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| **Order Decision** |
| On papers on file  |
| **by K R Saward Solicitor, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 27 September 2022** |

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| **Order Ref: ROW/3283344** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (‘the 1981 Act’) and is known as the Bridleways no.s 15.70/9 Kirkby Malzeard & 15.75/2 Laverton Modification Order 2020.
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| * The Order is dated 16 October 2020 and proposes to modify the Definitive Map and Statement (‘DMS’) for the area by the upgrading the public footpath between grid references SE 2024 7355 and SE 1830 7322 to a public bridleway, and adding a new section of public bridleway between grid references SE 1830 7322 and SE 1838 7300, and upgrading the public footpath to a public bridleway between grid references SE 1838 7300 and SE 1846 7292, as shown in the Order plan and described in the Order Schedule.
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| * There were 2 objections outstanding when North Yorkshire 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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Procedural Matters

1. The application for a Definitive Map Modification Order (‘DMMO’) was made on behalf of the British Horse Society (‘BHS’) for the addition of and upgrade of the claimed route to a bridleway. The claimed route follows a road known as ‘Carlesmoor Road’, in the parish of Kirkby Malzeard.
2. The Council as Order Making Authority (‘OMA’) concluded that an Order should be made to record the existing footpath in the DMS as a bridleway and to add an approximate 253 metre stretch of track as a bridleway also.
3. When notice of the Order was published, two objections were made. These raised safety concerns over: (1) the limited width of the route for oncoming users to pass; and (2) risks associated with horse-riders encountering farm traffic and other large commercial vehicles.
4. The purpose of a DMMO is to record public rights of way that exist already rather than the creation of new rights. The suitability of the route for the type of traffic which could use it, is not a relevant factor in establishing if there is already a bridleway. For this reason, the objectors were advised by the Planning Inspectorate that their objections did not contain any evidence that could be taken into account. They were afforded opportunity to amend or withdraw their objections or otherwise explain why the objections are relevant. No response was received.
5. The BHS confirms that it supports the Order as made.
6. Under paragraph 7(2A) of Schedule 15 to the 1981 Act, the Secretary of State does not have to hold an Inquiry or Hearing if, in his opinion, none of the representations or objections received relate to an issue which the Inspector is able to consider. Given the lack of relevant of objections, my decision shall be based solely on the papers on file without inviting further written representations.
7. Whilst the DMMO application was supported by nine user evidence forms, the Order was made on the basis of discovery of historical documentary evidence only. In the circumstances a site visit was not necessitated.

Main Issues

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in Section 53(3)(c).
2. The main issue is whether the discovery by the OMA of evidence which (when considered with all other relevant evidence available) is sufficient to show:

(c)(i) that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates; and

(c)(ii) that a highway shown in the map and statement subsists as a highway of a particular description which ought to be there shown as a highway of a different description.

1. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be *reasonably alleged* to subsist for a DMMO to be made to add a route to the DMS, the standard of proof is higher for the Order to be confirmed. At this stage, evidence is required on the balance of probabilities that a right of way subsists. That is the same test which applied for the Order to be made to upgrade the existing footpath under section 53(3)(c)(ii). In that regard, the test is not whether the existing path was inaccurately recorded in the DMS, but whether the evidence suffices to upgrade its public status.
2. The burden of proof lies with those who assert the existence of a public bridleway.

Reasons

***Background***

1. The application relies upon both historical documentation and user evidence.
2. Section 32 of the Highways Act 1980 requires that documentary evidence is taken into consideration ‘before determining whether a way has or has not been dedicated as a highway’ – and that such weight is given to this evidence as ‘justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced.’
3. Whereas, a footpath allows a right of way on foot only, a bridleway allows the public a right of way on foot, on horseback (or leading a horse) and by bicycle.

***Documentary evidence***

*Inclosure maps and awards*

1. Both the Kirkby Malzeard Boundary Map 1730 and 1789 Award and Township Map depict the eastern end of the route as a road “To Carlsmoor”.
2. In the Inclosure Award for Kirkby Malzeard Moors of 1789, the eastern end of Carlesmoor Road was set out and appointed as “one other Carriage road or highway 30 ffeet in breadth”. Under the repair provisions within the Award, the Carlesmoor Road is one of several roads which is “repairable by the Inhabitants of the Township of Kirkby Malzeard by such means and ways… as other public highways are by the laws of this Realm now repaired and kept in repair.”
3. When the 1789 Award was discussed in an Order Decision of 16 February 2015, the Inspector rejected arguments that a ‘Bridle Road’ did not have public status because the Commissioners had no power to set out public ways other than public roads at a breadth of 40 feet and that private maintenance equates to a private way. The Inspector noted that when a public right of way is set out in an inclosure award, that is a legal event which declares that the right of way existed at that time. There was no evidence to suggest that the way was subsequently extinguished and it therefore still existed.
4. In this instance, it is clearer still that the road was to be repaired in the same manner as other public highways. The Award does not explicitly state that it is a ‘public’ carriage road, but as pointed out by the previous Inspector, the Award specifies those ways which are restricted to private use. There is no such restriction in this case and it may be concluded that the Carlesmoor Road, as shown, was set out as a public highway.

*Tithe records*

1. Tithe maps officially recorded the boundaries of all tithe areas on which tithe rent-charge was apportioned. Their purpose was not to identify highways.
2. The Order route is shown on the Tithe Map for Laverton 1838. It also appears on the Tithe Map for Grewelthorpe 1840 with the western end annotated “From Nidderdale” and “To Kirkby Malzeard” at the eastern end, indicating a through route providing links to other nearby settlements.
3. On the Tithe Map for the Parish of Kirkby Malzeard 1840 part of the route is shown at the edge of the map, coloured sienna and annotated “From Carlesmoor” in the same manner as other existing roads with public status. This provides evidence of some weight that it was a through route considered by the tithe commissioners to be a public carriageway in 1840.

*Commercial mapping*

1. Extracts of various commercial maps are produced. Carlesmoor Road appears as a ‘cross road’ in part, as far as the farmstead area, on Greenwood’s map 1817, Greenwoods Atlas 1829-1834, Charles Fowler map 1834 and J H Franks map 1840. The depiction of the route in this way provides positive evidence in support of a public highway over which the travelling public had a right of way on horseback or with vehicles.
2. On G&J Carey’s map 1825, Carlesmoor Road is shown as a ‘parochial road’. Whilst undefined, a ‘parochial road’ may suggest one used on foot and horseback and not with carriages. It appears (up to the farmstead) in the same manner as other roads on Story’s Motoring and Cycling map 1926.
3. Buyers of these maps may have expected the routes shown to be available for

public use. Afterall, there would be no point in showing a route to a purchaser that they could not use.

*Estate maps*

1. The estate plan of the Earl de Grey of Ripon 1869 shows the eastern end of the route annotated “From Carlsmoor”.

*Finance Act 1910 records*

1. In the Finance Act 1910 Maps, Register and Field Books, Carlesmoor Road is identified as being within the hereditament of the Leeds Corporation. No deduction from tax liability is recorded on the landholding which might have indicated the existence of a public right away across the land. However, the BHS points out that there is no reduction in tax liability for public rights of way claimed by the Leeds Corporation across any of its considerable land holdings despite current day public footpaths, bridleways and roads crossing the same land. The Finance Act records are of limited assistance in consequence.

*Ordnance Survey (‘OS’) records*

1. A series of OS Maps (old series 1” to 1 mile 1858-1861, contoured road map 1” to 1 mile 1925, 1” to 1 mile 1955, 6” to 1 mile 1854) all depict Carlesmoor Road as a through route and shown in the same manner as other public roads in the area.
2. The Ordnance Survey Object Name Book (revised1928) names Kirk Bridge as a bridge kept in repair by Ripon Rural District Council. As the bridge is located at the eastern end of the route and maintained at public expense, the inference is that the road was reputed also to be available to the public.

*Other Twentieth century records*

1. Entries in the Ripon Rural District Council Highways Committee Minutes 1900 to 1904 refer to Carlesmoor Road in the context of complaints made by Harrogate Corporation about the state of the roads in the area around Kirkby Malzeard. In the response, the Council refers to having inspected and estimated the cost of repair of the roads relating to the extraordinary traffic that Harrogate Corporation are taking over the roads (in connection with its works in the area). In this regard, the Council refers to the “large quantity of material carted onto Carlsmoor [sic] Road……for both your Corporation and the Contractor for the sewage works.” This points to at least part of the route being maintained at public expense for horse and cart traffic. Such costs would not have been expended by the Council unless the route was considered to have public status.
2. The Order route is labelled “Public Road” on the engineering drawings drawn up under the Leeds Corporation Water Act 1901, an Act of Parliament empowering the Corporation of Leeds to make additional waterworks, amongst other purposes. The drawings identify the location of intended reservoir works and the road diversions required. As the drawings formed part of a legal process, it may be expected that care and accuracy was needed in their compilation.
3. When the initial draft was produced under the National Parks and Access to the Countryside Act 1949 in preparation for the first Definitive Map, the Order route was marked in green. Footpaths are shown purple. Under the National Parks and Access to Countryside Regulations 1950, authorities were required to show footpaths by a purple line, bridleways by a green line and roads used as a public path by a broken green line. This indicates that the parish council considered the route to have at least bridleway status.
4. The Order route covers three parishes. Three of the accompanying schedules to the draft map describe the type of path as a footpath, part of which is “very seldom used”. In the fourth schedule, the BHS interpret the description given of part of the route as “Carl Road”. It looks to me as though the entry reads “Cart Road” which is also consistent with the column heading being for the type of path, either as a footpath, bridleway or road used as a public path. Its general condition is given as a “Metalled Rd. for so far after that just a rough cart track across moor”. The reasons for believing this part to be public is: “Part admitted under 1932 Act”. This must mean that the landowner had deposited a map to admit that public rights of way existed over this stretch but the type of use acknowledged is unclear.

Assessment

1. Most of the Order route is already recorded on the DMS as a public footpath. The application for an upgrade to a bridleway was made on the basis that an error occurred in reaching that conclusion. As the OMA observes, it is necessary to consider the historical evidence from a number of sources in order to gain an understanding of the existing status of the route. Paths were surveyed at parish level and it is not uncommon to find examples where the surveyors did not consider the broader evidential landscape when determining the status of a route.
2. Given that most of the route was then recorded in the DMS, it is perhaps unsurprising to find various sources of documentary material signifying a public right of way. The pertinent point is whether the material shows, on the balance of probabilities, that the route carried rights higher than those of a public footpath.
3. There is no single compelling document to demonstrate conclusively that the Order route is a public bridleway. The Inclosure Award 1789 set out the Carlesmoor Road as a carriage road or highway maintainable by the township inhabitants from which it may be reasonably deduced this was maintained as a public highway. One end is annotated “To Carlsmoor”. The route is marked up as leading “To” or “From” a neighbouring destination on various other types of maps. This suggests the route was laid out and of some significance as a recognised through route. Notably, the Tithe Map for Kirkby Malzeard 1840 shows the route coloured sienna and annotated “From Carlesmoor” in the same manner as other existing roads maintainable at public expense which is a good indication of its public status.
4. Positive supporting evidence of a road carrying public rights is available from the estate maps. The amount and consistency of evidence points firmly towards the existence of the route linking destinations which was available to the public and partly laid out as a metalled road. The physical characteristics of the route are not indicative of its status but in all probability such a route would not have been limited to use on foot only. I am reinforced in that view by a variety of evidence that a public road existed. From nineteenth century records, the Carlesmoor Road continued to be maintained at public expense and was being used by horse and cart in connection with water works.
5. Whilst no taxable deduction was made for the Order route as a public highway under the 1910 Finance Act, this carries limited contrary weight only when the landowner did not claim any such deductions across the whole of its sizeable landholding. Moreover, the primary purpose of the Act was not the identification of highways and there may be other reasons for not seeking a deduction.
6. Collectively, the evidence suffices to demonstrate that in the past, the Order route would in all likelihood have been used by the public on horseback as well as on foot. I am satisfied on the evidence that the entirety of the route was at least a bridleway.

**Other Matters**

1. Nine user evidence forms were produced by the BHS in support of its application for the Order covering a period of 19 years, with individual use ranging from 4 to 12 years. This evidence did not suffice to give rise to a rebuttable presumption of statutory dedication under Section 31 of the Highways Act 1980 Act which would require evidence of public use as a bridleway over a period of 20 years immediately prior to its status being brought into question.
2. Given my findings based upon the historical evidence, there is no need to go on to consider whether the user evidence suffices for dedication at common law.

**Conclusion**

1. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does show that, on the balance of probabilities, the existing public footpath should be recorded as a bridleway and the remaining part should be added to the DMS as a bridleway also. The Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

*KR Saward*

INSPECTOR

COPY – MAP NOT TO ORIGINAL SCALE

