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| **Order Decision** |
| Site visit on 4 April 2023 |
| **by N C Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 19 June 2023** |

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| **Order Ref: ROW/3274048** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Northumberland County Council Definitive Map Modification Order (No 2) 2019. |
| * The Order is dated 12 August 2019. It proposes to modify the definitive map and statement for the area by recording two linked public footpaths, the first, Footpath No 65, between Hallgate, Hexham and a spur off the U8291 road, the second, Footpath No 66, from the spur off the U8291 to a point immediately north-east of Prospect House, in both cases as shown on the Order map and described in the Order schedule. |
| * There was one objection outstanding when Northumberland County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs. |
| **Summary of Decision: The Order is not confirmed.** |
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Preliminary Matters

1. It has been agreed by all interested parties that this matter will be determined on the basis of an exchange of written representations and a site visit.
2. I made an unaccompanied site visit on 4th April 2023 when I was able to walk the length of FP65 (Bank Head) although the gate at point C was closed and locked. The principal feature of the route is the Old Grammar School, an ancient building of architectural and historical interest.
3. I was unable to gain access to walk FP 66 (Prospect House) because the site was fenced. The route is only 50 metres long and I was able to view it through the fence. I also walked Hallstile Bank to gain familiarity with the area.
4. I have before me the application and supporting documentation together with written representations from Nicholson Portnell, solicitors on behalf of the objector. Northumberland County Council (NCC) has taken a neutral position, but I have the benefit of their Investigation Report and Statement of Grounds. I have considered all these documents in forming my conclusions.
5. In this decision I have found it convenient to refer to the annotation on the Order map and for ease of reference a copy of this is appended below.

Main issues

1. The main issue is whether the evidence before me is sufficient to show that, in the past, the Order routes have been used in such a way and to such an extent that public footpaths can be presumed to have been dedicated.
2. NCC made the Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). At that stage the test applied by the Order making authority was whether the claimed rights of way ‘subsist, or are reasonably alleged to subsist’. If I am to confirm the Order, I must be satisfied that, on a balance of probability, the evidence shows public rights of way on foot subsist along the claimed routes. A reasonable allegation is not sufficient at this confirmation stage.
3. The Prospect House route (D – F) is a cul-de-sac route terminating at the point where an information board was located describing the view over the Tyne valley from this elevated position. As a preliminary matter I shall consider whether this route is in the nature of a public right of way.

**Reasons**

Cul-de-sac route

1. The Prospect House route commences at point D which is located on an unnamed spur from Hallgate. It terminates at point F where I understand an information board was once located. I was unable to access this area and thus could not see whether the board remains in position. I was also unable to see or asses the view available from this point, but it is described in the evidence and I accept that it is an impressive outlook.
2. One person who has completed a user evidence form relates that there was at one time a route from point F to Hallstile Bank. No other witnesses refer to a through route and all others give evidence of using the route only to access the viewpoint. Point F is at an elevated position and is significantly higher than Hallstile Bank. There is currently no evidence of any means of access between the two and it would have required a steep set of steps to achieve that. Accordingly, I must consider the evidence on the basis that the route claimed is a cul-de-sac.
3. The route D – F is located mainly around the perimeter of the grounds of Prospect House, with no defined or obvious route on the ground. Prospect House, and the properties in the vicinity are in the course of development and it is clear that significant changes have occurred since the application was made. The open area over which the Order route runs was previously a tarmacked car park but is now an open block paved area.
4. Prospect House was originally a private house. At some point, and certainly by 1981, it had been acquired by Tynedale District Council and was used as the Council offices. The open area at the rear was set out and used as a car park.
5. A public right of way is usually a thoroughfare, providing a through route from one highway, or point to which the public have access, to another. A cul-de-sac public right of way can exist, but there would need to be a compelling reason for the public to have access to the termination point. A viewpoint can be justification for a cul-de-sac and I accept that in this case the view available from point F could be sufficient justification.

Ordnance Survey maps

1. I have been provided with various old Ordnance Survey maps submitted by the Applicant. These show that the configuration of the streets and buildings in the vicinity of point C has changed significantly since the second half of the nineteenth century. The Order route C – D (Bank Head) can be identified on all the maps considered, but a solid line appears to be drawn at each end on various of these. The Order route D - F lies within an open area to the east of Prospect House with no indication of a route consistent with the Order route. There is no indication that a way is available from point F to Hallstile Bank. The representation of any route on these maps is not evidence that they were open to the public.

User evidence

1. The main case in support of the Order is based on the presumed dedication of public footpaths 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 routes by the public on foot as of right and without interruption, over the twenty years immediately prior to their status being brought into question. Such use would raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence to show that during the relevant period there was no intention on the part of the relevant landowner to dedicate the way for use by the public; if not, a footpath will be deemed to subsist.
2. Alternatively, if the case is not made out under statute, the evidence may be considered under the common law. In this case the issues to be addressed would be whether the owner of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owner, and whether there is evidence of acceptance of the claimed right by the public

*When was the status of the way brought into question?*

1. When considering evidence in relation to Section 31 of the 1980 Act, the first matter to be established is the date when the public’s right to use the route was brought into question.
2. In relation to Bank Head, NCC concluded that the public’s right to use this route was brought into question in 2016 when, following a change of ownership, gates were closed and locked at each end of the route. This is confirmed by a number of those who have completed user evidence forms, and I agree that this was effective to bring into question the public’s right to use the route. There is some evidence that the gates were locked at an earlier date but there is no consensus on that.
3. In relation to the Prospect House route (D – F), the open area behind Prospect House was blocked off by fencing at or slightly north of point D in 2016 following the sale of Prospect House by Tynedale District Council and this was a clear act bringing into question the public’s right to use the Order route.
4. I shall therefor in respect of both routes, examine the evidence of use for the twenty-year period 1996 to 2016.

*Evidence of use by the public 1996 - 2016*

1. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed ‘as of right’, without interruption, and to have continued throughout the full twenty years. Use ‘as of right’ is interpreted as use by the public that does not take place in secret, is not by force and is not with the permission of the landowner.

Bank Head

1. I shall first consider the evidence of use of the Bank Head route, C – D. In relation to this claim I am provided with 25 user evidence forms. Nineteen of the users state that they commenced using the route prior to 1996. Of those 19 all but one measure the frequency of their use in times per year, with 15 referring to use of 12 times a year or less and of these six refer to use less than five times a year. Only one witness refers to weekly use, and he was for part of the time an employee of Tynedale DC who refers to ‘visiting the Planning Department and Robbs store’.
2. In addition to the 19 users from 1996 or earlier, there are six whose use began after that date. Of these four refer to use measured in fewer than 12 times per year. Two, who shared an address in Hallgate, refer to regular use and it would seem that they parked a car in the Prospect House car park and used Bank Head as a short cut to their home. At the relevant time both the car park and Bank Head were owned by Tynedale DC.
3. For a presumption of dedication to arise the extent of use must be sufficient to alert a reasonably diligent landowner to the fact that the public were asserting a right to use the route. In terms of quantity, whilst 25 users would often be more than sufficient to satisfy the requirement, it is necessary to have regard to the frequency of use, and in this case, I consider the evidence to be borderline. Accordingly, it will be necessary to examine carefully the extent to which the use was in fact use as of right.
4. There are three elements to whether use is as of right being whether it was by force, secrecy or with permission. There is no suggestion in this case that use has taken place forcibly or secretly. The question of permission, actual or deemed requires consideration.
5. In considering the question of permission it is an important factor that throughout the relevant twenty-year period the Old Grammar School was owned and occupied by Tynedale DC or NCC as its successor. Persons using Bank Head for the purposes of visiting the Council offices would be doing so with the implied permission of the Council and such use would not be as of right. A number of users refer to using Bank Head to visit the Council Planning Offices, located in the Old Grammar School. I must disregard this use.
6. One significant reason given for using Bank Head is for the purposes of viewing the Old Grammar School, and in many cases as part of a guided tour, either as guide or visitor. I have to consider whether use as part of such a guided walk was use as of right.
7. A number of the user evidence forms are completed by guides who describe taking groups on a walking tour of the town which included a visit to the Old Grammar School from Bank Head. Some other forms are completed by people who took part in such a guided walk.
8. I have been provided with copies of a series of visitors guides to Hexham covering a period from 1974. These all describe a route along Bank Head for the purposes of viewing the Old Grammar School. I note that the 1992 guide was produced jointly with Tynedale DC who, at the that time owned Bank Head and the Old Grammar School. In the same year the Council erected an information board in Bank Head relating to the School.
9. I have also been provided with a copy of a NCC report into an earlier application to record Bank Head as a public footpath. The report is helpful in various respects. First, it refers to a letter written in August 1982 by the former owner of the School (Mr. Lockhart) in which he rebuts ‘the assertion of public rights around Bank Head’. Second, Tynedale DC confirm that when they took possession of the School in August 1989 there were notices at either end of Bank Head stating respectively ‘Private. No Parking’ and ‘Private Road. No Parking’. Third, and in this context of most relevance, the report quotes Tynedale DC as follows; ‘In the present circumstances therefore the Council are prepared to grant permission for the Civic Society to conduct guided walks via Hallbankhead, but in doing so are not supporting the application for Hallbankhead to be declared a public footpath’. This is a clear statement by the landowner that it did not regard Bank Head as a public right of way, but that it gave permission for guided walks to use the route.
10. The Objector has provided a letter from a West Northumberland Museums Officer involved with the installation in 1992 of information boards around Hexham, including those at the Old Grammar School and at Prospect House. She states these boards were installed ‘with the involvement of the Hexham Guild of Guides’ and that it was ‘made clear … that the Guild of Guides had to seek permission from the Tyneside Council departments housed in those buildings before they could take guided groups to the panels’.
11. Having regard to this evidence I conclude that use of Bank Head for the purposes of guided walks to view the Old Grammar School, or the information board, was permissive use and thus not as of right.
12. When I discount the evidence of use which was permissive, I conclude, on a balance of probabilities, that the remaining evidence of use of the route as of right is insufficient in quantity to give rise to a presumption of dedication.

Prospect House

1. I turn to consider the user evidence in relation to the Prospect House route, D – F. Throughout the relevant twenty-year period the land over which this route is claimed was a car park for Prospect House which was occupied by Tyneside DC until its abolition in 2009 whereupon it vested in NCC as a unitary authority.
2. The evidence of use is very similar to that for the Bank Head route. There are 21 user evidence forms, mostly from the same people that provided evidence for Bank Head. Most of the forms describe infrequent use, with sixteen referring to use of 12 times per year or less, with four no more than twice a year.
3. Various reasons are given for use of the route. Most refer to visiting the viewpoint at point F on the Order map, some as guides leading a walk around Hexham and some participating in such walks. Several refer to visiting the Council offices and some to using the car park.
4. Use to access the Council offices, or to use the car park is permissive use, and in any event not use of the route in the nature of a public right of way. Similar considerations to the Bank Head claim apply to the permissive nature of use by guides leading walking tours and the participants in those walks. When this evidence is discounted I am drawn to the same conclusion that I have reached in relation to the use of the Bank Head route; that the residual evidence of use is insufficient in quantity to qualify as use by the public such as to give rise to a statutory presumption of dedication.

*Actions of the landowner*

1. Given the conclusions I have reached in relation to the insufficiency of the evidence of use it is not necessary for me to conclude whether or not the landowner can rely upon demonstration of a lack of intention to dedicate. In the case of both the Bank Head and Prospect House routes there is some evidence that signs were displayed during the relevant period and these may have been sufficient to demonstrate a lack of intention to dedicate. In the case of the Bank Head route there is a not insignificant amount of evidence that gates at both ends of the route were sometimes shut, and particularly the gate at Hallgate was sometimes locked. There is also evidence from one user witness of evidence of challenge, although this was at about the time the public’s right to use the route was brought into question.

*Common Law*

1. Finally it is necessary to consider whether there is evidence of express or implied dedication at common law by a competent landowner, and acceptance of dedication by the public.
2. There is no evidence of the landowner having expressly dedicated the appeal route.
3. For an implication of dedication to arise at common law mere use by the public is not necessarily sufficient. There must be evidence from which an inference can be drawn properly that the landowner intended to dedicate the route for use by the public. In this case the landowner has, by its actions demonstrated consistently that it did not intend the Order routes to be dedicated as public rights of way.

**Summary and conclusions**

1. The evidence of use prior to 2016 is insufficient to meet the requirements of section 31 of the 1980 Act
2. There is no credible evidence to support an inference of dedication at common law dedication.
3. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal Decision

1. The Order is not confirmed.

Nigel Farthing

**Inspector**

