

Order Decision

On papers on file

by Nigel Farthing LLB

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

Decision date: 10 May 2024

Order Ref: ROW/3323948

- This Order is made under Section 53(3)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cumbria County Council (Parish of Burgh by Sands District of Carlisle)) Definitive Map Modification Order (No1) 2023
- The Order is dated 8 March 2023 and proposes to modify the Definitive Map and Statement (DMS) for the area by upgrading a public footpath to a bridleway in the parish of Burgh by Sands, as shown on the Order Map and described in the Order Schedule.
- There were 2 objections outstanding when Cumbria County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. At the time this Order was submitted for confirmation there were two objections outstanding. On reviewing the objections, it was concluded that neither raised matters relevant to determination of the Order. Both objectors were written to on 7 February 2024 and invited to respond by 21 February giving full reasons for objecting to confirmation of the Order. Neither objector responded to this request, and in consequence a decision will be made based on the papers submitted by the Order making authority with no site visit being necessary.
 2. In 1997 an application for a Definitive Map Modification Order was made to the Council to delete from the DMS various public rights of way including bridleway (BW)127005 in the parish of Orton and footpath (FP)106008 in the parish of Burgh by Sands. After investigation the Council decided not to make the modification order sought but concluded that FP 106008 was wrongly recorded and has the status of a bridleway.
 3. The Order was made by the Council under the 1981 Act on the basis of events specified in sub-section 53(3)(c)(ii). It proposes to upgrade to a bridleway the route between points A and B on the Order map which is currently shown on the DMS as FP 106008.
 4. Although there are no relevant objections to confirmation of the Order, I am required to be satisfied that the requirements of section 53(3)(c)(ii) of the 1981 Act are met.
 5. In writing this decision I have found it convenient to refer to points A to G marked on the Order Map, a copy of which is attached to this decision for ease of reference.
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The Main Issues

6. The requirements of section 53(3)(c)(ii) of the 1981 Act are in two parts. The first is that there has been a discovery of evidence, being material that has not been considered previously in the context of the status of the Order route. The second element is that the 'discovered' evidence, when considered with all other relevant evidence available, should show that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
7. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway of the appropriate status.
8. The Order has been made solely on the basis of documentary evidence. There is no user evidence for me to consider.
9. For the Order to be confirmed the evidence must demonstrate, on a balance of probabilities, that the route in question is incorrectly recorded as a footpath and that it should be recorded as a bridleway.

Reasons

Discovery of evidence

10. The discovery of evidence is a prerequisite to the making of an order in reliance upon section 53(3)(c)(ii). In this case a number of witness statements have been submitted and various historical documentary sources have been investigated and are before me. No objection has been made questioning whether the requirement for new evidence has been fulfilled. I am satisfied that there is sufficient new evidence to meet this requirement.

Physical and historical characteristics

11. The Order route (FP 106008 Burgh by Sands) and BW 127005 Orton are effectively two sections of a single route within separate parishes. FP 106008 is in the parish of Burgh by Sands and was claimed by the parish and recorded on the first DMS as a footpath. BW 127005 is in the parish of Orton and was claimed by the parish as a CRB (carriage road used as a bridleway), later amended to a bridleway and recorded on the first DMS as a bridleway. In consequence BW 127005 is a cul-de-sac route for horse riders and cyclists terminating at point B on the Order map where it meets the southern terminus of FP 106008. There is no logical or obvious reason for there to be a change in status of the route at this point, thus giving rise to an anomaly.
12. The underlying physical characteristics of FP 106008 and BW 127005 (which I shall refer to together as the combined route) are very similar, both being enclosed tracks of sufficient dimension to accommodate vehicular traffic.

Documentary evidence

Private County Maps

13. The combined route is depicted on Greenwood's map of 1823 but is not shown on Hodgkinson and Donald's map of 1774, Cary's map of 1829 nor on Bell's map of main and district roads dated 1892. On Greenwood's map the combined route is shown as a single, uniform feature.

Tithe Maps

14. Although not shown on the Burgh by Sands Tithe Map (1686 to 1708) the route within the parish of Orton is shown on the Orton Tithe Award of 1843/1847 where it is described as a 'road' but it is not included in the list of public roads (although, unlike some other roads, it is also not described as either private or an occupation road).

Ordnance Survey (OS)

15. OS mapping consistently depicts the combined route as a continuous enclosed track between solid line boundaries. The schedule to the 1st Edition OS describes the combined route as 'Occupation Road'. The 1925 3rd Edition shows trees within the track for the Order route section whilst the Orton section (BW127005) is shown without trees. The 1957 edition shows both routes to be clear although the southern section of FP 106008 is annotated 'path' whereas the northern section of BW 127005 is annotated 'track'. The OS is an accurate representation of physical features apparent to the surveyor. Most OS maps carry a disclaimer that public and private routes are not distinguished. The description of one section of the route as 'path' and another as 'track' is an indication of how the routes appeared at the time, and, perhaps how they were being used, but it is not indicative of their legal status.

Finance Act 1910

16. The Finance Act evidence is perplexing. The northern section of FP 106008 and the southern section of BW 127005 are shown uncoloured and excluded from taxable hereditaments whereas the central section of the combined route is shown within taxable hereditaments. There is no obvious reason why the two excluded sections should have a different status to the remainder of the route. Generally, a public right of way would only be excluded if it were a vehicular highway, lesser public rights being recognised by a deduction from the taxable value. An alternative explanation for the exclusion of the two end sections could be that these were used in common for the purposes of providing access to adjoining lands and were exempt from duty on this basis. Accordingly, the treatment of the Order route, whilst problematic, does not suggest public vehicular status and does not preclude bridleway status.

Definitive Map process

17. The Burgh by Sands Parish minute books show that the owner of the land over which FP 106008 passes, Mr J S Stordy, was a member of the parish Footpath Committee from 1928 and remained a member of the committee when a map of public rights of way was produced in accordance with the Rights of Way Act 1932. The minutes record that Mr Stordy agreed to the deletion of one route on the grounds that it was private, but did not object to FP 106008, indicating that he recognised the existence of a public right of way along this route. The evidence

does not suggest that Burgh by Sands Parish Council contemplated whether FP 106008 enjoyed any status greater than a footpath.

18. The Burgh by Sands parish survey under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) describes the Order route as an unnamed but defined footpath in very good condition. The question asking the grounds for believing the path to be public is unanswered.
19. The Orton parish survey under the 1949 Act initially described the route now recorded as BW 127005 as 'CRB & FP'. Subsequently the description of the route was amended to 'BR', being a bridle road. The track was said to be metalled in part and to have a width of 15'. The grounds for believing the route to be a public right of way are given as 'Old inhabitant'. The route is said to be named Mill Road and it is argued that this is suggestive of it being part of a through route to the mill at Thurstonfield. Thurstonfield is located to the north of the Order route, thus consistent with the Order route being used to get to it.

Witness statements

20. The application made to extinguish various routes recorded on the DMS, including both FP 106008 and BW 127005, was supported by 34 witness statements from local people, each asserting that the routes in question were not public rights of way and had been wrongly recorded as such. Many of the witnesses stated that the routes were occupation roads for the benefit of the landowners and occupiers. Of the 34 witnesses, 27 were 16 or under in 1933 when the routes were first claimed as public rights of way under the 1932 Act. Whilst these witness statements are relevant to whether or not a right of way exists over the Order route, they do not assist in determining the status of any right of way found to in fact exist.

Conclusions on documentary evidence

21. The picture painted by the documentary evidence is mixed and confusing. The evidence is consistent in demonstrating that for the past two centuries the Order route has been in physical existence with the characteristics of a route capable of being at least a bridleway. The depiction of the route on Greenwood's map is suggestive of a vehicular highway, and some weight must attach to this, but it must be balanced with the fact that the route is not shown on the other three private maps.
22. The evidence of the Tithe and Finance Act maps is equally uncertain. The Orton Tithe Map confirms the character of BW 127005 as a vehicular way but does not give clarity over whether it was considered a public or private road, or if a private occupation road, whether lesser public rights subsist. The treatment of the route on the Finance Act map is difficult to reconcile, with the central section shown within taxable hereditaments whilst the two end sections are shown excluded. The points at which the sections are divided are not related to the parish boundary or any other obvious factor. On balance the evidence points against public vehicular status but is not inconsistent with either bridleway or footpath status.
23. The representation of the Order route on OS mapping is of a track or road but the schedule to the 1st Edition describes it as an 'occupation road' suggesting private status at least for vehicles but not precluding either public bridleway or footpath rights.

24. There is a direct conflict between Burgh by Sands PC and Orton PC as to the perceived status of the combined route in the mid-twentieth century. There is no evidence from either parish as to any public use of the route at that time.
25. To confirm the Order I must be satisfied, on a balance of probability, that the Order route has the status of a bridleway. The burden of proof is with the party proposing the modification of the DMS. If there is insufficient evidence for such a conclusion to be reached, I would have no option but to refuse to confirm the Order, leaving the current anomaly unresolved.
26. There is no compelling evidence either way. Much of the evidence is of little or no assistance. However, the characterisation of part of the combined route by one parish council as a footpath and part by the other as a bridleway is illogical and the anomaly which arises can only be resolved by reclassifying one of the routes or by extinguishing both. The Council has rejected the application to extinguish the routes, and I agree with that decision. I am left with the task of determining whether there is sufficient evidence to demonstrate that the combined route is a footpath or a bridleway.
27. Greenwood's map is suggestive of a status greater than footpath, and the physical characteristics depicted on all other mapping are consistent with this. Whilst the Tithe and Finance Act evidence is mixed, and not suggestive of public vehicular rights, it does leave open the possibility of bridleway status. The apparent name of the combined route as Mill Road, and the attribution of bridleway status by the 'old inhabitant lends some weight to that evidence. There is little evidence limiting the status of the route to a footpath other than the Burgh by Sands recording of the route on the first DMS. The matter is thus very finely balanced, but on the basis that there is some evidence supportive of bridleway status, and no credible objection to confirmation of the Order, I am able to find this is sufficient to tip the balance of probability in favour of confirmation of the Order.

Other Matters

28. The objections which were rejected for not raising relevant matters do raise matters which I recognise are of concern to the landowners. However, the exercise I have to undertake is to determine what status the Order route has acquired by reason of historical factors. The implications of my findings, such as any interference with private rights, potential damage to the land or matters of safety are not matters which I can take into account.

Overall Conclusion

29. Having regard to these and all other matters raised I conclude that the Order should be confirmed.

Formal Decision

30. The Order is confirmed.

Nigel Farthing

Inspector

