

NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE

25 FEBRUARY 2011

PUBLIC FOOTPATH N° 05.5/105, SHAKEY BRIDGE, BENTHAM

MODIFICATION ORDER 2010

1.0 PURPOSE OF THE REPORT

- 1.1 To advise Members of an Definitive Map Modification for the addition of Public Footpath N° 05.5/105, to the Definitive Map at Shakey Bridge, Bentham.

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

- 1.2 To inform Members that the matter will be referred to the Secretary of State for a decision on whether or not to confirm the Order, and to request Members to decide what stance North Yorkshire County Council should take within its submission to the Secretary of State.

2.0 BACKGROUND TO THE ORDER

- 2.1 On 7 April 2006 Dr A M Horn of Bentham submitted an application under Section 53 of the Wildlife and Countryside Act 1981 for a Definitive Map Modification Order for the addition of a footpath to the Definitive Map and Statement.

- 2.2 The evidence that was originally submitted in support of this application consisted of six Evidence of Use forms, although a further five forms were later submitted.

- 2.3 After investigations into the ownership of the land over which the claimed right of way is located, it was established that part of the land is owned by Rail Track. Legal advice was taken, and an interpretation of Section 57 of the British Transport Commission Act 1949 was made that public rights could not be acquired across land held by the British Transport Commission or its successors. Despite the evidence of use of the route submitted with the application, officers felt that the interpretation of the British Transport Commission Act meant that there was no alternative but to reject the application. The application was formally rejected on 15 June 2006.

- 2.4 On 23 June 2006, the applicant submitted an appeal against the decision made by North Yorkshire County Council to the Secretary of State, who appointed an Inspector to review the evidence.
- 2.5 The Inspector came to the view that that the British Transport Commission Act would not make it an offence to use the land on which the claimed route lies, as the land in question was not railway lines, sidings, or a railway embankment, and did not form part of an access or approach to a station or a goods yard; and therefore rights could be acquired by usage. The Inspector upheld the rejection of the application, but on the grounds that the initial evidence of use that was made available to him was limited.
- 2.6 The Secretary of State shared the Inspector's view that the British Transport Commission Act would not prevent the acquisition of rights, and further, believed that there was sufficient evidence of use provided by the applicant to suggest that an Order should be made. A copy of the Secretary of State's Decision letter is attached as Appendix. 1.
- 2.7 The Secretary of State therefore directed the County Council to make a Definitive Map Modification Order, which was sealed on 16 August 2010, and was advertised from 14 October 2010 to 25 November 2010. A copy of the Order and Order plan is attached as Appendix. 2.

3.0 REPRESENTATIONS MADE TO THE ORDER

- 3.1 No representations were received in support of the order.
- 3.2 One objection to the order was received from Mr P Kellaway, who owns part of the land crossed by the route. Mr Kellaway's objection was made on the basis that
- The eastern end of the claimed route is not by public access but used by anglers to provide access to the river.
 - The field through which the path runs has been in the ownership of two parties and farmed by at least two tenants over a similar period and who have given many parties the right to use the land. Mr Kellaway states that he has given permission to seven households, and his late wife gave permission to others.
 - Landowners do not live near to the field, therefore they are unable to challenge people using the route.
 - Path users are walking on top of a wall/embankment built to control the erosion of the river, raising issues of ownership of the structure, and of safety of walkers due to a 3m drop to one side.

- In 2006 the Lune Habitat Trust considered that the river bank was of high conservation value and erected fencing to protect the banking from grazing and allow vegetation regeneration.
- The value of the wildlife is also recognised by the Woodland Trust, who in December 2010 provided saplings and deer stock fence to create a wildlife corridor linking the river bank to the land above the valley. The Natural Environment and Rural Communities Act 2006 s40 states: “Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.”

3.3 The landowner states that he and previous tenants of the land have given permission to a number of people to use the land, however none of the witnesses who completed Evidence of Use forms indicated that they had been given permission to use the route. Whilst safety of the public is of concern, this is not an aspect that can be taken into consideration. His comments relating to conservation of wildlife are also not relevant to the consideration of the application.

4.0 SUMMARY

4.1 This application was originally rejected due to officers’ belief, in the light of advice, that rights could not be claimed over land held by the British Transport Commission or their successors (eg, Network Rail). On this basis no consideration had been given to the Evidence of Use forms that had been submitted with the application.

4.2 After receipt of the Secretary of State’s Decision letter and the accompanying Inspector’s report, further advice was sought from Legal Services, and the interpretation of the implications of the 1949 Act made by the Secretary of State was confirmed. The effect of the changed approach to the application is that officers have reconsidered the application, giving due regard for the evidence of use of the route, and the landowner’s objection.

4.3 The 11 Evidence of Use forms indicate that the public have used the route without interruption for a full period of 20 years. Nine of the witnesses who have completed the forms state that they have used the route for 20 years or more, with the remaining two having used the route for 17 and seven years respectively. The witnesses were not prevented from using the route until fences were erected in 2006, and none of the witnesses were given permission from the landowners to use the route. Landowners have not provided evidence of any steps that have been taken to prevent use of the route, nor have they denied that the route was used by the public.

4.4 On balance, the evidence received suggests that a footpath is reasonably alleged to subsist, and without the confusion of the interpretation of the British Transport Commission Act officers would have recommended the making of a Modification Order at the outset.

5.0 CONFIRMATION OF THE ORDER

- 5.1 There is an outstanding objection to the Order, and only the Secretary of State can determine whether or not the Order should be confirmed. However, the County Council needs to decide what stance it wishes to take in its submission to the Secretary of State.
- 5.2 Officers now support that the Order should have been made, and, given the strength of the evidence of use of the route, and the absence of any evidence that any of the landowners took any steps to prevent access by the public, or to draw to the public's attention that the route was intended to be permissive only, it is considered that the County Council should support the confirmation of the Order.

6.0 RECOMMENDATION

- 6.1 It is therefore recommended that:

The Committee authorise officers to support the confirmation of the Order within the County Council's submission to be made to the Secretary of State, and that in the event of any Public Inquiry that may be held, that officers retain that stance.

DAVID BOWE
Corporate Director, Business and Environmental Services

Appendices:

Appendix 1 – Secretary of State decision letter in respect of a claimed public footpath at Bentham

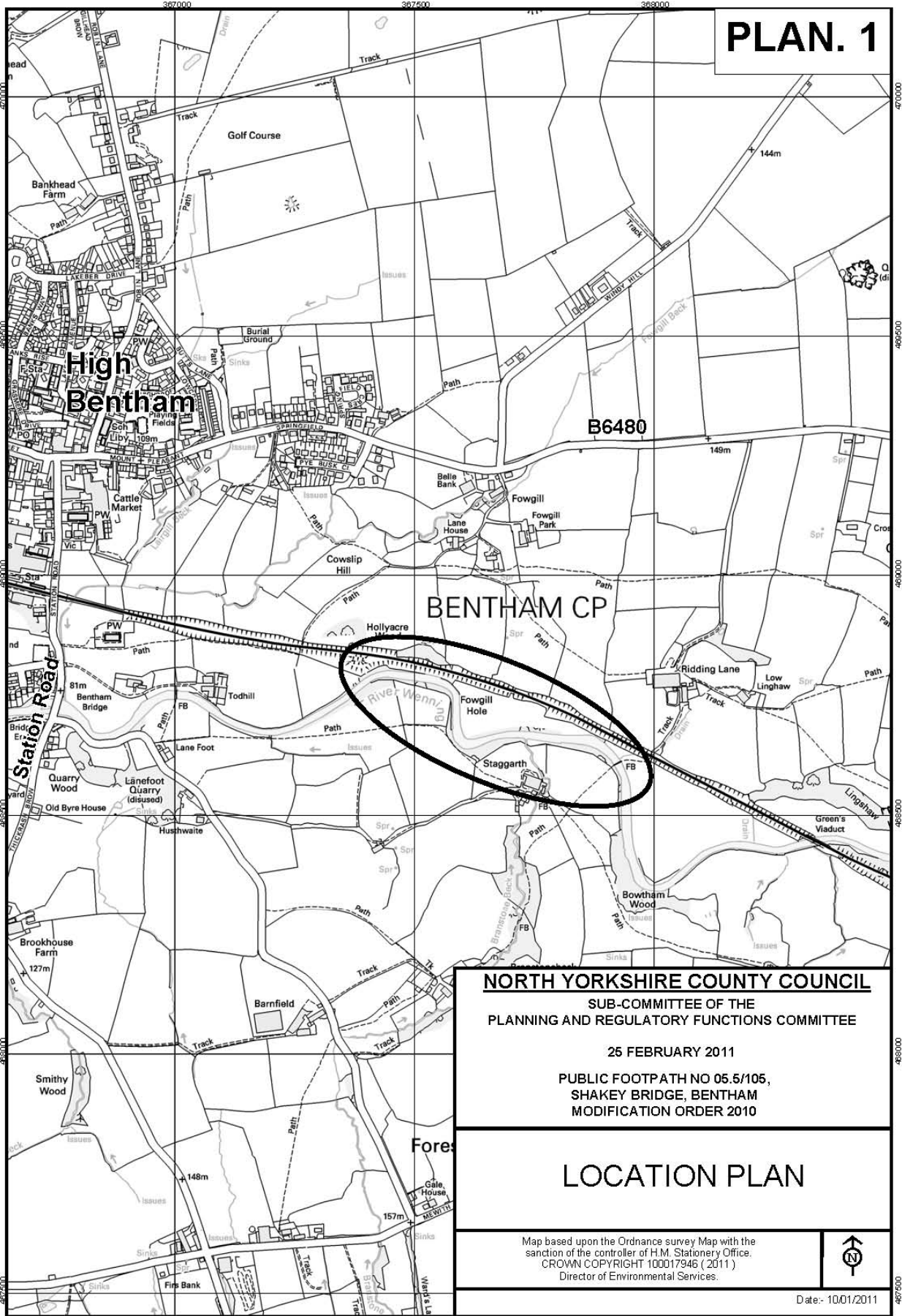
Appendix 2 – Public Footpath No 05.5/105 Shakey Bridge, Bentham Modification Order 2010

Background Papers:

The documents are held on file marked CRA/2006/30/DMMO, which will be made available to Members at the meeting.

Author of report : James Perkins, Definitive Map Officer

PLAN. 1



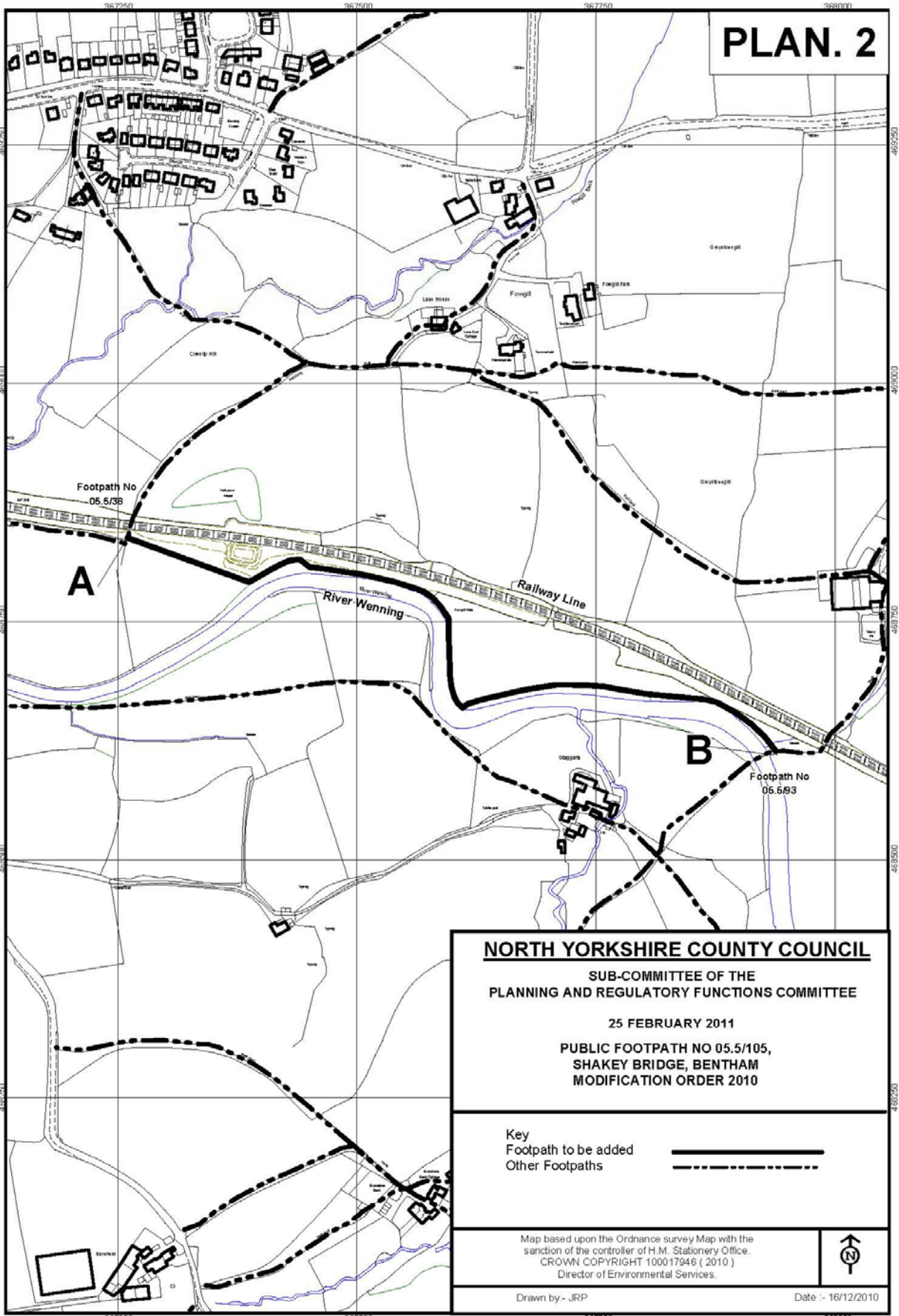
NORTH YORKSHIRE COUNTY COUNCIL
SUB-COMMITTEE OF THE
PLANNING AND REGULATORY FUNCTIONS COMMITTEE
25 FEBRUARY 2011
PUBLIC FOOTPATH NO 05.5/105,
SHAKEY BRIDGE, BENTHAM
MODIFICATION ORDER 2010

LOCATION PLAN

Map based upon the Ordnance survey Map with the
sanction of the controller of H.M. Stationery Office.
CROWN COPYRIGHT 100017946 (2011)
Director of Environmental Services.



Date:- 10/01/2011



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Our ref: NATROW/P2745/529A/06/78
 Date: 26th April 2010

Email: Geraldine.Christie@gone.gsi.gov.uk

Dear Sir

**WILDLIFE AND COUNTRYSIDE ACT 1981
 APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
 BY DR A M HORN AGAINST THE DECISION OF NORTH YORKSHIRE COUNTY
 COUNCIL NOT TO MAKE AN ORDER IN RESPECT OF A CLAIMED PUBLIC
 FOOTPATH AT BENTHAM**

1. I am directed by the Secretary of State for the Environment, Food and Rural Affairs to refer to your appeal made under Section 53(5) of, and Paragraph 4(1) of Schedule 14 to, the Wildlife and Countryside Act 1981 against the decision of North Yorkshire County Council ("the Council") not to make an Order modifying their Definitive Map and Statement for the area by the addition of a public footpath which runs for roughly 750 metres between the River Wenning and the Settle to Carlisle railway line at High Bentham as shown on the attached Annex B map.

2. An Inspector, Peter Millman, BA, has carefully considered all the submissions made with regard to this appeal and has submitted his report to the Secretary of State. A copy of the Inspector's report is attached as Annex A to this letter. Your case as the appellant and the case for the Council are set out in paragraphs 5 to 7 and 8 to 9 respectively, of the Inspector's report. The Inspector, whose conclusions are set out in paragraphs 10 to 25 of his report, has recommended at paragraph 26 that the appeal be dismissed.

Other Matters

3. Following production of the Inspectors Report in July 2007, the Secretary of State pursued with the Local Authority the issue of there being further evidence by way of User forms completed with the application as per paragraph 24 in the Inspectors Report. The Local Authority has confirmed that there were eleven evidence of use forms submitted in support of this application. The Secretary of State has now obtained copies of these and considered them alongside the Inspectors Report.



www.defra.gov.uk

The Secretary of State's Considerations and Decision

4. The Secretary of State has considered the Inspector's Report and his own further evidence, taking account of the relevant part of the 1981 Act. Whilst agreeing with the Inspector's Report, he has taken into consideration the evidence provided with the original application.

5. Section 53(3)(c)(i) of the Act specified that an Order should be made on the discovery of evidence, which when considered with all other evidence available, shows "that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.....".

6. As made clear in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw (Norton and Bagshaw)* this involves two tests:

Test A. Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of the appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

7. The user evidence must be considered against the requirement of Section 31(1) of the Highways Act 1980 which provides that:

"Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 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."

and Section 31(2) that:

"The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as mentioned in subsection (3) below or otherwise."

8. The question of dedication at common law, where it is possible for a right of way to be created over land through expressed or implied dedication and acceptance, should also be examined.

9. The Secretary of State considers that a date when the right of the public to use the claimed footpath was brought into question can, in this case, be taken to be 2006, that being the date given in the user forms when barbed wire was placed on the route where it leaves Network Rail and the erection of 2 new fences at other parts of the route. The Secretary of State has therefore examined the previous 20 years' use, and beyond, from 2006 as supplied in user evidence forms as part of his considerations.

10. Of the eleven user evidence forms which the Secretary of State is aware of, he notes that there is evidence of such use of the claimed footpath by prior to 2006. Three of those user statements claim use of between 20 and 30 years, a further six claim use of 20 years with the final two claiming 7 years and 17 years use. The Council did not take these user forms into account when they made their decision on the application. The Secretary of State is satisfied that there is sufficient evidence of use of the claimed footpath for a twenty year period prior to 2006 to raise a presumption of it having become a public right of way.

11. The Secretary of State is satisfied that sufficient evidence has been provided to show that the claimed footpath can be reasonably alleged to subsist and that there is no incontrovertible evidence that a public footpath right of way cannot be reasonably alleged to subsist along that route, therefore that Test B has been fulfilled.

12. At common law, dedication can be either expressed or implied by the owner of the land. Network Rail are owners of a substantial portion of the land over which the claimed footpath extends. However, the Inspector makes clear in his report that the claimed path does not cross any access or approach land as defined in section 57 of the British Transport Commission Act 1949 – see paragraph 7 of the report. The Secretary of State concludes therefore that there is sufficient evidence to infer dedication of the claimed footpath at common law.

Summary and Decision

13. Having taken all the arguments and representations before him into account, the Secretary of State has reached the view that an Order should be made. Therefore in accordance with the provisions of paragraph 4(2) of Schedule 14 to the Wildlife and Countryside Act 1981 he has directed North Yorkshire County Council to make an Order, under Section 53(2) and Schedule 15 to the Act, modifying the Definitive Map and Statement for the area to add a footpath, as described in paragraph 3 above and shown on the Annex A map. This decision is given without prejudice to any decision that may be given by the Secretary of State in exercise of his powers under the said Schedule 15.

14. A copy of this letter is being sent to the Council.

Yours faithfully



G M Christie

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:

APPENDIX 2

NORTH YORKSHIRE COUNTY COUNCIL

WILDLIFE AND COUNTRYSIDE ACT 1981

DISTRICT OF CRAVEN (OUTSIDE THE YORKSHIRE DALES NATIONAL PARK) DEFINITIVE MAP AND STATEMENT

PUBLIC FOOTPATH NO 05.5/105, SHAKEY BRIDGE, BENTHAM MODIFICATION ORDER 2010

This Order is made by North Yorkshire County Council under Section 53(2)(a) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the District of Craven (Outside the Yorkshire Dales National Park) Definitive Map and Statement require modification in consequence of the occurrence of an event specified in Section 53(3)(c)(i) of the Act, namely, the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to Section 54A, a byway open to all traffic.

The authority have consulted with every local authority whose area includes the land to which the Order relates. North Yorkshire County Council hereby order that:-

1. For the purposes of this Order the relevant date is 2 August 2010.
2. District of Craven (Outside the Yorkshire Dales National Park) Definitive Map and Statement shall be modified as described in Part 1 and Part 2 of the Schedule and shown on the map attached to the Order.
3. This Order shall take effect on the date it is confirmed and may be cited as "Public Footpath No 05.5/105, Shakey Bridge, Bentham Modification Order 2010".

SCHEDULE

PART 1

MODIFICATION OF DEFINITIVE MAP

DESCRIPTION OF PATH TO BE ADDED

<u>Section of Footpath as shown on the attached map</u>	<u>Description</u>
Marked by a bold broken black line and shown as A – D.	Commences at Grid Reference 36793 46861 (Point A) at the point where Footpath No 05.5/93 joins this Footpath No 05.5/105 and then proceeds to follow the River Wenning on its northern bank for approximately 350 metres to Grid Reference 36761 46865 (Point B), the path continues to follow the River Wenning northern river bank, proceeding in a northerly direction for approximately 99 metres, then heading in a westerly direction for approximately 236 metres, continuing to follow the River Wenning northern river bank, to Grid Reference 36738 46879 (Point C), the path leaves the river bank and heads in a north westerly direction, heading along the north eastern side of the field boundary for approximately 137 metres to Grid Reference 36726 46883 (Point D), where the footpath joins Footpath No 05.5/38 at the end of the route.

PART 2
MODIFICATION OF DEFINITIVE STATEMENT
PARTICULARS OF PATH TO BE ADDED

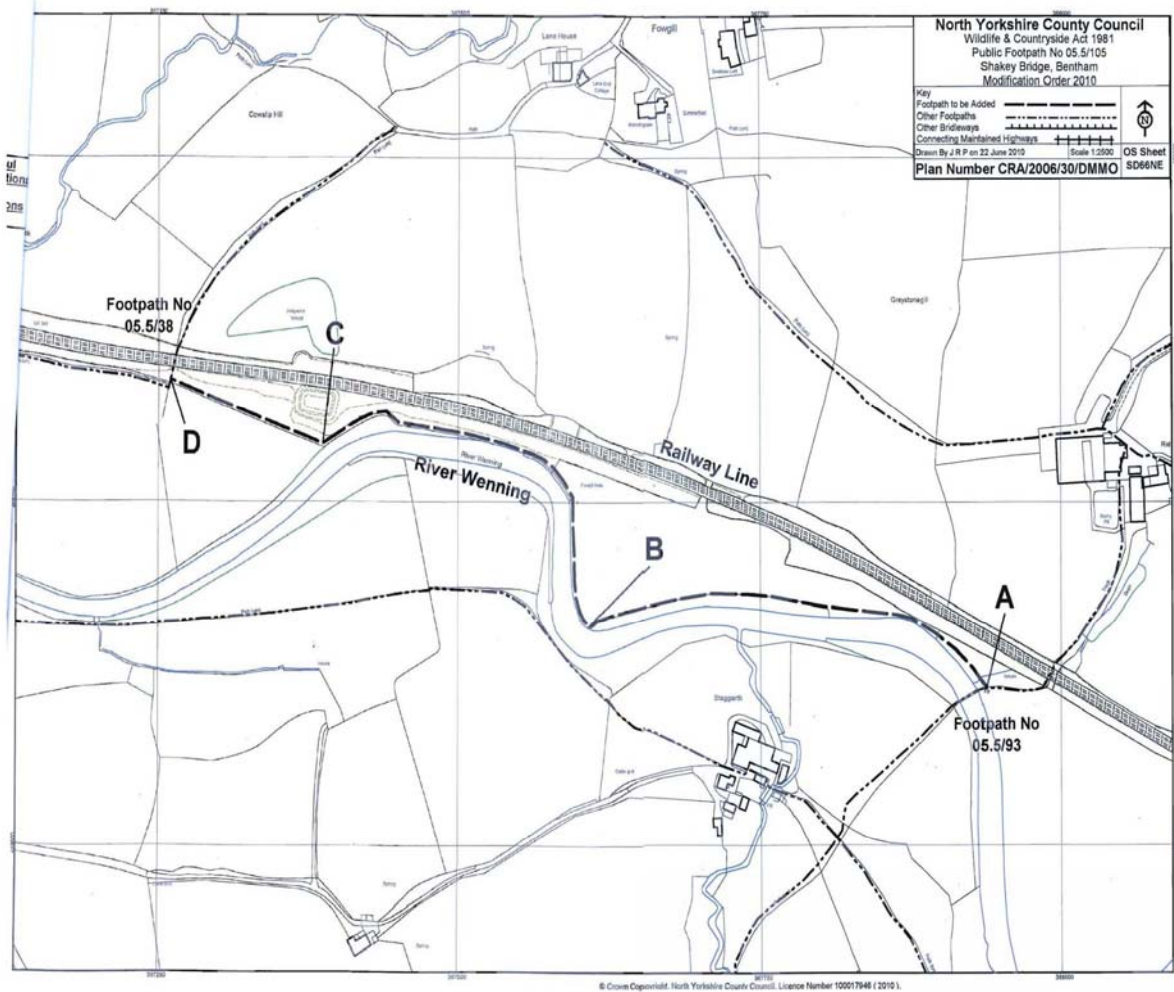
<u>Path No</u>	<u>Grid Reference End Points</u>	<u>Description</u>	<u>Nature of Surface</u>	<u>Length (km)</u>	<u>Width (m)</u>	<u>Lawful Obstructions and Conditions</u>
05.5/105	36793 46861 (Start Point)	Commences at the point where Footpath No 05.5/93 joins this Footpath No 05.5/105, it then proceeds to follow the River Wenning on its northern bank for approximately 350 metres, the path then continues to follow the River Wenning northern river bank, proceeding in a northerly direction for approximately 99 metres, then heading in a westerly direction for approximately 236 metres, continuing to follow the River Wenning northern river bank, the path leaves the river bank and heads in a north westerly direction, heading along the north eastern side of the field boundary for approximately 137 metres, where the footpath joins Footpath No 05.5/38.	Grass	0.685	1.5	-
	36726 46883 (End Point)		Grass	0.137	1.5	
				Total		
				0.797 km		

THE COMMON SEAL of NORTH YORKSHIRE COUNTY COUNCIL)
 was hereunto affixed this 16th)
 day of August 2010 in the presence)
 of:-)

Alice M. Baddy

**AUTHORISED
SIGNATORY**





NORTH YORKSHIRE COUNTY COUNCIL

WILDLIFE AND COUNTRYSIDE ACT 1981

**DISTRICT OF CRAVEN (OUTSIDE THE YORKSHIRE DALES NATIONAL PARK)
DEFINITIVE MAP AND STATEMENT**

**PUBLIC FOOTPATH NO 05.5/105, SHAKEY BRIDGE, BENTHAM
MODIFICATION ORDER 2010**

**DAVID BOWE
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