UEFs, the responses vary from between 0.2 metres to 2 metres. The majority, however, place the width at around 1 metre. That is consistent with objectors’ photographs taken when the Order route was intensively used in the early months of this year. It is also consistent with the width of the corridor formed between the trees and the boundary wall, where a width of 1.5 metres or more would encompass the trunks of the trees.
2. This matter was canvassed at the Inquiry. The objectors consider that a width of 1 metre is more appropriate, and the OMA are content to leave it to my judgment. In my view, the evidence indicates that a width of 1 metre (with the obvious exception of the stiles at points C and D) is more indicative of actual use of the Order route. I shall therefore modify the Order to refer to a width of 1 metre.

 Conclusion

1. Having regard to the above and all other matters raised, I conclude that the Order should be confirmed with the modification referred to in paragraph above.

 Formal Decision

1. I confirm the Order with the following modification:

In Part II of the Order schedule, in the column headed “**Width (M)**” under “**Variation of** **Particulars of path or way**”, delete “1.5 metres” and substitute there “1 metre”.

Paul Freer

INSPECTOR

**APPEARANCES**

**For the applicants**

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 Parish Council

Ms Pippa Mason Chair - Kirkby Malzeard, Laverton and Dallowgill Parish Council

**For the Order Making Authority**

Mr Freddie Humphreys Of Counsel

He called:

Ms Penny Noake Principal Definitive Map Officer, North Yorkshire County Council

**Persons supporting the Order**

Mr David Robinson Local Resident

Ms Claire Walker Local Resident

Mr Nick Croome Local Resident

Mrs Tracey Cole-Brownlee Local Resident

Mr David Noble Local Resident

**For the objectors**

Mr Charles Morgan Of Counsel

He called:

Mrs Elizabeth Julie-Ann Hercock Objector

Mr David Hercock Objector

**DOCUMENTS SUBMITTED AT THE INQUIRY**

Skeleton argument on behalf of the objectors

Email from Mr David Noble, dated 15 September 2021.

Letter from Mr Brian Wensley

Map showing facilities in Kirkby Malzeard

Leaflet titled “East Walks Around Kirkby Malzeard”, by Gwynneth Jackson

Closing submissions on behalf of the Order Making Authority



1. With the exception of discounted user evidence form noted above. [↑](#footnote-ref-1)
2. *Fairey v Southampton County Council* [1956] 2 QB 439, 457; *Oxfordshire CC v Oxford City Council* [2004] EWHC 12 (Ch) [2004] Ch 253 §100. [↑](#footnote-ref-2)
3. *Fortune and others v Wiltshire Council and another* [2012] EWCA Civ 334 [↑](#footnote-ref-3)