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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: 18 February 2025** |

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| **Appeal Ref: ROW/3343410** |
| * 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 9 February 2021, the applicant claimed that part of public footpath no. 10.20/3 in the Parish of Burneston should be deleted from the definitive map and statement (DMS) for the area. * The application was refused by the Council and the applicant was formally notified on 3 April 2024. |
| **Summary of Decision: The Appeal is dismissed.** |
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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. The applicant has stated that part of the footpath is recorded on the wrong line, they do not appear to dispute that the footpath exists. However, no evidence has been submitted to support any alternative alignment, although the applicant claims the footpath runs through the southern neighbour’s property. The application is only to delete the section of footpath they believe is recorded incorrectly.
4. On the 27 March 2024 the Council resolved not to make an Order to delete part of the footpath. They concluded that the historical evidence was insufficient on which to base the making of a Definitive Map Modification Order (DMMO). In addition, the Council commented that deleting one section of the footpath would create a cul-de-sac path and break a link in an undisputed footpath between the villages of Snape and Burneston.

**Main Issues**

1. The original application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their DMS under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Section 53 (3)(c)(iii) 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 there is no public right of way over land shown in the map and statement as a highway of any description.
3. The evidence submitted in support of the application was documentary evidence. 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 the right of way should be deleted. My decision is reached on the balance of probability.
4. The case of *Trevelyan v Secretary of State for Environment, Transport and Regions (2001) EWCA Civ 266* confirms that cogent evidence is needed before the DMS are modified to delete a right of way. Lord Phillips MR stated that when considering whether a right of way that is marked on the definitive map in fact exists, the initial presumption is that it does. In the absence of evidence to the contrary, it should be assumed that proper procedures were followed. There must be evidence of some substance if it is to outweigh the initial presumption that the right of way exists.
5. In the case of *R v* *Secretary of State for Environment ex parte Kent County Council CO/2605/93*  the Inspector refused to confirm an Order under section 53(3)(c)(iii) on the basis that the confirmed order would have deleted the whole of the footpath whose position but not existence was in dispute. The judge agreed that it was not appropriate to use section 53(3)(c)(iii) to delete a way which is known to exist, but the line is uncertain.
6. The case of *McLeish v Secretary of State for Environment (2024) EWCA Civ 1562* concerned the situation where a DMMO was made to rectify an unintended shift in the alignment of a footpath that had occurred on successive definitive maps. The judge, in dismissing the appeal, stated the result of the order is that the route of the footpath will revert to what it should have been all along. The case confirmed that the conclusive evidence provision, contained in Section 56 of the 1981 Act, will apply to the current definitive map.

Reasoning

***Background***

1. The application route begins at point A on the road running through the village of Burneston, the B6285, and is signposted off the footway. It follows a south westerly direction along the driveway of the property known as Sunnyfields. The route continues past the rear garden and through pasture paddocks at the rear of the property into the open countryside. The footpath as a whole is 4 kilometres long and connects the villages of Burneston and Snape. The section of the footpath which is the subject of the DMMO application is shown between points A and B. The Council state that the footpath was signposted and in use when the applicant purchased the property and has continued to be used. The applicant has since sold the property.
2. In October 1969 planning permission was granted for the erection of 2 pairs of semi-detached dwellings and one detached bungalow on the land containing the footpath. One of the semi-detached properties is Sunnyfields. There is no evidence of a diversion order being made. The Council state that it is possible that once it was established that the footpath was to remain within the curtilage of the property, that any change of alignment was considered too minimal to warrant the making of a diversion order. Furthermore, considering the scale of the definitive map at that time (1:25000), the line showing the footpath effectively represented an approximate 20 metre width on the ground.

***Documentary evidence***

*Ordnance Survey Maps 1856 - 1972*

1. Six Ordnance Survey maps were submitted with the DMMO application, three 6 inch to 1-mile, and three 25 inch to 1-mile. A further two 6 inch to 1-mile maps, dated 1956 and 1972, have been submitted with the appeal documents. On the 6 inch to 1-mile maps it is possible to see the whole length of the footpath between the two villages. The application route is shown in a very similar way on all the maps. As the route approaches from the west up to point B, it appears as a single dashed line on all the maps apart from the 1856 map which depicts it as a double dashed line. Just before the route reaches point B it appears to curve slightly to the east, it then follows an enclosed route between solid lines, and then continues between the buildings to reach the road. The maps depict the layout of the buildings which were there prior to the current semi-detached properties.
2. There is a clear physical depiction of a route on an alignment very similar to the application route on the historic Ordnance Survey mapping. It is difficult with the small scale of the 6 inch maps; however, when examining the 25 inch to 1-mile maps, I consider that the route may have exited onto the road slightly further south than point A, but most likely still within the curtilage of what is now Sunnyfields.

*Public Rights of Way Parish Files 1972 - 1973*

1. Correspondence relating to the footpath and the planning permission granted in 1969 has been discovered in the Council’s files. In a letter from June 1972 a Council officer writes to the area planning officer. It had recently been noticed the adjacent properties had been demolished and new houses built on the land. The officer expresses concern regarding the preservation of the footpath, and states they have no knowledge of a diversion order. The officer requests that the area planning officer investigates the matter. In response the planning officer states that when the planning permission was granted it was accompanied by a letter to the developer informing them that a public footpath crosses the site, and it must not be diverted or stopped up without the consent of the County Council. This letter and a copy of the decision notice is included with the correspondence.
2. In November 1972 there is correspondence from the county surveyor to the parish council informing them that signposting of various public rights of way is required and will be carried out. They ask for the parish council’s agreement on the intended location of the signposts. Enclosed with the letter is a schedule, in reference to the footpath in question there is an entry which states, *‘owner of property has agreed to wall mounted sign position to be discussed’*. In May 1973 the parish council respond and state that the owner of the bungalow ‘Stroma’ has agreed to a signpost to be erected in the corner of their garden. The parish council enclose a copy of an agreement which is signed by the owner. The property known as Stroma is the neighbouring property adjacent to Sunnyfields. There is currently a signpost on the footway at point A, however, the Council state that the remains of the original signpost in the corner of the garden are still present.

*Aerial Photographs 1964 and 1985*

1. Two photographs were submitted by a resident of Burneston showing the area around point A before and after the construction of the semi-detached houses, one of these houses is Sunnyfields. The photographs are not taken from exactly the same angle; however, the footpath is clearly visible on both photographs going along the driveway between the houses. It does appear from these photographs that the alignment of the footpath moved slightly further north following the construction of the semi-detached houses.

*Provisional Map 1959, Definitive Map 1961, Definitive Map 2004*

1. Both of these earlier maps show the footpath in question on an alignment which appears very similar to the route as shown between points A and B, which is the alignment on the current definitive map published in 2004. Due to the small scale of the earlier maps at 1:25000 it is not possible to see the route in enough detail to see if the alignment has changed.

*Council Correspondence February 2021 – April 2024*

1. The applicant has submitted Council correspondence to provide context and background to the DMMO application. It is claimed that one email between Council officers admits that the original line of the footpath was lost and moved to a new line without a legal process. I do not consider this to be the case, the officer states the path ‘lost its place’ due to the demolition work in 1971, however, with regard to the current alignment the officer states they believe it to be lawful. I consider that the correspondence does not add any weight to the applicant’s case that the footpath does not exist.

###### Conclusions

1. As set out above; in order to justify the making of a DMMO to delete a public right of way under sub-section 53(3)(c)(iii) of the 1981 Act it is necessary to provide sufficient evidence to show that there is no public right of way over land shown in the map and statement as a highway of any description.
2. It is clear from the historic Ordnance Survey maps that there has been a route, on an alignment very similar to that between points A and B, since at least 1856. The route was subsequently recorded as a public footpath as part of the Definitive Map process and appeared on the North Riding of Yorkshire Definitive Map published in 1961. No evidence has been submitted to suggest an error was made or that the footpath does not exist.
3. It is plausible that there was a slight change in the alignment of the footpath to accommodate the semi-detached houses, which were constructed in the early 1970’s. This is evidenced by the original location of the property driveway on the 25 inch to 1-mile Ordnance Survey maps and the aerial photographs referred to above. Both of which appear to show the driveway, and therefore the public footpath, slightly to the south of point A.
4. The correspondence from the Council parish files in the early 1970’s demonstrates that the developer was aware of the public footpath crossing the site. Only five months after a Council officer raised concerns with the planning officer regarding the preservation of the footpath, there is evidence that the landowner had been contacted regarding the signposting of the route. There is no evidence of any dissent by the landowner. Therefore, I consider that it is possible that the officers at the time did not feel it necessary to pursue a diversion order.
5. The scale of the definitive map in 1961 at 1:25000 means the footpath is indicated as a thick purple line, equating to an approximate width of 20 metres. I consider that the current route on the ground, and as shown on the current definitive map published in 2004, is most likely to be within the width of the original line.
6. There does not appear to be a dispute regarding the existence of a footpath in this case, indeed the Council received many letters of objection to the deletion from users of the route. I therefore consider it is not appropriate to delete a footpath which is known to exist. If the applicant disagrees with the alignment of the footpath the correct procedure would be to apply for a public path diversion order under the 1980 Act.
7. The applicant has commented that there are direct parallels between the McLeish case, referred to above at paragraph 10, and the appeal route. However, I consider that in the McLeish case there was a distinction between the routes recorded on the successive definitive maps, and they clearly went through different parcels of land. In this appeal case I agree with the Council that there is no conflict in the recording of the footpath between the original and current definitive maps.
8. In this case I consider the evidence, when taken as a whole, on the balance of probabilities, is insufficient to show that the section of public footpath between points A and B should be deleted from the DMS.
9. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

###### Formal Decision

1. The appeal is dismissed.

J Ingram

Inspector

