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Your Ref: HAR/2010/14/DMMO
Our Ref: FPS/P2745/14A/3
Date: 22 DEC 2011

Dear Sir

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION S14

North Yorkshire County Council

Refusal to downgrade Public Bridleway No. 38 to a Public Footpath at Monk Ing Road, Dacre

I enclose herewith a copy of the Inspector's decision on this Appeal.

For your information, you will also find enclosed two leaflets entitled *Our Complaints Procedure* and *Challenging the Decision in the High Court*.

Please note that this decision can only be challenged by applying to the Administrative Court for a judicial review.

If you have any queries about the enclosed decision, please contact the Quality Assurance Unit at the following address:

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http://www.planning-inspectorate.gov.uk/pins/agency_info/complaints/complaints_dealing.htm

An electronic version of the decision will shortly appear on the Inspectorate's website.

Yours faithfully

John Greenslade
(Rights of Way Section)



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Appeal Decision

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

an Inspector on direction by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 22 DEC 2011

Appeal Ref: FPS/P2745/14A/3

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of the North Yorkshire County Council not to make an Order under section 53(2) of that Act.
- The application dated 22 July 2010 was refused by way of a letter from North Yorkshire County Council dated 4 July 2011.
- The appellant claims that part of the route recorded as Public Bridleway 38, Dacre, should be downgraded to the status of footpath.

Summary of Decision: The appeal is allowed

Preliminary Matters

1. I am appointed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act").
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.

Description of the route

3. The appeal relates to part of the route recorded on the Definitive Map and Statement ("the DMS") as a public bridleway in the parish of Dacre numbered 38. The affected section of the route runs in a generally south-westerly direction from the entrance to Monk Ing House, south-west of Four Lanes End, Lane Foot Road to Dyke¹ Lane, Dacre. The route passes through the properties Corner House, Monk Ing Farm and Pasture Side.
4. Unless stated otherwise reference to the bridleway relates only to that part of the route described above and not to the continuation north-east to Four Lanes End nor beyond that, recorded as a footpath, to the Dacre - Summerbridge county road at Dacre Banks.

Main issues

5. In considering the evidence and submissions, I take account of the relevant part of the 1981 Act and relevant court judgements.
6. In considering the evidence and submissions, I take account of the relevant part of the 1981 Act and relevant court judgements. References are given [in square brackets] to earlier paragraphs where appropriate.
7. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence, shows:

¹ Shown as 'Dike' on Ordnance Survey mapping

- (ii) *that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description...*"
8. Defra² Circular 1/09, Version 2, October 2009 ("the Circular"), sets out that *"The procedures for identifying and recording public rights of way are comprehensive and thorough...Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded...particularly where recent research has uncovered previously unknown evidence...it is unlikely that such a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.*
 9. *"Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence...Notwithstanding the clear starting point in relation to the possible...downgrading...the powers in...the 1981 Act include the making of orders to...downgrade where evidence shows that rights did not exist at the time when they were first shown on the map.*
 10. *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights - will need to fulfil certain stringent requirements. These are that:*
 - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
 - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;*
 - *the evidence must be cogent.*
 11. *"...Where there is...an application [to downgrade a right of way], it will be for those who contend...that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded...it is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to...downgrade the way."*
 12. The Circular makes the link between the downgrading of routes and deletion and the most relevant recent case relates to deletion. The Court of Appeal in *Trevelyan v the Secretary of State for the Environment, Transport and the Regions, 2001* ("Trevelyan") set out that there should be an initial presumption that a route was correctly recorded, there having been evidence of it carrying those public rights when it was put on the map. The standard of proof required to demonstrate that it does not is the 'balance of probabilities', however, evidence of some substance must be put in the balance to outweigh the initial presumption that the right of way exists as recorded. 'Clear and cogent' evidence would be required and in the absence of evidence to the contrary, it should be assumed that the proper procedures were followed in recording the route in the first instance.

² Department for Environment, Food and Rural Affairs

13. The issue of 'discovery of evidence' was discussed in the cases of *R v Secretary of State for the Environment ex parte Simms and Burrows (1990)* ("*Simms and Burrows*") and *Mayhew v Secretary of State for the Environment (1992)* ("*Mayhew*"). *Mayhew* held that the meaning of 'to discover' is to find out or become aware. This implies a mental process of the discoverer applying their mind to something previously unknown to them and the judge, Potts J, adopted the following passage from the judgment of *Simms and Burrows*:

"I am satisfied that section 53(3)(c), with its use of the word "discovery", embraces the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the time of the definitive map".

14. This passage was also referred to in the more recent case of *Kotarski v State for the Environment, Food and Rural Affairs (2010)* ("*Kotarski*"). That case related to a situation of conflict between the Definitive Map and the Statement. This was described as 'a drafting error', which was itself the result of what was in *Burrows and Simms* characterised as 'recent research.' It was noted that this approach was consistent with the general approach of the Court of Appeal in *Burrows and Simms* and 'the importance of maintaining an authoritative map and statement of the highest attainable accuracy'.

Assessment of the evidence

The Definitive Map and Statement

15. In order to show that rights should be removed from the DMS it is necessary for the appellant to show that there were no public bridleway rights at the time the route was first recorded on the DMS.
16. The National Parks and Access to the Countryside Act 1949 ("the 1949 Act") introduced the concept of the DMS. It was generally the case that the Parish Council would provide information to the surveying authority as to the rights of way in their area and the information was compiled into the Draft Map. On publication of the Draft Map there were opportunities for anyone to object to the inclusion, omission or incorrect recording of a route, with an appeal process. Once these matters were determined a Provisional Map would be published and at this point landowners were able to raise objections through the Quarter Sessions. Following this the DMS was produced and there was a further opportunity for challenge on procedural grounds.
17. The Definitive Map and Statement for this area is the 1972 map produced by the former West Riding County Council and now held by North Yorkshire County Council ("the County Council").
18. The Parish Survey form, dated 3 September 1951 with reference to a survey apparently carried out in September 1950, refers to the relevant part as a footpath, "*part metalled & rest grass [with] Stiles & Gates in order.*" The Definitive Statement for this route is confusing as it refers to the route as a '*Bridleroad and footpath*' with the continuation north-east beyond Four Lanes End shown as a footpath on the Definitive Map. The sections from Monk Ing Road to School House Road and from there to The Grange were described as a footpath on the Parish Survey, whilst from The Grange to the county road and the section from Four Lanes End to East Wood Lane were roads used as a public paths, noted to have kissing gates and stiles.

19. The County Council said that the Parish survey maps did not survive and whilst the appellant has annotated one map as the 'walking map, 1950' this is actually an extract from the Definitive Map. Given that the base plan does show the route as a bridleway it seems that this is the case.
20. No copies were provided of the documents but I note that there has been no argument from the appellant that the County Council are correct in saying that the route was shown with the status of bridleway on the Draft (1953), Provisional (1970) and subsequent Definitive (1972) map.
21. It appears that everything that should have been done under the 1949 Act, and subsequent Acts, was done as required. There were opportunities to challenge the DMS at the Draft and Provisional stages and subsequently on procedural grounds but this did not occur. There is no evidence of improper procedures in relation to the production of the DMS and therefore weight must be placed on this recording of the route as a public bridleway.

Witness Statements

22. The appellant supplied a statement indicating that he was born at Monk Ing Farm and had lived there, or at Corner House, for all his life. He had always known it to be passable on foot only due to the presence of stone stiles and cattle grids. His father was the John Marshall who had signed the 1951 survey form indicating the route as a footpath with stiles and gates.
23. Mrs Kendrew, presumed to be the appellant's sister, was born at Monk Ing Farm and walked the route to catch her school bus on Dyke Lane for ten years. She indicated that there had always been stiles.
24. A letter from the former owner of Pasture Side, Mr Abbott, shows that he was born there in 1931. He confirmed that there had been no access for horses whilst he was there due to a 5 foot wall with a stile between Monk Ing and Pasture Side.
25. Mrs Lambert was born at Pasture Side Farm in 1934, living there until 1958 and then returning to the property in 1982. She was aware of a footpath leading from Monk Ing Farm, which she always remembered being in the ownership of the Marshall family. This route had always crossed stiles, with stone stiles and cattle grids still in place now.
26. Mrs Lambert said that when the house was extended in 1982 the route was diverted and that it was acknowledged then as a footpath. I do not consider that a diversion order could alter the status of a route and neither would it be the appropriate mechanism to 'acknowledge' a different status, therefore, in the absence of further evidence I give this no weight. No copy of the diversion was available and the DMS has not been updated to show any legal changes of the line of the route.
27. Mrs Chapman, presumably some relation to both Mr Abbott and Mrs Lambert, was born at Pasture Side Farm in the 1950s and lived there until she was 23. She regularly used the route to walk to Dacre Banks and during that time the route was only passable on foot due to the stone stiles and cattle grids. Mrs Chapman also refers to the diversion of the route and says that this means that the route now avoids a number of stiles previously on the route. Whilst she believes this might have led to the 'confusion' over status the route has been recorded as a bridleway on the DMS from the 1970s, which appears to predate any diversion referred to.

28. Reference to the situation after the route was already recorded on the mapping, albeit not on the DMS itself, may provide limited evidence as to whether the route was properly recorded in the first instance. However, in this instance what they provide is a picture that what exists on the route now, in that at least of some stone stiles set within walls and perhaps the cattle grid onto Dyke Lane, were in place from at least the 1930s, within the twenty year period prior to the Parish survey.

Documentary evidence

29. I will look at the documentary evidence to see whether this assists in relation to the witness statements.

Dacre Pasture Inclosure, 1844

30. Between 1545 and 1880 the system of farming scattered arable strips of land, and grazing animals on common pasture, was gradually replaced as landowners sought to improve productivity. The process of inclosure began by agreement between the parties concerned but by the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The Act set out the powers of the Inclosure Commissioners in the process and the Award then set out how the land was inclosed and awarded to the interested parties.

31. The reason given in the Parish Survey for believing the route to be public was given as "Awarded. Dacre Pasture Award." The appellant supplied a copy of the relevant plan and this shows 'Dyke Lane and Hayshaw Road 30 feet' to the south-west and 'Monk Ing Road and Northwoods Road 15 feet wide' to the north-east. No route which could equate to either a footpath or bridleway is shown through the fields numbered 28 and 29 joining the two roads. Apparently there was also no reference to such a route within parcel 29, through which it would have passed.

32. The date of this Award suggests that it would be subject to the General Inclosure Act 1836 ("the 1836 Act"), although without a full copy of the Award I cannot be certain that it does not expressly state that the 1836 Act does not apply. Without looking at the entirety of the relevant Act(s) and Award it is not possible to be certain as to the powers of the Commissioners and what might or might not have been done in relation to public rights over this land.

33. At first instance it appears that no public rights were laid out on the majority of the route and this implies that the reason given for recording the route as public in the first instance does not apply to the route as a whole. What was set out over Monk Ing Road does not seem to be referenced in the extract submitted but it seems likely that this section was what was referred to in the Parish survey as having been 'awarded'.

Mapping

34. What appears at first to be the earliest Ordnance Survey ("OS") is noted to be surveyed in 1848-49 and revised in 1907, however, the County Council have clarified that this was a 6" map issued after 1907. This clearly shows the relevant properties already mentioned and Monk Ing Road as a feature separate from the surrounding fields. To the east of Corner House the route continues as a pecked line feature, suggesting it was discernable on the ground at the time of the survey. There are 5 points with lines across the route. Such

lines may indicate gates, stiles or walls. The appellant notes that the section between Monk Ing Farm and Pasture Side is annotated 'F.P.' but it may be that this annotation arises from the later 1907 revision as R Oliver, in his book *'OS Maps – a concise guide for historians,'* said that footpaths and bridleways were not generally identified on OS maps prior to 1883, although there were occasional exceptions, some within Yorkshire, and this may be one of them.

35. Without the key and details I am unclear as to the purpose of the plan marked as 1854; it appears to be an OS map but may be a survey. The appellant points out that the route from Lane Foot to Heyshaw is annotated 'Bridle Road' whilst BR38 is not. However, I note that this route is now recorded as a footpath and there are other routes annotated 'Foot Path' which is not shown on the route in question.
36. The next OS map was re-surveyed in 1890 and again revised in 1907, with confirmation from the County Council that it was published after this date. This larger scale map shows a similar situation to the 1848-49 survey, with lines across the route, which may indicate gates or walls and the annotation 'F.P.', on which R Oliver says that "From 1883 onwards, footpaths were shown by 'F.P.', the object being that the public may not mistake them for roads traversable by horses or wheeled traffic." However, from 1888 OS maps have included the disclaimer that "The representation on this Map of a Road, Track or Footpath, is no evidence of the existence of a right of way."
37. OS maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey but given the purpose of the mapping it is difficult to consider the maps as evidence of the status of a route. The earliest map is the 1854, just ten years after the Inclosure, and shows a route on the ground, although not annotated. The two later maps, published after revisions in 1907 show the route annotated as a footpath and despite the caution to be placed on reliance on the OS maps with respect to identification of status they do provide some evidence and I accept that there is no evidence that the surveyor identified higher rights than footpath.
38. I note that the DMS was annotated with 'S' for stile and 'FG' for field gate. This shows 4 field-gates and 2 stiles recorded on the route. It is not clear whether this relates to the situation in the 1970s, when the DMS was published, or from the original 1950s Parish survey, by reference to the now missing survey maps. Nevertheless, clearly at the time of recording the route the DMS recognised that there were stiles on the route.

Photographs

39. The appellant supplied copies of photographs but unfortunately I was unable to match the positions indicated on the attached map to the photographs as they were unnumbered. Nevertheless I feel I am able to make some observations. Firstly, the two wooden stiles in fencing do not assist in showing long-standing features as they could have been erected at any point in time, before or after the apparent acceptance of a bridleway on the route.
40. Whilst stone walls may also have been erected, or altered, at any time I consider that this is less likely, given that in this case they may well relate to the Inclosure process. The existence of the stone stile and cattle grid over a long period is also supported by the witnesses.

Applying the required tests

The 'discovery of evidence'

41. Section 53(3)(c) relies on there having been a "...discovery...of evidence...". It is my understanding that this is to avoid the possibility of changes where the evidence on which the routes were first based has been lost. This was set out in *R v Secretary of State for the Environment, ex parte Hood, 1975* ("Hood") where it was said "*The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975. So it would be very unfair to reopen everything in 1975.*" We are now 40 years on from the date of publication of the DMS and almost 60 years from the date it was first shown as a bridleway on the Draft Map. This is an even longer period than referred to in *Hood* which makes it even more important to bear in mind that there may have been information then that is no longer available.
42. Whilst the County Council are correct that the Inclosure Award was clearly part of the information considered in the production of the DMS, I do not agree that this means it cannot be taken into consideration. The County Council referred to *Burrows v Secretary of State for the Environment, Food and Rural Affairs (2004)* ("*Burrows*") as authority on this point. However, whilst *Burrows* held that "*An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up...*" it is appropriate, once satisfied that there is some new evidence, to then consider all the evidence together. This means that it is appropriate, in my view, to take account of the lack of evidence of a route apparently arising from the Inclosure Award, as well as all the other evidence.
43. The appellant has relied upon the statements given by former local residents as being sufficient 'new' evidence. In this instance they do accord with the mapping evidence, which shows a route on the ground generally annotated as a footpath and the Parish Survey, which described the route by reference to existing gates and stiles. Taking all the evidence together, particularly the fact that the reason for the route being recorded in the Parish survey form does not adequately explain why the route was recorded in the first instance, and taking account of the *Mayhew, Burrows and Simms* and *Burrows*, I am satisfied that there has been a 'discovery of evidence'.

The presumption that the definitive map is correct

44. *Trevelyan* sets out the weight to be given to the recording of a route on the DMS. In this case I note that John Marshall senior, the former owner of Monk Ing Farm, was on the Parish Council at least at the time of the Parish survey. This suggests that he would have been in a good position to be aware of the process and opportunities to object to what was recorded. I consider that this adds a little weight to the possibility that there was other evidence known at the time that the route was recorded as a bridleway.
45. It is clear that those giving statements accept that there are public rights here, and I consider that weight can be safely placed on the DMS to that extent. The question arising is whether the status of the route is correct.
46. I agree with the County Council that the existence of stiles and the indication of a route as a footpath on an OS map cannot provide positive evidence that higher rights did not exist. However, combined with the lack of clarity of the

reason why the route was recorded as a bridleway in the first instance, and the witness evidence of structures existing from the earlier part of the twentieth century, likely to have prevented dedication through use, I consider that there must be some doubt as to the status.

47. Taking all the above points into account, I consider, on the balance of probabilities, that the evidence is sufficient to disturb the presumption that the DMS is correct.

Cogency

48. Cogent evidence should be 'compelling' or 'forcefully convincing'³. Whilst I consider this case to be very finely balanced, given in particular the length of time over which the claimed error has been unchallenged, I am satisfied that the evidence presented is sufficient to meet the test.

Summary

49. Taking all the evidence together I consider, on the balance of probabilities, that there has been a discovery of cogent evidence sufficient to displace the presumption that the DMS is correct in recording this route as a public bridleway.

Conclusion

50. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

51. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Derbyshire County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to downgrade to footpath status that part of Bridleway 38 in the Parish of Dacre shown on the plan attached to the application.
52. This decision is made without prejudice to any decisions that may be issued by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Heidi Cruickshank

Inspector

³ The Collins English Dictionary