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| **Order Decision** |
| Site visit made on 11 March 2025  |
| **by J Ingram LLB (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 22 April 2025** |

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| **Order Ref: ROW/3319526**  |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Restricted Byway 25.63/2 Broates Lane Middleton and Restricted Byway 25.73/4 Broates Lane Pickering Modification Order 2021.
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| * The Order is dated 23 February 2021 and proposes to modify the Definitive Map and Statement for the area by upgrading a footpath to a restricted byway as shown on the Order plan and described in the Order Schedule.
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| * 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.
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| **Summary of Decision: The Order is confirmed.** |
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Preliminary Matters

1. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan which is in two parts.
2. This case concerns the proposed upgrade of a route from public footpath to restricted byway status on the Definitive Map and Statement (DMS). The route, known as Broates Lane, consists of footpath no. 25.63/2 in the parish of Middleton (points A-B) and footpath no. 25.73/4 in the parish of Pickering (points B-C-D-E-F). The route commences from its junction with Middleton Lane (point A) and follows an easterly then south easterly direction to join Swainsea Lane (point F). The parish boundary is at point B. North Yorkshire County Council are the Order making authority (OMA) and are supporting the Order. Submissions in support of the Order have also been submitted by a representative of the British Horse Society (BHS) and the Byways and Bridleways Trust (BBT), I shall refer to them as the supporter.
3. The objector has confirmed that they do not oppose the confirmation of the Order in relation to the upgrading of footpath no. 25.73/4 in the parish of Pickering (points B-C-D-E-F). Their objection only relates to footpath no. 25.63/2 in the parish of Middleton (points A-B).

The Main Issues

1. The OMA made the Order under Section 53(2)(b) of the 1981 Act on the basis of an event specified in sub-section 53(3)(c)(ii). As a result, the main issue is whether the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that the footpaths should be upgraded to restricted byways, and that the DMS requires modification.
2. Some of the evidence in this case seeks to show the Order route is a public carriageway. However, Section 67 of the Natural Environment and Rural Communities Act (NERC) 2006 extinguished unrecorded public rights for mechanically propelled vehicles unless one of the exceptions contained in that section of the Act applied. As the application was made after the cut-off date of 20 January 2005 and no other exceptions apply, the Order was made for the status of restricted byway.
3. The evidence submitted in support of this case is documentary evidence and user evidence. As regards to documentary evidence, Section 32 of the Highways Act 1980 (the 1980 Act) requires that I take into consideration 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. My decision is reached on the balance of probability.
4. In addressing the user evidence, I must consider whether it is sufficient, along with the documentary evidence, to show dedication of the route as a restricted byway has occurred under common law. In addressing this possibility the issues I would need to examine are whether, during any relevant period, there was express or implied dedication by the owner of the land in question (having the capacity to dedicate a right of way), and whether there is evidence of acceptance of the claimed restricted byway as demonstrated through use by the public.
5. I may also need to determine whether presumed dedication has arisen under the tests set out in section 31 of the 1980 Act. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way as a restricted byway was brought into question

Reasons

**Documentary Evidence**

*Cropton Inclosure Award 1766 (Middleton Parish), Pickering Inclosure Award and Plan 1789/1790*

1. The Cropton Inclosure Award is submitted in relation to the claimed route between points A and B in the parish of Middleton. There is no map with the award, however, the OMA contend that it is possible to identify locations referred to in the award text by reference to names on the Ordnance Survey (OS) mapping. The name ‘Middleton Old Lane Gate’ is believed to be the same place named on the 1854 OS map as ‘Middleton Lane Gate’ (point A).
2. The award describes a ‘good and sufficient highway or road’ from Middleton Old Lane Gate to Lydgate. There are two other roads described as extending from Middleton Old Lane Gate which the OMA have identified on the OS map. As the route, from Middleton Old Lane Gate to Lydgate, is described on the north side of several old inclosures, the OMA believe this is referring to the claimed route between points A-B. The location of ‘Lydgate’ is not certain, I consider the name may originate from ‘Ludgate’ meaning ‘back gate’ or ‘postern’. I consider it is likely that the award is referring to the claimed route (A-B).
3. The award sets out the road, 12 yards wide (36 feet), for the named owners of the inclosures and their heirs only. It is also noted that the word ‘public’ does not precede the word ‘highway’ in the description of this road, which it does for the other awarded roads extending from Middleton Old Lane Gate. I consider the use of the words ‘highway or road’ would generally be referring to a public route, however, as this particular document clearly sets out the road for the owners and their heirs only, I consider that in 1766 the route A-B was likely a private road.
4. The Pickering Inclosure Award and Plan 1789/90 refers to the claimed route between point B at the parish boundary and point F, where it joins what is now known as Swainsea Lane. It is named as ‘Nova Scotia Road’ and is described as a public carriage road of a width of 40 feet. The objector accepts this evidence for this part of the Order route. I consider this is significant evidence and substantial weight can be attributed to it.
5. The description of the route B-F in the Pickering Inclosure Award begins ‘commencing at the end of a certain ancient road’. The OMA state it is unlikely the commissioners would set out a public carriage road as a cul-de-sac. They contend that by the time of the Pickering Inclosure Award in 1790 it is reasonable to suggest the route was used as a through route. Furthermore, there is nothing at the parish boundary which could be considered a place of public interest. The objector disagrees and suggests that the ‘ancient road’ referred to could be footpath no. 25.73/5 which joins the claimed route from the south at point B. The objector claims this footpath is a named lane and is consistently shown as a track on the OS maps. The objector submits that the word ‘ancient’ in this context simply means ‘former’ or pre-existing’.
6. The supporter refers to the ‘thoroughfare principle’ and contends that an ancient way, between two public ways, is itself public. They refer to the case of *Fortune and others v Wiltshire Council and Taylor (2010) EWHC B33 (Ch)* where they claim this principle was upheld. The supporter appears to suggest that because there is evidence that part of the route is a public highway, that all of it is. The objector states that this principle is confined to situations where the origins of the route are unclear, and it can be rebutted from other facts. In this case, from the two inclosure awards, we do know the origins of both parts of the Order route. The objector contends there is no evidence that route B-F existed prior to the inclosure award, it was not therefore an ancient thoroughfare. The new road B-F, simply connected to the existing private road.
7. I consider that it is more likely than not that route A-B was set out as a private road in 1766. I agree with the objector that the wording ‘ancient road’ in the Pickering Inclosure Award may simply mean an existing road. The Award and Plan of 1789/90 are clear that route B-F should be set out as a public carriage road. I agree with the OMA that it would be unusual for the commissioners to set out a public carriage road as a cul-de-sac, however, the Pickering Inclosure Award in isolation cannot be evidence of public rights on the route A-B. I consider it more likely than not that the Pickering Inclosure Award is referring to the route A-B when it describes ‘a certain ancient road in the Parish of Middleton’. I consider it is unlikely to be referring to footpath no. 25.73/5, which does appear to be within Pickering parish and is depicted as a narrower track, possibly of less importance, than route A-B. I consider that once route B-F had been created, and the route became a connection between two public highways, it is possible that it was used by the public. At 36 feet wide, route A-B would most likely have been suitable for use on horseback and by horse and cart. Although the creation of a through route may be suggestive of public rights during this time period, the Pickering Inclosure Award will need to be considered alongside the other evidence when determining the status of route A-B.

*County Maps 1817 - 1834*

1. The following maps have been submitted, Greenwood 1817, Cary 1825, Teasdale 1827 and Fowler 1834. The OMA contend that the full length of the Order route is consistently shown as a through route from 1817. They state that the maps were sold to the public and cartographers were likely to have included routes the public were able to use, which therefore indicates public highway reputation at the time. The objector disputes the comments made by the OMA, they state that the maps are small scale and inconsistent in their notation. The objector contends that the maps were prepared for sale to the public as opposed to being a definitive record of public status. They also state that the maps have been held to show private ways as well as public.
2. Fowler’s map key indicates the route is a ‘cross road’, and Cary’s map key states ‘parochial road’. The objector states that the depiction of the route as a parochial road is consistent with a private road for local inhabitants but not the wider public. I consider these maps to be supportive of a public through route at the time. It is reasonable that the depiction of this route on these small scale maps that were sold to the public is indicative of a public status higher than footpath. I consider the representation of a parochial road to be indicative of a road within the parish and it may be supportive of the route forming part of the local road network.

*Sales Plans c1860’s*

1. A sales plan of the property known as Cottage Leas on Middleton Lane, to the south of point A, shows the first short section of the Order route from point A. The route is shown extending from Middleton Lane and it is annotated ‘Nova Lane’. This may have been included to indicate that access is available from Nova Lane, or simply to show the location of the property in relation to surrounding routes. Limited weight can be given to this evidence with regard to the public status of the Order route as no other information is given.

*Tithe Map 1848*

1. The Tithe map shows the eastern section of the Order route between points B and F. It is depicted as double dashed lines and runs through three parcels. Parcel number 1869, between points B and D is shown as a narrower strip parcel with the double dashed lines running through it. The apportionment describes the plots as pasture or arable, tithes are payable on these plots. The tithe map indicates that a route was present on the ground, although no inference can be drawn on the public status of the route.

*OS First Edition Map 1-inch to 1-mile 1859*

1. The 1-inch to 1 mile first edition OS map 1859 clearly shows a route with two solid lines on the same alignment as the Order route between points A and B. The double solid lines continue into Pickering parish as far as the property, between point E and F the route is depicted between a solid line and a dashed line, indicating it was unfenced on the northern side. The objector states that this may be indicative of a track on the ground but is not evidence of public rights. I consider this map does show a route to be in existence on the ground at the time. It may be indicative of public rights higher than footpath, due to the scale of the map only routes of some importance were depicted at this time.

*OS Mapping 1854 - 1947*

1. The 6-inch OS map dated 1854 depicts the Order route between two solid lines between points A and D. There is a short gap at the property and then a route, depicted as a double dashed line, is shown between approximately point E and point F, this is named as Nova Scotia Road. The route in Middleton parish is named as Nova Lane, for a section of the route extending from point A there are double dashed lines within the solid lines, this most likely indicates that this part of the route had an improved surface.
2. The 25-inch OS map dated 1893 no longer shows a gap in the route at the property, it therefore appears a through route. Once again between points A and D the route is depicted between two solid lines, the continuation is shown as two dashed lines. Route A-B in Middleton parish is now named as ‘Broates Lane’, and this section is coloured sienna the same as Middleton Lane and what is now known as Swainsea Lane, this most likely indicates surfacing on these routes.
3. The subsequent editions of the 6-inch and 25-inch OS maps show the Order route in the same manner, with Broates Lane shown in Middleton parish and the double solid lines extending from point A to point D; and Novia Scotia Lane being named as the continuing route from point D and shown as double dashed lines.
4. The 1-inch OS map dated 1898 again shows route A-D between double solid lines, and the route between points E and F is shown between a solid line and a dashed line. The key indicates that these are unmetalled roads, fenced and unfenced respectively. The objector states this does not give an indication of public rights.
5. The 2 ½ inch OS map dated 1947 shows the Order route as a through route, again the section A-D is shown fenced, and D-F is unfenced on the northern side. The key indicates the route is classed as ‘*Other Roads (not classified by Ministry of Transport)*’. This is opposed to footpaths or bridle roads which are given the annotations F.P and B.R. on this map.
6. I consider that all the OS maps from 1898 onwards consistently record the physical existence of the Order route in its entirety. The maps show that route A-B has been depicted the same since 1854, it is shown of sufficient size to accommodate vehicular traffic and has had an improved surface. From 1888 OS 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. Therefore, the OS maps after this date are of limited assistance regarding the status of the route. Although in this case as the route between points A and B has been shown consistently in the same manner, it could still be useful evidence in determining the status, particularly when considered in conjunction with the other evidence.

*OS object name book 1890’s revised 1910*

1. The object name book describes Broates Lane (route A-B) as ‘*a parish road extending in an easterly direction from Middleton Lane and ending at the west end of Nova Scotia Road’.* Nova Scotia Road (route B-F) is described as ‘*a public road which commences at the western boundary of Pickering parish leading in an easterly direction along the north side of Broates to the south end of West Moor Road’.*
2. The supporter claims that the reference to Broates Lane being a parish road indicates it was a local road, used by the public and maintained by the parish. The objector states that this evidence supports their case that route A-B and route B-F are of different status and not one throughfare. They claim that ‘parish road’ should be contrasted with ‘public road’ and this may be an indication that route A-B was available to the parish, or the inhabitants of local properties, but not the general public.
3. I consider the OS object name book to be significant evidence of the reputation of the Order route at this time. Clearly route B-F is considered to be a public road. There is dispute over the description of route A-B, I consider in this context a ‘parish road’ indicates a road that is considered a public road. It may have been maintained by the parish and used by the residents and landowners within the parish, however, there is no indication that there were restrictions on general public use. The object name book does not record route A-B as a private road.

*OS Boundary Remarks 1892*

1. Where the parish boundary crosses the Order route at point B the extract shows the route is bounded by a wall as there in an annotation F.W. meaning ‘face of wall’. The route is depicted as double dashed lines inside double solid lines, which may be an indication of a track with verges each side. The document does not provide any evidence of the status of the route.

*Finance Act 1910 Records*

1. It is not clear whether the Finance Act plan submitted is the working copy or record plan. The plan does show Broates Lane (between points A and D) as separate from the adjacent hereditaments, it is bounded with red edging and given the parcel number 474. The valuation book shows that this parcel is owned and occupied by the owners of the adjacent hereditaments. A deduction in the valuation is made for an easement, there is no deduction for a public right of way. The remainder of the Order route between points D and F appears to be within hereditament number 1110, for which no valuation book entry is provided. Accordingly, I consider that the Finance Act documents are of no assistance in determining the status of the route D-F; for route A-D the documents indicate the route was jointly privately owned with no indication of any public status.

*Commercial maps 1920’s*

1. Four maps have been submitted all c.1920. Story’s map is of poor quality, it does show a route on the alignment of the Order route, however, it is not clear if it is a through route. Horne’s map shows the route as ‘other roads’, there is however a small gap in the route at the property. Bacon’s map shows the route as a through route. The Geographia map also shows it as a through route and the key indicates it is depicted as ‘other roads (subject to a right of way)’. The objector states that some private routes are shown on these maps, in addition some other footpaths are also shown as roads. The objector contends that these maps are not of assistance on whether the public enjoys any more than footpath rights over the route A-B.
2. I consider that these maps were produced for practical purposes, particularly for cyclists and road users. They are consistent with the earlier OS maps which indicate a route that was capable of carrying vehicular traffic and was connected to the public highway network.

*Definitive Map records*

1. The Order route is currently recorded on the Definitive map as a public footpath, however, no records from the Definitive Map process during the 1950’s have been submitted. The objector has submitted a letter dated 13 January 1956 from the County Council to Pickering Rural District Council, which states that the County Council have added Broates Lane to the survey. This seems to suggest that the parish council did not claim the route during their survey. There are two possible explanations for the route not being claimed; either that the parish believed it was not a public right of way, or that it was believed to be a public right of way of a status higher than appropriate for inclusion on the DMS.

*Conclusions on the documentary evidence*

1. The Pickering Inclosure Award clearly sets out the route B-F as a public carriage road, which in the absence of any subsequent stopping up order, is substantial evidence of the status of that section of the Order route.
2. There is no single piece of evidence which is as significant regarding the status of the section A-B. Many of the documents considered are consistent with the Order route being either a public vehicular way or a private occupation road. Some of the documents are suggestive of public status, some of private status. My task is to assess the relevance and weight of each piece of evidence and to reach a conclusion on a balance of probability. I can only undertake this exercise on the basis of the evidence before me.
3. I consider that the route A-B is an ancient lane, it appears to have been in existence since at least 1766, originally set out as a private road for the owners of the adjacent inclosures. However, following the Pickering Inclosure Award creating a continuation in 1790, and therefore forming a link between two public highways, it is likely that the route gained greater significance in the late eighteenth century, and this continued in the nineteenth century. It would appear that through the twentieth century use as a vehicular route declined, it may be that this was due to the rise of the motor car requiring an improved surface.
4. The OS and all other mapping evidence prior to 1929 demonstrates that, from the earliest records, the Order route A-B had the character and physical characteristics of a vehicular way. It has been depicted as open at both ends to routes which are recognised vehicular highways, and this is suggestive of the Order route being an integral part of the local highway network.
5. Whilst there is no direct evidence of status, the OS Object Name Book from the 1890’s and revised in 1910 does refer to the Order route. Whilst recognising that it was not the purpose of the Object Name Book to determine the status of routes shown on the OS, the description does indicate that the Order route was considered to be a road.
6. There is some conflicting evidence, the Finance Act records of 1910 show the route between points A-D to be in private ownership and no deductions are made for a public right of way.
7. The principle ’once a highway, always a highway’ means that if there is sufficient evidence to give rise to an inference of dedication at an earlier date, the route will retain that status unless there is evidence of a subsequent stopping up or diversion.
8. There is some consistency to the evidence which, when taken together, is persuasive. The significant features are that the Order route as a whole links two vehicular highways. It is shown as a through route on maps, including Greenwood’s and Cary’s maps, which were intended to be used by the public. I consider it unlikely that route B-F would have been set out as a public carriage road if it was considered to be a cul-de-sac. Route A-B is depicted in the same manner as the local vehicular highway network. The OS maps of 1854 and 1893 indicate that route A-B had an improved surface.
9. The standard of proof that I am required to apply is the balance of probability. I conclude that the cumulative weight of the evidence is sufficient to satisfy me that it is more probable than not that in the late eighteenth century and nineteenth century the Order route was considered to be, and was used as, a vehicular highway such that dedication at common law can be inferred.
10. Having concluded that the Order route was an historic vehicular highway the evidence that the Order route may have been viewed differently in the twentieth century cannot detract from that status.

**NERC**

1. The effect of NERC section 67, subject to certain exceptions, was to extinguish the right for mechanically propelled vehicles to use an existing public right of way which was not shown in a definitive map and statement, or was shown only as a footpath, bridleway or restricted byway.
2. The Order route is shown in a definitive map and statement, but only as a public footpath. In consequence the provisions of section 67 are engaged.
3. As none of the exceptions set out in section 67(2) to (8) apply and in consequence the right to use the Order route with mechanically propelled vehicles has been extinguished and the correct status of the route is a restricted byway.

**User Evidence**

1. From the submissions I understand that Broates Farm, including the Order route, was previously owned by the Whitehead family. There is reference to a tenancy agreement dated 1973, they may have owned it prior to this. The Russell family were tenants of the farm from 1941 until 2012 when the farm was sold to the current owners. It has been stated by the applicant, who is a former occupier of the land and related to the previous tenant, that the Russell family never stopped the public from using the right of way on foot, horseback or cycle. There has been nothing produced that shows the owner did not have the capacity to dedicate a restricted byway over the Order route if he or she so wished.
2. Fifteen user evidence forms (UEF) have been submitted; however, the OMA have not carried out interviews with the witnesses to corroborate their evidence. The objectors state that the evidence is provided by friends and acquaintances of the applicant. They claim that permission to use the route was given to their friends and some of the statements provided, that are not relied on by the OMA, reference being given permission to use the route. They further state that some of the evidence is from members of the same family. The applicant states that they may know some of the people from the locality who used the route, but only two are friends.
3. Clearly there are conflicts with the user evidence that cannot be resolved by the written submissions. As I have concluded above that the Order route was an historic vehicular highway, it is not necessary for me to reach a decision on the user evidence.

Overall Conclusion

1. Having regard to the above and all other matters raised I conclude, on the balance of probabilities, that there is sufficient evidence for the Order route to be upgraded to a restricted byway. Therefore, the Order should be confirmed.

Formal Decision

1. The Order is confirmed.

J Ingram

INSPECTOR



