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# Interim Order Decision

Inquiry held on 20 November 2013

by **Michael R Lowe** BSc (Hons)

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

Decision date: 10 February 2014

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## Order Ref: FPS/P2745/7/41

- This Order is made under section 53(2) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as Public Bridleway No 30.9/16 Fordon Road, Folkton Modification Order 2012.
  - The Order is dated 30 October 2012 and proposes to modify the Definitive Map and Statement by adding a bridleway from a point along Public Footpath 30.9/5 to Filey Road as detailed in the Order map and schedule.
  - There was 1 objection outstanding when North Yorkshire County Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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## Decision

1. I propose to confirm the Order subject to modifications which require advertisement:

In the first line of the Order delete '53(2)(a)' and insert '53(2)(b)'.

In Part 1 of the schedule (Section of Public Bridleway as shown on the attached map) delete the width of '6.1m' and insert a width of '3.5m'.

In Part 2 of the schedule (Particulars of Bridleway to be added) in the column headed 'Width (m)' delete the width of '6.1 metres' and insert '3.5 metres'.

## Preliminary Matters

2. I held a Public Inquiry into the Order at Flixton & Folkton Village Hall, Folkton, Scarborough YO11 3UH on 20 November 2013. I visited the site during the course of the Inquiry.
3. This is an interim decision and allows for any person to make objections or representations in the light of the legal basis upon which I have provisionally concluded that the claim for dedication based upon presumed dedication under the provisions of Section 31 of the Highways Act 1980 (the 1980 Act) must fail. It also allows for any new evidence to be submitted on the substantive issue.
4. It was submitted on behalf of the objectors that the Order was incomplete in only showing part of a longer route and therefore the Order was potentially ultra vires. The Council stated that they were still considering a further Order to extend the published Order route, thereby linking the Order route to another public highway. In my view there is no legal impediment to the showing of only part of a through route on an Order.

5. The Order states that it has been made under section 53(2)(a) of the 1981 Act. This is a drafting error for section 53(2)(b) which I propose to correct.

### **Main Issue**

6. The Order has been made under section 53(2) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i). The main issue is therefore whether the evidence is sufficient to show, on the balance of probabilities, that a public footpath which is not shown in the map and statement subsists on the route in question such that the definitive map and statement require modification.
7. Section 32 of the 1980 Act requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

### **Background and Reasons**

8. The Council resolved to make the Order in October 2010, following an application by Folkton Parish Council made in June 2008.
9. The Order route is part of a highway set out as a 'bridle road' with a width of 20 feet under the Folkton Inclosure Award of 1807. The Award, after describing the public carriage roads, sets out under the heading of Fordon Road *Also one Bridle Road of the Breadth of Twenty feet leaving out of Flixton Road opposite the South West Corner of the old Inclosure of Folkton aforesaid and extending Southwards over the allotments hereinafter awarded to the said Samuel Herbert as Rector as aforesaid in respect of his Tithe and Glebe into the Township of Flixton.* The Award map clearly shows a track along the Order route and extending to lands within Flixton Township. The track is labelled 'Fordon Road'.
10. The award was made under the Folkton Inclosure Act of 1802, an Act which incorporated the clauses of the General Inclosure Act of 1801. In the case of R. v Secretary of State for the Environment ex parte Andrews [1993] QBD it was held that the provisions of the 1801 Act only allow the Commissioners to set out public ways at 30 feet wide and that, unless the local Inclosure Act established such power, then the award of a public way at less than 30 feet in width was *ultra vires* (i.e. outside the powers of the Act). There is no such provision in the Folkton Act of 1802 and it therefore follows that the purported award of a 20 feet bridleway (Fordon Road) was invalid. However, the judgement also held that the extinguishment provisions of section XI of the 1801 Act would not apply to any pre-existing public footpaths.
11. The Council accepted that in the light of the Andrews case they could not rely upon the Folkton Inclosure Award. They therefore submitted substantive evidence of public use of the Order route for the 20 year period before 2007 when a gate and sign indicating the private nature of the way was erected at point B on the Order plan. On behalf of Messrs. Alan & John Baker, the objectors to the Order, it was submitted that dedication could not be implied or presumed between 1802 and 1993, the date of the Inclosure Award and the date of the Andrews decision. This submission is based upon paragraph 4.35 of the Rights of way Circular 1/09 in which reference is made to the principle that 'rights that cannot be prevented cannot be acquired'.

12. The argument was made that before 1993 the Inclosure Award would have been clear and conclusive evidence of the existence of the rights set out within it and therefore the landowner would have been powerless to take lawful actions to prevent public use of the way as a public bridleway. Indeed, in 1991 the Council's Divisional Surveyor took the view that the public were entitled to use the Order route as a bridleway consequent upon the Award and notwithstanding the absence of the route from the Definitive Map and Statement of Public rights of Way.
13. In my view the objectors' submission is substantially correct. In Hollins v Verney (CA) (1884) 13 QBD 304 it was said *A right of Way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed; and if one must actually enjoy it for a full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. Upon this principle it has been held that easements the enjoyment of which cannot be prevented, cannot be acquired.* This case concerned an action for a private right of way under the Prescription Act 1832. In R v Oxfordshire County Council ex parte Sunningwell (HL) (1999) it was recognised that the words "*actually enjoyed by the public as of right and without interruption for a full period of 20 years*", first enacted in the Rights of Way Act 1932, were *clearly an echo* of the words of the Prescription Act 1832 and it *therefore seems safe to assume that "as of right" in the Act of 1932 was intended to have the same meaning as those words in s. 5 of the Act of 1832 and the words "claiming right thereto" in s. 2 of that Act.* It therefore follows that a claim for a public right of way under section 31 of the 1980 Act, under which a statutory presumption arises where user is "actually enjoyed by the public as of right and without interruption for a full period of 20 years", is subject to the principle set out in *Hollins v Verney*.
14. The Rights of Way Circular deals with the instance of a public right of way having been recorded on a Definitive Map and Statement in error. Here the conclusive provisions of the Definitive Map and Statement would prevent the landowner from resisting public use of the way. The Inclosure Act of 1801 contains a similar provision in section XXXV which, when incorporated within a local Act, would make the provisions of an Award 'binding and conclusive'.
15. As the parties have not considered these matters, I have only reached the provisional conclusion that a claim based upon section 31 of the 1980 Act must fail, as the only period to which it could apply would be between 1993 and 2007 and that is less than the necessary period of 20 years.

***Implied Dedication of a bridleway under common law***

16. As noted above, the case of R. v Secretary of State for the Environment ex parte Andrews 1993 held that a pre-existing footpath would not be extinguished by the invalid setting out of a replacement way in an Award. I have therefore considered the evidence that the Order route was a public bridleway before the Folkton Award of 1807.
17. The Order route was stated by the Council and their supporters to be part of a longer route from Folkton to Fordon. The Folkton Award clearly sets out Fordon Road as extending to the Township of Flixton. The termination of the southern end of the Fordon Road, as set out in the Folkton Award, joins to a

short length of road set out in the earlier Flixton Award of 1802. This Award, made under an Act of 1800, sets out Folkton Wold Road as a public carriageway with a width of 40 feet. The Folkton Award plan shows an arrangement whereby Fordon Road joins a short length of Folkton Wold Road, and then joins Bridlington Road, and then a further short length of road is labelled 'From Fordon'. The two Award plans together therefore indicate that the Order route was part of a route from Folkton to Fordon, at least after the 1807 Award.

18. It would seem unlikely that the Flixton Award of 1802 would have anticipated the Folkton Award of 1807 when it set out Folkton Wold Road. However, the purpose of this length of road is not clear from the 1802 Award.
19. Greenwoods Map dated 1817 shows the whole of the Order route and the extension of the route to the Flixton parish boundary. It is shown by pecked lines, which are keyed as cross roads. Bridlington Road, as set out in the 1802 Award, is only shown as extending some distance south of Flixton. It does not show the whole length of the road as set out in the 1802 Award and, in particular, does not show the length of Bridlington Road in the vicinity of Folkton Wold Road. Catriona Cook submitted the case of The Commission for New Towns & Anor v JJ Gallagher Ltd [2002] EWHC 2668 in which expert witnesses discussed the possible mapping convention by Greenwoods of only showing roads over enclosed land and omitting minor roads over common land (paras. 84 - 88). In my view it seems improbable that Greenwoods Map of 1817 is mapping the roads and enclosures set out in either the 1802 or 1807 Awards. If it had surveyed and mapped after the implementation of the Awards it would have shown Bridlington Road to its full extent. It appears to me more likely than not that Greenwoods is adopting the mapping convention of only showing a limited number of roads across commons and that the mapping depicts a survey before either the 1802 and 1807 Awards. It therefore follows that the Order route pre-existed the 1807 Award.
20. The general scheme of the 1800 Act for Flixton and the 1802 Act for Folkton is that all roads and ways, public and private, were to be set out in the Award and that any roads or ways not so set out were extinguished. In the words of the 1801 Act at section XI 'and all roads, ways, and paths, over, through, and upon such lands and grounds which shall not be set out as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided, allotted and inclosed'. It appears to me that, as the bridleway set out in the 1807 Award crossed land in one ownership and the 1802 Award had established a substantial and parallel carriageway with Bridlington Road, there would not have been any purpose in the establishment of Fordon Road as a bridleway unless such a way already existed. This would be consistent with the nature of Fordon Road shown on the Award plan. That is a track that meanders through the allotted pastures, rather than following the straight lines bounded by enclosures for new ways or diverted ways, as typically set out in Awards of this period. In other words, if the 1807 Award were creating Fordon Road it would be expected to follow alongside and be fenced against a boundary of the allotted lands.
21. On the balance of probabilities and for the above reasons, I consider that the Order route was a public bridleway before the Folkton Inclosure Award. It follows that the width of the way should be no greater than that which it can reasonably be expected had been used by the public and not the 20 feet (6

metres) set out in the Award and in the Order. In my view the width should be 3.5 metres.

### **Conclusion**

22. Having regard to these and all other matters raised in the written representations, I provisionally conclude that the Order should be confirmed with modifications.
23. Since the Order as proposed to be modified would not show part of a way shown in the order as submitted, I am required by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposals to modify the Order and to give an opportunity for objections and representations to be made to the proposed modification. A letter will be sent to interested persons about the advertisement procedure.
24. I appreciate that matters have been raised in this interim decision that have not been considered by the parties. The advertisement of the proposed modifications will allow the parties the opportunity to make further representations.

*Michael R Lowe*

INSPECTOR

## APPEARANCES

### **North Yorkshire County Council**

*represented by*

John Hunter of Counsel

*who called*

Russ Varley Definitive Map Officer

Isobel Green

Peter Green

Gill Vinten

Ann Goldsborough

John Vinten

Michael Kitchen

Derek Pitman

### **In support of the Council**

Catriona Cook MBE

British Horse Society

Elizabeth Kirk

Byways and Bridleways Trust

*represented by*

Robert Halstead

Les Atkinson

Scarborough Ramblers

### **The Objectors**

#### **Alan & John Baker**

*represented by*

Robin Carr

Robin Carr Associates

*who called*

Alan Baker

Miss C Smith

## **DOCUMENTS (submitted at the inquiry)**

- 1 Affidavit of Bryan Found
- 2 Additional statement from Peter Green
- 3 Statement of Derek Pitman