

NORTH YORKSHIRE COUNTY COUNCIL

**COUNTY COUNCIL'S PLANNING AND REGULATORY FUNCTIONS SUB
COMMITTEE**

26 NOVEMBER 2010

**APPLICATION TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND
STATEMENT FROM AGRICOLA BRIDGE ALONG THE RIVERSIDE AT
BROMPTON ON SWALE**

1.0 PURPOSE OF THE REPORT

- 1.1 To advise Members of an application for a Definitive Map Modification Order the effect of which if confirmed would be to add a footpath to the Definitive Map and Statement from Agricola Bridge along the riverside at Brompton on Swale.

A location plan is attached to this report as **Plan 1**. The route referred to is shown by a broken black line and is marked A – B on the plan attached to this report as **Plan 2**.

- 1.2 To request Members to authorise the Assistant Chief Executive, Legal and Democratic Services to make a Definitive Map Modification Order.

2.0 THE COMMITTEE'S RESPONSIBILITIES

- 2.1 The Committee in considering the Modification Order application acts in a quasi-judicial capacity. It is fundamental that consideration and determination of an issue is based on the evidence before the Committee and the application of the law. The merits of a matter have no place in this process and so the fact that a decision might benefit or prejudice owners, occupiers or members of the general public, or the Authority, has no relevance to the issues which members have to deal with and address.

- 2.2 The Committee's decision whether to "make" an Order is the first stage of the process. If Members authorise an Order being "made", and there are no objections to the Order, the County Council can "confirm" the Order. However, if there is objection to an Order that is not subsequently withdrawn, only the Secretary of State would have the power to decide if it should be "confirmed". It would then be likely that a Public Inquiry would be held, and the decision whether or not to confirm the Order would rest with the Secretary of State.

3.0 LEGAL ISSUES

- 3.1 Under Section 53 of the Wildlife and Countryside Act 1981 the County Council has a duty to make a Modification Order to modify the Definitive Map and Statement where evidence is available, which when considered with all other evidence, indicates that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist.
- 3.2 Under Section 31 of the Highways Act 1981 a statutory presumption arises that a way has been dedicated as a highway on proof that the way has actually been enjoyed by the public, as of right, and without interruption for a full period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it. That period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

4.0 BACKGROUND

- 4.1 A formal application was submitted by Brompton on Swale Parish Council on 12 July 2006, following challenges to users of the path by the tenant of one of the fields crossed by the claimed footpath. Users were verbally challenged and the route blocked in September 2004, following an attack on livestock in the field. The application originally included evidence of use forms completed by 6 people.
- 4.2 Following further challenges to attempted use of the route between 2004 and 2009, another 53 user evidence forms were submitted in spring 2010.
- 4.3 When the investigations into the application commenced in spring 2010, in accordance with required procedure, landowners affected by the application were contacted and invited to submit any evidence relevant to the application. The current owners and tenants of the central field (marked Field 2 on Plan 2) wrote with objections to the application. No replies were received from the owners of the other two fields (Field 1 and Field 3). In June 2010 Field 1 was sold. The new owner contacted the County Council Public Rights of Way team about the claimed footpath, but had no evidence to submit to the investigation. At the time of writing this report (October 2010), Field 1 is currently up for sale again.

5.0 EVIDENCE IN SUPPORT OF THE APPLICATION

- 5.1 A total of 59 evidence of use forms were completed by local residents and submitted to the County Council relating to the route along the riverside from Agricola Bridge. 57 of these forms are valid (one form gave no dates of use, and another had no plan drawn or any dates of use, so these two forms were not taken into consideration).

- 5.2 Of these 57 witnesses, 10 stated that they had been given permission to use the path; therefore these forms were also withdrawn from the supporting evidence.
- 5.3 This leaves 47 witnesses, of whom 27 people have at least 20 years use of the footpath prior to 2004 when the status of the route was brought into question by the challenge to the public from the current tenants. A further 18 people state they have used the path for part of this 20 year period.
- 5.4 20 people state that they have never been stopped, challenged or prevented from using the path.
- 5.5 7 people state that they were stopped when using the path but gave no date (4 were stopped by the tenant/occupier, the other 3 by the path being physically blocked). 19 people state that they have been stopped from using the path at various times since 2004 (either verbally or by the route being blocked, first when it was closed for a short time in 2004/2005, then when the path was permanently blocked in 2009).
- 5.6 One person states that between 2005 and 2010 there were notices asking for dogs to be kept on a lead, but that the notices have now been removed along with the stiles.
- 5.7 Apart from the 7 people who gave no dates of when they were challenged, none of the users state that they were challenged or stopped before the current landowners/tenants took over Field 2 in 2000.
- 5.8 The reasons given for using the claimed route include; walking the dog, exercise, recreation, and as part of longer walks to Scorton and Catterick, which are all bone fide reasons for using a public right of way. All the witnesses state that they had seen other people using the route.
- 5.9 Of the 47 people who used the route without permission in the belief that it was public, one person states that they used the path once or twice a year, 4 people used it up to 10 times a year, and 42 people have used the path more than 10 times a year (two of these people say they used it daily).
- 5.10 Reasons given in the user evidence forms for believing the route to be public include:
- It is well defined and has been used by local people for many years, and/or local people told new residents it was public (36 people gave this reason)
 - A fence separated the path from the rest of the field (2 people gave this reason)
 - There were stiles present along the route (12 people gave this as a reason)

6.0 EVIDENCE AGAINST THE APPLICATION

- 6.1 Consultations were undertaken with the statutory consultees and landowners affected by the application. No comments or evidence were received from the current or previous owners of Field 1, or from the owner of Field 3. The previous owner of Field 2 is deceased.
- 6.2 The Darlington Brown Trout Angling Association, whose members have access rights along the claimed route, was also consulted. Although their members are not in favour of the route being public, they had no evidence in support of or against the application.
- 6.3 The current owners and tenants of Field 2 made representation against the application, which can be summarised as follows:-
- 6.3.1 The current owner of Field 2 (who purchased the field in 2000) also owns the nursery overlooking the claimed path. The tenant of Field 2 has worked at the nursery for 22 years. Both the tenant and current owner say they remember the previous owner of Field 2 complaining about dog walkers on several occasions on his daily visits to the nursery. They say that on one occasion he also told a dog owner to get off his land after he saw the dog attacking his livestock.
- 6.3.2 The tenant states that when the previous owner had Field 2 she saw very few people using the claimed riverside path, as they “seemed reluctant to walk in a field with beasts”. She claims she has a good view of the path from the nursery (which was confirmed by the Definitive Map Officer following a site visit to see the path on 4 May 2010).
- 6.3.3 After purchasing Field 2 in 2000, the current owners put up stockproof fencing, creating a walkway around the edge of the field with stiles at each end to allow access for the fishermen, and to keep the horses from getting out of the field when the river is low. The fencing contractor told the owner he could get money from the Parish Council for the stiles but the owner has no recall of receiving any money.
- 6.3.4 The tenants of Field 2 state that they have challenged everyone they have seen using the path, and although some users say they have had permission from the owner, the owner of Field 2 told the tenant that he has not given permission to anyone to use the path.
- 6.3.5 In 2004 the tenants learnt that the Parish Council had been telling people that the path was public, and had shown it as such on the parish website. After explaining to the Parish Council that it the path was private the route was removed from the website.

- 6.3.6 On 10 September 2004 one of the tenants' pygmy goats was attacked by a walker's dog in the field and had to be put down. That evening the tenants blocked off the stiles (with agreement from the owners and the fishermen). After this there were many objections from local residents, and the tenants have had problems on several occasions since then with the fence wire being cut, signs pulled off and stiles "knocked out of shape". There have also been incidences of violence and vandalism where the police have been involved, and the tenants are concerned about similar incidences happening in the future if the public have access across their land. This has culminated in the route being permanently blocked off in 2009. The tenants state that the previous owner also had problems with the fence between his field (Field 2) and his neighbour's field (Field 3) being cut.
- 6.4 One person who completed a user evidence form supports the case against the path being a public right of way, by stating that the route is private and that he walked it with permission from the current owner of Field 2 (as stated in paragraph 5.2). Nine people who completed evidence forms stated that they had used the path with the permission of either the current or previous owners or current tenants of Field 2, although they all also stated that they believed the route to be public.

7.0 HISTORICAL EVIDENCE

- 7.1 No historical documentary evidence showing a public right of way along the claimed route was submitted with the application.
- 7.2 Investigation by Definitive Map Officers revealed no evidence that the route was a historic highway.

8.0 COMMENTS ON THE EVIDENCE

8.1 Comments on the evidence in support of the application

- 8.1.1 The Evidence of Use forms indicate that a number of people have used the claimed route along the riverside between Points A and B on the attached plan for a period in excess of 20 years without let or hindrance until use of the route as a public right of way was called into question by challenges to users in September 2004.

8.1.2 About half of the users (26 out of 47 users) have acknowledged some form of blockage or challenge whilst using the route, although mostly this has been since 2004 (when the status of the path was called into question following the livestock attack incident). The seven users who did not give a date of when they were challenged or prevented from using the path all refer to being stopped by the tenant or by physical barriers. As no other users have mentioned physical barriers prior to 2004, and, as far as we are aware, previously the fields were all owner occupied and not tenanted, we can perhaps assume that these challenges to use referred to by the seven witnesses also occurred since 2000, when the current owners and tenants took over Field 2.

8.1.3 After discounting the people who believe the route to be public, but who had used it with permission, there are 45 people whose evidence shows use of the path uninterrupted and as of right cumulatively over a 20 year period prior to the status of the path being brought into question in 2004. This is fairly strong evidence to show “presumed dedication” of public rights along the route before the current owners and tenants of Field 2 brought use of the way into question.

8.2 Comments on the objections to the application

8.2.1 The comments made by the current landowners and tenants of Field 2 (in paragraphs 6.3.2, 6.3.4, 6.3.5 & 6.3.6) can be considered as evidence against the application, as they demonstrate that the current landowners and tenants of Field 2 believe there is not a public right of way along the route A to B claimed by the applicant. Their actions since acquiring the field, by challenging users and blocking up and removing stiles represent a clear challenge to users. A number of user evidence forms also confirm this, as many of them state they have been stopped or challenged since the current owners and tenants took over Field 2. The only counter to this is that one person has said there were signs asking people to keep their dogs on leads.

8.2.2 The 10 user evidence forms in which witnesses state that they used the route with permission can also be considered as evidence against the application, as use with permission is a use “by right” rather than being use “as of right” that has to be demonstrated for an application of this type to succeed.

8.2.3 The tenants are understandably concerned about the possible consequences of people and dogs having access to their fields after the incidents of livestock attack, violence and vandalism. Whilst we can sympathise with this, these are not issues that are relevant when determining an application for a Definitive Map Modification Order.

9.0 SUMMARY

- 9.1 Whilst the current owners and tenants believe there is not a public right of way along the route A – B as claimed, and since they acquired the land crossed by the route they have acted in support of this belief, the public appear to have used this route on foot, apparently unhindered, for bona fide journeys, in excess of the statutory period of 20 years prior to the status of the route being brought into question.
- 9.2 To accord with the provisions of Section 53 of the Wildlife and Countryside Act 1981 (as described in 3.1 above), the County Council needs to be satisfied that a claimed route **subsists or is reasonably alleged to subsist** before it “makes” an Order. Officers are satisfied that the evidence available shows that a public footpath along the claimed route is reasonably alleged to subsist, therefore this test has been satisfied.
- 9.3 For an Order to be “confirmed”, a more stringent test needs to be met. An Order will only be confirmed when either the Secretary of State (in the case of an opposed Order) or the County Council (in the case of an unopposed Order) is satisfied that the right of way has been shown to exist **on the balance of probabilities**. If the Order is made and then opposed, the process will allow the evidence to be fully tested to determine whether or not public rights do exist.

10.0 RECOMMENDATION

- 10.1 The Committee authorise the Corporate Director, Business and Environmental Services to make a Definitive Map Modification Order for the route concerned to be shown on the Definitive Map as a public footpath, and in the event that formal objections to that Order are made, and are not subsequently withdrawn, to refer the Order to the Secretary of State for determination and in doing so to exercise powers delegated to him under the County Council’s Constitution in deciding whether or not the County Council can support confirmation of the Order.

D. BOWE

Corporate Director - Business and Environmental Services

Background papers:

DMMO application dated 12 July 2006

Evidence submitted in support of, and against the application

The documents are held on a file marked: County Council's Planning and Regulatory Functions Sub Committee, 26 November 2010, Application to add a footpath to the Definitive Map along the riverside at Brompton-on-Swale, Richmondshire, which will be made available to Members at the meeting.

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