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| **Order Decision** |
| Site visit made on 17 August 2023 |
| **by Grahame Kean BA(Hons) MRTPI, Solicitor** |
| **appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 15 December 2023** |

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| **Order Ref: ROW/3309677** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Yorkshire Dales National Park Authority (Bridleway No. 20 Malham and Bridleway No. 3 Malham Moor downgrade to Footpath) Modification Order 2006. |
| * The Order is dated 7 December 2006 and proposes to modify the definitive map and statement for the area by downgrading to footpath that part of public bridleways No 20 (BR20) and No 3 (BR3) shown in the Order plan and described in the Order Schedule. |
| * There were 5 duly made objections outstanding when North Yorkshire County Council (‘the Council’) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is not confirmed.** |
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Procedural matter

1. I have considered this case on the basis of the written representations submitted and my unaccompanied site visit on 17 August 2023.

Legal framework and main issue

1. By s53(3)(c)(ii) of the 1981 Act an order to modify the definitive map and statement (DMS) should be made following the discovery of evidence which, when considered with all other relevant evidence available, shows that a highway of one description ought to be shown as a highway of a different description. By s32 of the Highways Act 1980 (‘the 1980 Act’) before determining whether or not a way has been dedicated as a highway, I must take into consideration any map, plan or history of the locality, or other relevant document tendered, giving it such weight as is appropriate,
2. In *Trevelyan v Secretary of State for Environment, Transport, and the Regions* [2001] EWCA Civ 266 it was held that in considering whether a right of way marked on a definitive map in fact exists, one must:

*“start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed.”*

1. The case also held that when all the evidence has been considered:

*“the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”*

1. The main issue is therefore whether any new evidence has been produced, not available or considered at the time the map was first produced, that when considered with all other relevant evidence, shows on the balance of probability that the way shown in the definitive map and statement (DMS) as a public bridleway ought to be shown instead as a public footpath.

**Reasons**

1. The application relates to consecutive sections of bridleways that run from Street Gate to Malham Moor Parish boundary at Lings Head Gate (A-B on the Order map), and from Lings Head Gate to a stile at Arncliffe parish boundary, (B-O). The applicant believed the continuous bridleway between these points was incorrectly recorded as such on the DMS. Submitted with the application were two survey schedules said to indicate its status to be a footpath, and evidence showing continuation of the route outside the application route as a footpath.
2. Both schedules are survey forms used to compile information ascertaining the public rights of way preparatory to publication of the draft DMS. The first form dated November 1951, deals with a path named “*Monks road*” starting from “*Malham Moor Street Gate*” to “*Arncliffe*” (which may refer to the boundary with Arncliffe parish). The type of path is stated to be “*Farm occupation road used as footpath”* and “*footpath*”. The compiler notes reasons for believing the path to be public, ie it “*maintains Abbey route from property at Malham Tarn to property in Littondale in 12th century onwards*”. The route appears to correspond to the application route. Its condition is stated as “*metalled water bound road, 10’ wide*” from the parish boundary (ie at Malham Moor) to Middle House, and “*undefined*” from Middle House to the parish boundary) ie Arncliffe parish boundary.
3. The second form dated October 1951, deals with a route starting at “*Falcon Hotel*” (in Arncliffe village beyond the application route) and ending at “*Middle House*” (inside the application route). It is described “*FP*” ie footpath. The compiler suggests, by annotating “*50*” in the space provided, that there was uninterrupted user by the public for 50 years. Its condition is described as “grass track”.
4. The Order route is covered by statements in the DMS for BR3 Malham Moor parish and BR20 Malham parish. That for BR3 reads:

*Bridleway known as Monks Road commencing at the Malham Parish Boundary Great Close Mire and proceeding in a northerly direction via Middle House to the Arncliiffe Parish Boundary at Great Clowder* (description of surface “*metalled moorland*”).

1. The statement for the relevant part of BR20 reads:

“*Bridleway and footpath known as Lings Road and Gordale commencing at the Malham Moor Parish Boundary and proceeding south to Street Gate thence continuing as a footpath in a south easterly direction to Gordale Scar and southward to its junction with Hawthorns Lane County Road*” (description of surface “*Metalled*” and “*Pasture and rocks*”).

1. The definitive map clearly depicts BR20 and BR3 as a bridleway from Street Gate up to the parish boundary and thence continuing as a bridleway up to and past Middle House and north-east to Arncliffe parish boundary, after which the path continues as a footpath down to Arncliffe.
2. The application, made by the tenant of Middle House Farm was dealt with by Yorkshire District National Park Authority (YDNPA) acting under delegated powers from the Council. YDNPA made the Order but there were unwithdrawn objections and YDNPA had not forwarded the opposed Order to the Secretary of State by the time the Council resumed direct responsibility for such orders. The Council has not considered there to be enough evidence to support the application, therefore it takes a neutral stance to confirmation of the Order.
3. I have considered the documents before YDNPA when the Order was made, including historic maps, Finance Act records and historic texts and two inclosure awards, Arncliffe Inclosure Award 1766 and the Malham Inclosure Award 1850.
4. The Malham Inclosure Award initially set out a public highway 23 feet wide from Lings Gate to New Close Gate (now known as Street Gate) but did not go to Lings Head Gate which lies on the application route even though it is marked on the inclosure map as point C. That section was considered by YDNPA to have been mapped in error. However, there is no evidence before me that formal objections or representations to the depiction of the application route as a bridleway were made at the draft or provisional stages, and it has not been suggested that the route had not been so depicted on the draft and provisional maps.
5. Furthermore, there is no evidence that the depiction of the application route as a bridleway was objected to at the quarter sessions. The route continues to be shown as a bridleway on the DMS.
6. YDNPA’s report of the case conference in July 2006, and the annexed evidence displays a plethora of detailed research. Whilst interesting, much of it is not directly relevant. The salient findings appear to include that:

* no public road was ultimately awarded on the claimed route;
* there was a discrepancy between the Malham Inclosure Award and the map annexed to it. The map showed Lings Head Gate as Point C (point B on the Order map) but no public road leading to this point was set out in the Award. The unnoticed error led to the route being recorded as a bridleway;
* the Finance Act 1910 records were of little value;
* documents surrounding the recording process in the Rights of Way Act 1932, do not assist to determine the status of the application route;
* among the documents related to compilation of the DMS in the 1950s, a map of parish claims shows the route numbered “2” (BR3) as a “BR” south of Middle House, but to the north is marked “FP”. However, on the draft map “FP” was changed to “BR”. Nevertheless the provisional map and statement continued to show “BR” and this was confirmed in the DMS. No landowner challenging this status was found.
* thus, the inclosure award had wrongly included a road south from Lings Head Gate to New Close Gate (Street Gate) and the OS and commercial maps had perpetuated the error but no firm conclusions could be reached.
* since 2002 at least, locked gates prevented passage for horses. There was some use by pedal cyclists who must have lifted their bikes over the stiles. The long standing presence of stiles in boundary walls north of (old) Middle House conflicted with alleged equestrian use, which latter use was limited.
* the equestrian use alone was not enough to satisfy the 20 year test in s31 of the 1980 Act.
* in taking account of the route as a whole the section north of the application route (from the Falcon Inn in Arncliffe) was set out in the Arncliffe Inclosure Award as a private road for owners and occupiers, albeit with horses and carriages. The Award is silent on whether footways or bridleways are also set out.
* the status of footpath should be recorded for Malham Moor and Malham sections of the application route.

*Analysis*

1. In preparation for publication of the DMS pursuant to the National Parks and Access to the Countryside Act 1949, parish councils usually informed the surveying authority what it considered were public rights of way in the parish, the initial information gathering exercise being undertaken at a very local level.
2. The surveying authority used this information to compile the draft map of public rights of way. When published, interested parties could object to the inclusion, omission, or incorrect recording of a route. On resolution of such matters a provisional map was produced to which affected landowners could object at the quarter sessions. Once all these matters were resolved the definitive map was published.
3. In commenting on the YDNPA reasons for making the Order, the Council states that whilst the apparent error in the inclosure documents might possibly have led to the path in Malham parish being recorded with a status higher than footpath, it cannot be evidence of error for the section in Malham Moor parish. In any event in my view, the exact reasoning as to how the status was decided on or how either section of the route was being used by the public at that time is likely to remain unknown. It is the case that both sections of the application route were recorded as bridleways on the draft and provisional maps with no evidence of objection at the time.
4. I also agree with the Council that whilst one takes due account of the circumstances of the route as a whole, cases where the status abruptly changes are not uncommon in definitive maps. Achieving a consistent status is not a reason in itself to rectify the record.
5. The evidence submitted with the application in my opinion is not new evidence given that the parish schedules were those same records created as part of the process to produce the DMS in the 1950s when the status of the application route and sections in adjoining parishes were considered. A decision was clearly made to record the sections in Malham and Malham Moor as bridleway and the section in Arncliffe with a public right of way on foot only.
6. Nor has the considerable research made by YDNPA revealed new evidence of status of the route. The available evidence suggests that the procedures required prior to the publication of the DMS were followed. Despite the opportunity to object to the proposals at the draft and provisional stages none such were made. The suggestion of error in the inclosure award is more conjecture than evidence of substance to outweigh the presumption that the DMS is correct. The overall test, ie whether on the balance of probability the information available demonstrates that the application route was mistakenly recorded as bridleway and should now be recorded with public rights of passage on foot only, is not met.

*Other matters*

1. I have considered all representations including the formal objections made in response to the Order, as well as the consultation responses prior to the making of the Order. Several points made are not relevant to my consideration of the legal status of the application route, eg the perceived need for a particular status of the route, or the apparently few numbers of bridleways in the area compared to footpaths. Some comments made as to equestrian user of the route were unsubstantiated, whilst others noted locked gates preventing or discouraging use. Further historical maps and texts were cited but their relevance to the precise application route is uncertain.
2. The representations contain a limited amount of user evidence. That supplied by objectors is if anything broadly consistent with the application route being ridden, at least until the occupier then padlocked the gate at Middle House Farm. Although there are very few instances of support for the Order denying use of the route as a bridleway, by far the majority of reported instances of user, either historically or in more modern times, is consistent with designation in the DMS of the application route as a bridleway.

**Overall conclusion**

1. 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.

Grahame Kean

Inspector

