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| **Appeal Decision** |
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| **by J Ingram LLB (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 29 April 2024** |

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| **Appeal Ref: ROW/3330006** |
| * This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of North Yorkshire County Council (the Council) not to make an Order under section 53(2) of that Act.
* By an application dated 12 April 2021, Diana Mallinson (the applicant) claimed that a public footpath should be added to the definitive map and statement for the area.
* The application was refused by the Council and the applicant was formally notified on 29 August 2023.
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| **Summary of Decision: The Appeal is allowed.** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal on the basis of the papers submitted. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
2. In writing this decision I have found it convenient to refer to points marked on the Council’s plan which shows the application route in more detail, and I therefore attach a copy of this plan.
3. Although the application to the Council was for the addition of a public footpath, the applicant now requests that the Secretary of State directs the Council to make a Definitive Map Modification Order (DMMO) to add the route A-B-C-D as a bridleway.
4. The claimed route is recorded on the Council’s List of Streets as a highway maintainable at public expense and given the number U8059/9. The Council refer to it as an Unclassified Unsurfaced Road (UUR). The Council’s legal stance is that UURs have at least footpath status, and higher rights may exist.
5. On the 22 August 2023 the Council resolved not to make an Order to record the route as a footpath. They concluded that the historical evidence was insufficient to determine whether footpath or higher rights exist or not. In addition, they comment that it would not be appropriate to make an Order for a footpath merely on the basis that at least footpath rights must exist, based on their legal stance. They state that such a decision would be prejudicial to the existence of any higher rights.
6. I will consider this appeal on the basis of the application as it was originally made to the Council, that is that public footpath rights exist historically. If I determine that an Order be made, then the issue of whether or not any higher rights exist, could be considered under the provisions of Schedule 15 of the 1981 Act. It is possible that further evidence could come to light, in that case if objections were made to an Order, an Inspector could then decide if it would be appropriate to modify the Order. This principle was recognised in the case of *Trevelyan v Secretary of State for Environment, Transport and the Regions [2001] EWCA Civ 266.*

**Main Issues**

1. The original application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Section 53 (3)(c)(i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown subsists or is reasonably alleged to subsist over land in the area to which the map relates.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the 1981 Act and the findings of the Courts in the cases of *Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402 [1995] (‘Bagshaw and Norton’) and *R v Secretary of State for Wales ex parte Emery [1998]* (‘Emery’).
4. As made clear by the High Court in *Bagshaw and Norton* this involves two tests:

**Test A** - Does a right of way subsist on the balance of probabilities?

**Test B** - Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

1. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that *“…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be* *heard and those issues determined following a public inquiry.”*
2. The evidence submitted in support of the application was documentary evidence, no user evidence was submitted. For documentary evidence, section 32 of the Highways Act 1980 (the 1980 Act) requires consideration of any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. Therefore, I must consider whether or not the documentary evidence available to me, when considered as a whole, shows that public rights have existed historically over the Order route.
3. The Council also refers to the case of *Todd, Bradley v Secretary of State for the Environment Food and Rural Affairs [2004] 4 All ER 497* with regard to the principle of synergy. They state that no synergy has been demonstrated in this case. They conclude the evidence is so weak, even when taken together, it does not demonstrate a synergy of evidence sufficient to prove the highway status of footpath as claimed by the applicant.

Reasoning

***Documentary evidence***

*Commercial Map, Ordnance Survey Maps 6 inch to 1-mile 1847-1907, Ordnance Survey Map 1964-77*

1. The application route is not shown on Jeffery’s map of Yorkshire dated 1771-2. I consider that the absence of the route from this map does not necessarily mean it was not in existence on this date, as many minor highways are not shown.
2. The Ordnance Survey 6 inch to 1-mile first edition dated 1847-50 shows the application route in part as double pecked lines, indicating the route as an unenclosed track. The route is not continuous, there are two breaks where no track is shown. The central section of the route is annotated ‘foot path’. The route at the southern end does continue onto the next map sheet and joins another track.
3. The second edition map dated 1888-90 shows the route as a continuous unenclosed track, it is annotated ‘foot path’ at the central section. The route at the southern end again continues onto the next map sheet, the track that it joins is labelled as ‘Gill Head Gate’.
4. On the third edition map dated 1906-07 the route is again shown as a continuous unenclosed track, it is annotated ‘FP’ at the central section. The southern end of the route, near to point D, again continues onto the next map sheet, here it is also annotated ‘FP’.
5. There is a clear physical depiction of the application route on the historic Ordnance Survey mapping second and third editions, with some evidence of part of the route on the first edition. I consider that this is good evidence of the physical existence of the route at the time. From 1888 Ordnance Survey maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. Although the first edition Ordnance Survey map is prior to this date. However, the FP annotation on the second and third editions does give an indication of the type of use the route was suitable for at the time. Taken in isolation the Ordnance Survey maps consequently hold some evidential weight, although in relation to the status of the route, due to the disclaimer, the weight is limited.
6. On the 1:25000 Ordnance Survey map of 1964-77 the route is not shown, this would indicate it was not an obvious feature on the ground at this time. One reason for this may be that it had fallen into disuse.

*Wharfedale Rural District Council (WRDC) minutes 1917-26, Newspaper articles 1917-23, Otley Local History Bulletin (information on Mr Atkinson)*

1. The applicant originally submitted WRDC minutes to the Council as evidence in support of the application. As part of the appeal the applicant has submitted additional evidence of local newspaper articles from the same time period and further information on Mr Atkinson.
2. The WRDC was the highway authority for this area from 1896 to 1929-30. Mr Atkinson was a local solicitor and is described in the Otley Local History Bulletin as the founding member of the Yorkshire Rambler’s Club in 1892, the group promoted walking and cultural studies in the countryside. Mr Atkinson was said to be ‘a painstaking defender of rights of way’ and his obituary in 1943 refers to one of his main hobbies as preserving moorland footpaths.
3. The WRDC minutes and the newspaper articles refer to Mr Atkinson’s letters regarding public rights of way across Blubberhouses Moor and in the Washburn valley. It would appear that Mr Atkinson first wrote to the clerk of WRDC in 1917 expressing his concern regarding several ancient public rights of way across the Moor. The paths were either blocked or trespass boards had been erected.
4. One newspaper article dated 1917 describes the application route in detail and refers to it as an ancient cattle driving track that was used by cattle dealers to avoid tolls when travelling to Otley market. This evidence adds substance to the minutes and confirms that the application route was indeed one of the paths Mr Atkinson was concerned about. The article explains that Mr Atkinson had taken evidence statements from 6 long standing residents, and he had marked most of the public rights of way on 6-inch Ordnance Survey sheets. He was now asking WRDC to call for the removal of obstructions and he requests that direction posts be installed.
5. In 1921 the minutes reference a site inspection by members of WRDC and their surveyor, accompanied by Mr Atkinson. It was suggested that direction posts be erected at 13 different points. Then in September 1923 it is referenced in the minutes and reported in a newspaper article that seven of the posts had been removed. The article explains’ that the signposts had been recently erected by the Council on being satisfied by Mr Atkinson that public rights of way existed there.
6. In October 1923 the WRDC resolved to restore the posts which had been temporarily removed and give the landowner formal notice of their intention. The minutes refer to the locations of the posts, one is indicated as *“Foot of Kexgill (No.9)”*, the applicant believes this is referring to a post at the northern end of the application route (point A).
7. I consider that although the minutes do not specifically refer to the application route, when read alongside the newspaper articles and the additional information provided on Mr Atkinson it does add weight to this particular evidence. The application route is described in the newspaper article dated 1917 in some detail from West End to Timble via Gill Becks and given the number 12. In addition, the description of a signpost at the ‘foot of Kexgill’ could reasonably be referring to the application route.

*Statutory Declarations 1926 and 1929*

1. The applicant has submitted 2 statutory declarations, these were obtained by Mr Atkinson in 1926 and 1929, both clearly describe the route of the claimed right of way. Mr John Metcalfe refers to the application route as a ‘footpath or bridlepath’, he also states that the route joins a bridlepath at its southern end (point D). Mr John Taylor refers to it as an ancient cattle driving track. The applicant claims that this evidence indicates that the appeal route must have been regarded as a public bridleway, not as a public footpath, as only bridleways and carriageways can have an additional right for the public to drive animals.
2. I consider the statutory declarations to be good evidence and they carry considerable weight to indicate public rights on the application route. The evidence of status of the route is conflicting with references to footpath or bridlepath.

*West Riding County Council maps of publicly maintainable highways 1929-74*

1. This working document is on an Ordnance Survey base map, with various routes annotated and marked in different colours. The application route is coloured orange and numbered 46. There is no key on the map to indicate what the different colours refer to. The Council state that apart from other modern UURs depicted, all the routes shown as coloured are modern A roads, C roads and tarmacked unclassified roads. They state no routes shown on the Definitive Map as footpaths or bridleways in the area are shown as coloured on these maps. They claim this suggests that West Riding County Council considered the route to be a maintainable highway, most likely with a higher public status than a footpath.
2. I consider these maps to be conclusive evidence of the Highway Authority accepting the maintenance responsibility of the application route and therefore it follows that there are public rights of some description over the route. The maps are not a record of the status; however, it could be said that at least public footpath rights exist.

*Ramblers Association Documents c.1953, West Riding County Council Correspondence 1954, 1960*

1. The Ramblers Association map is on an Ordnance Survey base map, the application route is marked and there is a green number 10 circled, this is at the north end of the route (point A), on the north side of the A59. The handwritten explanation states that green numbers indicate the positions where signposts once stood. The second document is a tracing, it shows the application route as a red dashed line and numbered 12, it also has FP annotated at the north end of the route (point A). The key indicates paths marked in red are omitted from the draft map, and FP indicates finger posts prior to removal or deletion in 1940.
2. The correspondence from 1954 confirms that the County Council was not prepared to add publicly maintained highways to the Definitive Map, as this would have involved a significant amount of work and expense. In 1960 when referring to another route that was omitted from the Draft Map, it is stated that the surveyor considered an accepted County Highway as having bridleway status. The letter states arrangements will be made for the route to be added to the Definitive Map at the review stage.
3. I consider these documents add weight to the suggestion that a signpost was in existence at the northern end of the application route (near to point A). It is a reasonable assumption that this would have been one of the signposts installed by WRDC in 1921, it most likely remained there until 1940 when it was removed. Furthermore, the applicant suggests that the correspondence shows that West Riding County Council did not consider all their accepted County Highways had vehicular rights.

###### Conclusions

1. As set out above, in order to justify the making of a DMMO to add a public right of way under sub-section 53(3)(c)(i) of the 1981 Act it is necessary to provide sufficient evidence to show that a right of way which is not shown subsists or is reasonably alleged to subsist.
2. There appears to be undisputed acceptance by the Highway Authority of the maintenance responsibility of the application route. Therefore, the route has public rights, the question is of what status the route should be.
3. I conclude that the evidence considered is suggestive of public footpath status. The Ordnance Survey maps are annotated ‘FP’ or ‘foot path’. The WRDC minutes, newspaper articles and Ramblers Association documents all refer to the application route, however, there is no specific indication on the status. Conversely, the evidence of a signpost at the northern end of the route does not assist with determining the status. The statutory declarations are significant evidence; however, they are conflicting the route is referred to as a footpath or bridlepath and as an ancient cattle driving track.
4. The application was originally for a footpath and there is sufficient documentary evidence to support these rights. Therefore, an Order should be made on the grounds that a right of way can be reasonably alleged to subsist. The making of an Order will give the opportunity for public consultation and any further evidence in support of footpath or higher rights may be discovered. In addition, if objections are made there would be an opportunity for the conflicting evidence to be tested more thoroughly and the issues determined at an inquiry.
5. In this case I consider the evidence, when taken as a whole, is sufficient to show there is a reasonable allegation of the existence of footpath rights.
6. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

###### Formal Decision

1. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act North Yorkshire County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add the public footpath proposed in the application dated 12 April 2021 and shown on the plan appended to this decision.
2. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

J Ingram

Inspector