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| **Order Decision** |
| Site visit made on 18 April 2023 |
| **by John Dowsett MA DipURP DipUD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food, and Rural Affairs** |
| **Decision date: 16 January 2024** |

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| **Order Ref: ROW/3296793** |
| * This Order is made under Section 119 of the Highways Act 1980 and is known as the North Yorkshire County Council Public Bridleways 15.44/3, 15.44/5 and Public Footpath 15.44/7, Thwaite House, Fountains Earth Diversion Order 2021. |
| * The Order is dated 31 August 2021 and proposes to divert the public rights of way shown on the Order plan and described in the Order Schedule. |
| * There was one objection outstanding when North Yorkshire County 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 Matters and Main Issue

1. On 1 April 2023 the functions of North Yorkshire County Council and a number of district councils were taken over by a new unitary authority, North Yorkshire Council. Whilst the Order Making Authority (OMA) has changed since the Order was submitted for confirmation, this has no implications for the Order.
2. The OMA supports the making of the Order and has requested that, if the Order is confirmed, that it be modified to clarify the routes of the proposed diversions and to correct a minor error in the Order which is not material to this decision.
3. The Highways Act 1980 (the Act) makes various provisions for alterations to the rights of way network. Section 26 allows for the creation of a new footpath, bridleway, or restricted byway, whilst Section 118 allows for the stopping up of such routes provided certain tests are met. Section 119 makes the provision for the diversion of the line of a footpath, bridleway, or restricted byway, again subject to certain tests being satisfied. An Order may relate to one or more footpath, bridleway, or restricted byway. However, it is not possible to make a single Order that combines the provisions of Section 26, Section 118, and Section 119.
4. Although the Order is framed in terms of a diversion of the routes under Section 119 of the Act, part of the objection that has been raised to the Order is that elements of it relate to matters which are not covered by Section 119 of the Act and are more properly addressed by Section 26 and Section 118.
5. Section 119(1) of the Act allows an Order to be made which diverts the line of, or part of the line of, a footpath, bridleway, or restricted byway where it would be expedient in the interests of the owner, lessee, or occupiers of land crossed by the path or way, or in the interests of the public. It also allows the creation of any such new footpath, bridleway, or restricted byway as appears requisite for effecting the diversion and for the extinguishment of the public right of way over so much of the path or way as is necessary to divert the route.
6. Within the above context, in the first instance, the main issue is whether the proposed alterations to the routes set out in the Order fall within the scope of Section 119 of the Act.

Reasons

1. The Order proposes diversions to three routes, Public Bridleways 15.44/3 and 15.44/5, and Public Footpath 15.44/7, that currently converge within the garden area of Thwaite House.
2. Bridleway 15.44/3 runs generally southwards following the route of an unmetalled track until it meets the surfaced driveway of Thwaite House. The route then runs across the house frontage and around the gable of the building before crossing the garden to exit via a gate, proceeding south to dog leg down a steep bank, and continuing south to the River Nidd. This bridleway forms part of the Nidderdale Way long distance walking route.
3. Bridleway 15.44/5 runs westward across an open field to the north west of Thwaite House before turning sharply south to meet Bridleway 15.44/3 at the north west corner of Thwaite House. Public Footpath 15.44/7 runs generally north west across an open field to the south east of Thwaite House to join Bridleway 15.44/3 within the garden area south of Thwaite House.
4. It is clear that the intention of the Order is to, in effect, divert the three routes which presently converge at Thwaite House to pass around the residential curtilage.
5. As drafted, the Order seeks to extinguish two sections of Bridleway 15.44/3, between Points A and B on the Order Map and between Point C and Point Q via Points D, K, and O. It also seeks to extinguish the route of Bridleway 15.44/5 between Points K and N on the Order Map, and extinguish Footpath 15.44/7 between Points D and E.
6. The Order would create two new sections of Bridleway. One between Point A and Point B via Point F on the Order Map, and the other between Point C and Point Q, via Points G, H, I, L, M, N, and P. It also creates a new section of Footpath between Points E and I and a new footpath between Point F and Point Q, via Points J and O.
7. The objector to the Order has argued that the Order is defective in so far as it seeks to extinguish a section of Bridleway which is not being replaced or diverted, namely the section of Bridleway between Points K and N on the Order Map.
8. Whilst the OMA have suggested that the approach that should be taken is to look at the route changes in relation to the marked points on the Order Map, in the absence of any evidence to the contrary this appears to be an *ex post facto* and somewhat contrived explanation of how the diversions are to be made. Notwithstanding that the numbers attached to particular routes are an administrative convenience, the diversions also have to be considered in relation to the routes themselves which are described in the Definitive Map and Statement. For ease of reference and for clarity I have, however, used the route numbers to refer to the routes in question in the remainder of the decision.
9. Whilst the three routes are interconnected, they are nonetheless three distinct routes. Bridleway 15.44/3 is a continuous north to south route that runs past Thwaite House. Bridleway 15.44/5 commences on Bridlepath 15.44/1 then approaches from the east and joins Bridleway 15.44/3 at Thwaite House. Similarly, Footpath 15.44/7 commences at its junction with Bridleway 15.44/3 at Thwaite House then runs south.
10. As set out in the Part 2 of the Schedule of the Order, the new Bridleway to be created would run from Point A on the Order Map to Point B via Point F. It would then follow part of the existing route of Bridleway 15.44/3 between Points B and C, which is not part of the diversion and would remain unaffected, with a further new section running from Point C to Point Q via Points G, H, I, L, M, N, and P. On a straightforward reading of the Order together with the Definitive Map and Statement, this would be a diversion to a continuous north to south route. Whilst Bridleway 15.44/5 would still join this route at a point north east of Thwaite House, the practical effect of the Order would be to extinguish part of its route between Points K and N rather than divert it onto the line C, G, H I, L, M, N as suggested by the OMA. The Definitive Map and Statement is clear that the route of Bridleway 15.44/5 terminates at its junction with the present line of Bridleway 15.44/3 at Thwaite House (Point K on the Order Map). The section of Bridleway between Point K and Point C via Point D is not part of the defined route of Bridleway 15.44/5, rather it is part of the route of Bridleway 15.44/3. The description in the Definitive Map and Statement sets out that the route of Bridleway 15.44/5 approaches from the east and meets Bridleway 15.44/3 at a point along its continuous north to south route, currently Point K. The route therefore terminates at this point.
11. The Order describes in Part 1 of the Schedule a continuous route from Point C to Point Q via Points D and K to be stopped up. This corresponds with a section of Bridleway 15.44/3. In Part 2 it describes a single continuous route from Point C to Point Q via Points G, H, L, M, N, and P. This description specifically refers to a junction of the route with Bridleway 15.44/5. The straightforward reading of the Order on its face is that the continuous north to south route of Bridleway 15.44/3 is moving to the new line described in Part 2 of the Schedule and that the termination point of Bridleway 15.44/5 effectively moves from Point K to Point N where it meets the new route of Bridleway 15.44/3.
12. The OMA’s explanation of the Order would result in the current defined route of Bridleway 15.44/3 being extinguished between Points Q and C. This would be replaced by a new section of bridleway between Points Q and N on the Order Map. A second new section of bridleway, which it is argued would be a diversion of the defined route of Bridleway 15.44/5, would be created between Points N and C thus forming a link between the new section of Bridleway 15.44/3 between Points Q and N and the resumption of its current defined route at Point C. Although this could be a diversion of the defined line of Bridleway 15.44/5, moving its termination point from Point K to Point C, it cannot also be a diversion of the line of Bridleway 15.44/3. Whilst Section 119 of the Act contemplates the diversion of part of a path or way onto the route of an existing right of way, that is not the case here as both existing routes would effectively be diverted onto a newly created single route.
13. The language of Section 119 of the Act refers to a public footpath, bridleway, or restricted byway, and to the line of the path or way. The route of each of the current paths or ways needs to be diverted by the Order. The OMA’s explanation results in a section of the continuous north to south route of Bridleway 15.44/3 effectively disappearing and a section of the route of Bridleway 15.44/5, which currently terminates where it joins the north south route, being inserted into the resulting gap. Notwithstanding that the route numbers are primarily for identification of the routes on the Definitive Map and Statement, this would not constitute a diversion of the route of Bridleway 15.44/3 in the accepted sense.
14. The Order also proposes the creation of an entirely new section of Footpath between Point F on the Order Map and Point Q, via Points J and O. It is not clear from the OMA’s Statement of Grounds what role this new section of footpath plays in effecting the diversions set out in the order. It is clearly not a diversion of Footpath 15.44/7, which would be moved to a new line between Points E and I on the Order Map, and although the new footpath would follow part of the current line of Bridleway 15.44/3, an Order under Section 119 of the Act cannot replace a route with one of a lower status. Whilst it would provide an alternative walking route, parts of which are new, no substantive evidence has been put to me which would indicate that its creation is necessary to effect the diversion of any of the routes covered by the Order. Whilst there have been no objections to this element of the Order, it does nonetheless appear to be the creation of a footpath which is unconnected to the diversion of any of the routes covered by the Order.
15. The proposed diversion of Footpath 15.44/7 from Point E to Point I is non-contentious and is not a matter in dispute.
16. I accept that for practical purposes the new routes set out in the Order are likely to allow users of the rights of way to travel north and south with the option to branch off to the east, or to approach from the east and thence turn north or south on routes of equivalent status to those that presently exist. However, from the evidence before me and from the wording of the Order, I am not persuaded that the line of both bridleways is being diverted, or that the desired result can be achieved using Section 119 of the Act alone.
17. On a straightforward reading of the Order in conjunction with the defined routes of the bridleways in the Definitive Map and Statement, it is clear that Bridleway 15.44/5 is being shortened rather than diverted. Consequently, section K-N is simply being extinguished and not moved to an alternative route. Similarly, there is no evidence that the new footpath from Point F to Point Q is required to facilitate the diversion of any of the existing routes. Whilst the provision of this new route may well be desirable, it is simply being created and is not directly related to any of the proposed diversions.
18. Given the above, I find that the Order as drafted is technically flawed, in that it would extinguish part of the line of Bridleway 15.44/5 without moving it to a new line, and it would create an entirely new stretch of public footpath for which there is no evidence to demonstrate that it is required to facilitate the diversions set out in the Order. These elements of the Order would fall outside of the scope of Section 119 of the Act and, for this reason, it is not possible to confirm the Order as it stands.
19. Whilst it is open to me to consider modifying the Order, the power of modification is not intended to make good orders which would otherwise be incapable of confirmation. Modifying the Order to address the technical deficiencies within it would result in the Order being substantially different from that which was submitted for confirmation. The omission of references to Bridleway 15.44/5 would result in this route becoming a dead end and the omission of the new section of footpath would lose a potentially beneficial addition to the rights of way network. Nor would it be in the interests of the landowner to modify the Order in this manner, as a right of way would still lead to Thwaite House with no onward connection as it would terminate at a point which is not on a highway. It would not be possible to modify the Order in such a manner as to bring the alterations to the network which are sought entirely within the scope of Section 119 of the Act.
20. The modifications which have been requested by the OMA are simply clarifications to the proposed new routes and to remove references to a bridle gate at Point Q. They do not address the matters set out above. Nor would modifying the Order to reflect the OMA’s explanation address the flaws for the reasons I have set out.
21. Given the above, the only conclusion that I can reach is that the Order should not be confirmed. In these circumstances, it is not necessary for me to consider the relevant tests set out in Section 119 of the Act, as regardless of any findings in respect of these it would not be possible to confirm the Order.

**Conclusions**

1. For the above reasons, I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

John Dowsett

INSPECTOR

COPY – MAP NOT TO ORIGINAL SCALE

ORDER MAP
