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| **Order Decision** |
| Inquiry and site visit held on 15 February 2022 |
| **by Helen Heward BSc (Hons) MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 07 April 2022** |

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| **Order Ref: ROW/3261460** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cumbria County Council (Parish of St Bees: District of Copeland) Definitive Map Modification Order (No 2) 2020.
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| * The Order is dated 4 August 2020 and proposes to modify the Definitive Map and Statement (DMS) for the area by deletion of one section of footpath and addition of another section of footpath as shown on the Order Map and described in the Order Schedule.
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| * There was one objection outstanding when Cumbria County 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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Application for costs

1. An application for costs was made by Cumbria County Council (the Council) against the Objector. This application is the subject of a separate Decision.

**Procedural Matters**

1. I undertook an unaccompanied site visit on 14 February 2022. I then made an accompanied site visit after the close of the Inquiry on 15 February 2022 together with the Objector and a representative of the Council.
2. The Objector’s Statement of Case included a video. I could not be certain it was accessible to all, and I have not watched it.
3. To allow the Objector to respond in writing to the Council’s closing submissions and costs application the Inquiry was closed in writing on 28 February 2022.

The Main Issues

1. S53(2)(a) of the 1981 Act states that as regards every DMS, the surveying authority shall as soon as reasonably practicable after the commencement date, by order make such modifications to the DMS as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3).
2. S53(3)(c)(i) provides that a modification order should be made on the discovery of evidence which, when considered with all other evidence available, shows that a public right of way which is not shown on the DMS subsists, or is reasonably alleged to subsist over land in the area to which the map relates.
3. S53(3)(c)(iii) provides that a modification order should be made on the discovery of evidence which, when considered with all other evidence available, shows that that there is no public right of way over land shown on the DMS as a highway of any description, or any other particulars contained in the map and statement require modification.
4. Section 56(1) states that a "*definitive map and statement shall be conclusive evidence as to the particulars contained therein*". In the case of Trevelyan v Secretary of State for the Environment, Transport, and the Regions Court of Appeal (Civil Division) 23 February 2001 *(Trevelyan*) the Court of Appeal considered the correct approach to be adopted when considering whether a right of way should be deleted and the weight to be given to the DMS.
5. The Court of Appeal held that where the Secretary of State or an Inspector appointed by them has to consider whether a right of way that is marked on a Definitive Map in fact exists, they must start with an initial presumption that it does. If there were no evidence that 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.
6. When all 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.
7. The Council argues that new evidence has been discovered to support an argument that FP423011 crosses the railway at a different point and in a different way to that shown on the Map, and in a different manner than is recorded in the Statement.
8. The Objector disputes that there is compelling new evidence; that there isn’t an underpass, and that the Council has produced sufficient adequate evidence. He argues that an alternative lesser change to the Definitive Map is all that is required and that the Definitive Statement is essentially correct.
9. At the Inquiry the parties agreed that the deletion and addition should not be considered in isolation. Consideration needed to be given first to the proposed route shown on the Definitive Map that would have to be removed under s53(3)(c)(iii). After which the evidence to support adding to the DMS a currently unrecorded right of way under s53(3)(c)(i) should be considered.
10. Therefore the main issues are whether, when considered with all other evidence available, new evidence which was not before the Council when the Definitive Map and Statement was prepared has been discovered, is sufficiently clear and compelling, and on a balance of probabilities, can be relied upon to:-
11. displace the presumption that a section of footpath FP423011 recorded on the Definitive Map and in the Statement is correct in relation to Order Map section A-B denoted by a black solid line,
12. show that a public footpath which is not shown on the Definitive Map and in the Statement subsists over Order Map section A-C-D-E-F-B denoted by a black hatched line.
13. After which I will conclude whether the evidence, as a whole, supports both the deletion and addition, although it remains open, on the evidence, to confirm one part of the Order but not the other.
14. Matters such as whether this would be a good or a bad idea; whether it fits in with any particular policy; and concerns over privacy, security, health & safety, are not relevant to this decision. References made to the conclusions drawn in Order Decision ROW/3209194 about the convenience of the route, steps and requirements of the Equalities Act do not apply in this case.

Reasons

1. The Council had long known that there was an “anomaly” with the DMS. Officers of the Council had a shared or common knowledge of the path which existed, and were aware that FP423011 was not correctly recorded on the DMS. Surveys in 2008 and 2013 noted a discrepancy between the recorded alignment and the route on the ground which was walked.

*The proposed deletion*

1. The alignment of FP423011 recorded on the Definitive Map runs south from Point A on the eastern side of the railway embankment before turning to run southwest to Point B. The Statement describes it as going “under” the railway. This is the section that the Order proposes should be deleted.
2. It was agreed that the Order Map accurately represented the alignment recorded on the 1989 Definitive Map. This shows the footpath running south from Point A to a feature of unknown significance marked on Ordnance Survey (OS) Maps. The route then crosses the railway on a diagonal line northeast to southwest.
3. The Council’s witness and the Objector agreed that the idea of a diagonal route across a railway line is most unlikely and that the line on the present Definitive Map is erroneous. I agree that the provision of a surface crossing over a railway at such an angle, or the construction of a bridged section or tunnel on such an alignment, would both be highly improbable.
4. The Council’s witness told the Inquiry that this particular error most likely occurred when Cumbria County Council undertook a Special Review of the Definitive Maps of the three former Councils in the 1970’s.
5. The Objector argues that what should have been shown on the Definitive Map is a line roughly at right angles from the southern end of the eastern embankment feature, crossing the railway to a point on the western side. This would roughly correspond with the northern extent of the footpath shown on both the Draft Definitive Map, 1950 and First Definitive Map of 1966; and roughly at Point F on the Order Map.
6. The Objector argues that the feature on the OS Maps depicts an underpass and that there is a crossing under, and at right angles to, the railway. There was no evidence before the Inquiry of a legend or notes to explain what is depicted on the OS Maps and there is an element of conjecture in the argument that the annotation was drawn to indicate an underpass.
7. It may be that other crossings along this branch line did, and some still do, go under it. Elsewhere routes under the railway are depicted with annotations such as indents and/or bridging symbols. One near Sea View Terrace can be seen on the 25” OS Map from1892-1914 and an extract of an OS Map produced by the Objector at Appendix A72 shows a similar feature. There are no such symbols where the Objector claims there to be an underpass on the alignment of the route which the Order would delete.
8. Storm damage to a bridge over Pow Beck, closer to the sea, in 2011 resulted in the Council preparing an Order in 2018 for a diversion of adjoining footpath FP423012. The Council sought to include a diversion to FP423011 to rectify the known anomaly. It was at the stage of preparing that Order that the Council went looking for new documentary evidence. The Council researched historical maps and consulted Network Rail in November 2017.
9. Network Rail’s Statement of Case, July 2019, to the public hearing for Diversion Order ROW/3209194 advises that the railway at this location was authorised by the Whitehaven and Furness Junction Railway Act 1845 and was opened to traffic in 1850. The Title Deed for the land purchased by the Whitehaven and Furness Junction Railway Company, dated 16 January 1847, refers to a well in enclosure 86. The Whitehaven and Furness Junction Railway Company agreed that the well would remain accessible to the public and the crossing was provided for the public to gain access.
10. In 2019 Network Rail stated that an under bridge has never been in existence at this location and the path has never crossed under the railway; the footpath has always crossed the railway on the level, has never passed under the railway by means of a bridge, and that Network Rail’s records confirm that the constructing railway company never provided an under bridge.
11. The Network Rail statement referred to a document from 1847 which might have been known to the Railway Company. Network Rail provided the evidence to the Council in 2019. It was not new evidence by the time this Inquiry met. But as far as can be reasonably determined, this evidence was not before the Council when the Definitive Map was reviewed in the 1970’s and adopted in 1989. In this way it is new evidence.
12. Network Rail did not provide copies of the original documents to support some submissions and the evidence does not say that an underpass such as a ‘cattle creep’ or other feature such as a culvert under the railway had not been provided. But the design of such features is not always suitable for people to walk through. They can be too small or otherwise unsuitable.
13. The Council argued that there was no evidence on the ground to suggest the presence of an underpass for the recorded line. On the accompanied site visit I could make out a wall and base on the eastern side of the embankment. The ground level appeared to fall towards the southern end. It could have been part of a construction to give access. The alignment appeared consistent with a section of the Definitive Map path to be deleted alongside part of the eastern side of the railway embankment.
14. At the end of this section a deep hole could be seen together with an opening which appeared to go into the embankment. On the eastern side it appeared quite big. On the western side, roughly opposite this feature, I observed a slabbed culvert with running water in the vicinity of Point F on the Order Map. This opening was very much smaller and came out of the embankment not much above ground level.
15. There is no survey or other evidence to explain what was seen on the site visit. However, I have no doubt that what I saw was not on the alignment of the route shown crossing the railway on the Definitive Map and I saw no evidence to suggest an underpass along the recorded footpath to be deleted.
16. On the two days I visited I observed several walkers. The general route of FP423011 leading to FP423012 appears well used and the route followed was that of the proposed addition. If a route under the railway had been possible I would have expected that the local community would have known.
17. The Objector surmised that the Parish Council had other interests and reasons for not objecting. Even if that were the case I would have expected some individuals to come forward in writing or in person. But that is not the case. The inference I draw from this is that whatever the feature is, it is probable that it never was and never has been used as a footpath.
18. The Definitive Statement states “under railway”. The Objector argues that the only error on the Definitive Map is the diagonal line. They propose that all that is required is to correct the Map by deleting the diagonal line and adding a line to reflect the route through the underpass. However, I was not persuaded by what I saw on the site visit that there was evidence to say that there was an underpass on such an alignment that was, or had been, capable of allowing people to pass on foot under the railway from one side to the other.
19. The Definitive Statement makes no mention of the steps needed to cross over the railway. But neither does it refer to the sharp turn that would be required to go south from Point A alongside the embankment or the next sharp turn that would be required to go under the railway on the alignment that the Objector proposes.
20. The Definitive Map and Statement, adopted 1989, were created following the Cumbria County Council Special Review, 1976. Agreeing that crossings over the railway are not usual on this line, the Council’s witness opined that the description in the Definitive Statement could have been copied from entries elsewhere and in so doing erroneously included the word “under” instead of “over” the crossing.
21. If information had been copied from one entry to the next as suggested then it is plausible that the erroneous inclusion of the word “under” would not have been picked up. The drawing of an improbable diagonal line adds to my conclusion that this could be how the errors arose.
22. At the Inquiry the Council’s witness argued that notwithstanding the extensive consultation of the 1970’s review, the error might not have been identified at that time because the route over the railway existed and no one had any concerns about it. I agree that in such a scenario the Parish Council and/or local people might not have felt any compulsion to check this particular entry.
23. Council surveys from 2013, 2008 and 1995 provide no evidence that any attempt had been made to walk the line shown on the Definitive Map and described in the Statement. A letter dated 11 December 1992 advises that "*With regard to footpath no 423011, no obstructions were found which denied access when the path was inspected on two occasions*". The Council postulated that it was most likely in response to a complaint about a surface, not the alignment of the route and that could explain why the discrepancy was not picked up then.
24. The Objector understood the 1970’s review to have been thoroughly undertaken and involved Parish Council’s undertaking detailed surveys. He is frustrated at a lack of documentation from the time of this review. There is no statement to accompany the First Definitive Map and the Council admit that records associated from the time of making the First to the Second Definitive Maps have been lost.
25. The Council is required to produce evidence of sufficient substance, and sufficiently clear and compelling to displace the presumption that a section of footpath recorded on the Definitive Map and in the Statement is correct. But a Council cannot produce evidence that is no longer available. It is not the role of this Inquiry to undertake an audit of the Council’s archives and I have confined my decision to assessing whether the evidence that has been provided is sufficient to meet the relevant tests.
26. Network Rail did not supply all documents. The Objector’s submission that an underpass exists is not wholly wrong. The test for deletion is more onerous than for addition; the evidence needs to be sufficiently compelling. Nonetheless the Objector agrees that part of the section to be deleted from the Definitive Map is an error.
27. I conclude that new evidence which was not before the Council when the Definitive Map and Statement was prepared has been produced which can be relied upon, and which together with all other relevant considerations, is sufficiently compelling to outweigh the initial presumption that a right of way exists running from Point A to Point B on the Order Map.

*The proposed addition*

1. There was no dispute between the parties that the footpath which the Order proposes to add exists on the ground and has done so for some long time. It is shown on the Order Map as section A-C-D-E-F-B. This route runs west from Point A up and over the railway line before turning at Point E to run broadly south along the western side of the railway to Point B.
2. Extracts from three 25” to the mile OS Maps covering the relevant area published in 1864, 1899 and 1924 indicate a footpath running southwest from Blythe Place to the railway along the route of recorded FP423011 so far as the railway and roughly to Point A on the Order Map.
3. The Objector agreed that the broken lines depict a path which can then be seen going over the eastern side of the railway line and that the old OS Maps show a crossing over the railway where steep and awkward steps exist. This is generally consistent with the section of the proposed addition shown on the Order Map between Points A-C-D-E.
4. On the same OS Maps, a broken line can then be seen running south inferring a path running along the western side of the railway embankment. Roughly between Order Map Points E-F. A footpath then appears to continue in a south westerly direction to a marked footbridge, roughly corresponding to section F-B on the Order Map, before continuing southwest along recorded FP423012.
5. An extract from an OS 6” Map dated 1892-1914 does not show the dotted lines going on to the eastern side of the railway at the claimed crossing point, in the area of section A-C on the Order Map. But the same map does appear to identify something on the western side, in the vicinity of section D-E. This is where the set of steep steps exist. Otherwise this Map shows a path leading to and from this crossing point in the same way as depicted on the other OS Maps.
6. I am not persuaded that the unusual cartographic depiction on the eastern side of the embankment materially detracts from the evidence of a path along the route of the proposed addition over the railway.
7. Overall I find that the routes shown on all of the 25” OS maps, spanning almost 60 years, appear to be almost identical. The 6” map is not so clear but does not contradict the others. The footpath to be added on the Order Map section A-C-D-E-F-B is very much consistent with the route depicted on these maps. From my observations on my site visit this route also reflects the footpath which exists and which I observed being walked by dog walkers and others on both days that I visited.
8. A proposition that staff who prepared the original Definitive Map would have known of the evidence is mere speculation. There is no tangible evidence that the Council were aware of the relevant historical maps and the information contained on them before they went looking for evidence to support the changes to the DMS in late 2017.
9. Although OS Maps cannot be used to presume a public footpath I attach weight in favour to the consistent and clear evidence that they provide of a way over time along the Order Map addition route A-C-D-E-F-B.
10. On the Draft Definitive Map, 21 July 1950 there is a black mark that could depict the steps on the western side, Order Map section D-E, but it is not at all clear. The footpath route is shown by a thick maroon line. On the west side of the railway a maroon line approaches the railway from the southwest and then, after a footbridge, turns to run north through a wicker gate and alongside the railway embankment. This would be part of proposed addition section B-E on the Order Map. The parties agreed at the Inquiry that the maroon line ends somewhere in the vicinity of Order Map Point F.
11. On the eastern side of the railway a maroon line runs east from Point A toward Blythe Place in a manner which appears consistent with FP423011 on the current Definitive Map. There is nothing on the Draft Definitive Map to depict the route of the footpath between Points A and F. In this way the Draft Definitive Map is silent about both the route of the footpath and whether the crossing is over or under the railway. There is scant survey or other evidence to provide further explanation to the Draft Definitive Map.
12. A facsimile of the First Definitive Map, 1966, is of no greater assistance. The route either side of the railway corridor is marked with a broad purple line, the word “Place” straddles the railway line. However, both the Draft and First Definitive Map show a section of footpath in the area of section B-F on the Order Map. This evidence adds weight in favour of a footpath existing on the western side of the railway along Order Route Section B-F.
13. A level crossing risk assessment, May 2015, undertaken for Network Rail provides some evidence including an aerial photograph, map, and other photographs of the crossing over the railway line at that time. It advises that a nine-day census undertaken in November 2015 recorded that 89 people used the crossing.
14. In the signed statement for the previous hearing Network Rail clearly state that the public has exercised the right of way on foot over the crossing, at right angles to the running rails, and not along the skewed route shown on the Definitive Map. If it had been possible for people to walk under the railway I think it highly improbable that Network Rail would have supported a surface crossing.
15. Although some original documents are missing, I attach moderate weight in favour to the evidence from Network Rail that the footpath exists on the basis of their own evidence and in particular to a statement by Network Rail that they would normally agree that a footpath which goes under a railway is safer than one which crosses over it. I am not persuaded that an argument that this surface crossing would have been the only one on the line is sufficient to say that there could not have been a surface crossing here.
16. The proposed addition matches the footpath on the ground and the Objector conceded at the Inquiry that he would give a ‘small amount’ of weight in favour to the existence of the path which is proposed to be added.
17. Historical OS Map evidence provides clear evidence of a route along the footpath to be added but does not provide clear evidence of a route along the section to be deleted. Over such a short distance I find it unlikely that both routes would have existed if one offered a safer route under the railway.
18. I conclude that new evidence which was not before the Council when the Definitive Map and Statement was prepared has been produced which can be relied upon, and is sufficient, to show that on a balance of probabilities that a public footpath which is not shown on the DMS subsists, over the Order Route and shown on the Order Map as section A-C-D-E-F-B.

**Other Matters**

1. The Objector argues that the Council is using a simple error as an opportunity to move the path to a place that is substantially less convenient, more dangerous, and not accessible to anyone with limited mobility. Such considerations are not within the remit of this Order decision.

**Overall Conclusion**

1. I conclude that the evidence, as a whole, supports both the proposed deletion and addition.

**Formal Decision**

1. The Order is confirmed.

**Helen Heward**

INSPECTOR

**ATTENDANCES**

For Cumbria County Council Erin Shearer, Senior Legal Officer, who called:

* Geoff Fewkes, Countryside Access Officer, Cumbria County Council
* In attendance Sandra Smith, Countryside Access Officer.

The Objector: Mr McConnell

Interested Persons : Mr Murgatroyd

