



# Appeal Decision

Hearing held on 11 October 2004

**by Roger Vickers BA (Hons).**

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

The Planning Inspectorate  
4/09 Kite Wing  
Temple Quay House  
2 The Square  
Temple Quay  
Bristol BS1 6PN  
☎ 0117 372 6372  
email: [enquiries@planninginspectorate.gsi.gov.uk](mailto:enquiries@planninginspectorate.gsi.gov.uk)

Date  
11/11/2004

**Appeal Ref: CROW/5/M/04/2400**

**Site Address: Land known as Whay Dale, near Birdsall, Malton, North Yorkshire.**

- This appeal is made under section 6(1) of the Countryside and Rights of Way Act 2000 (the Act) against the above land having been shown on a provisional map as open country.
- The appeal is made by Birdsall Estate Company Limited and is dated 12 February 2004.
- The provisional map was issued by the Countryside Agency (the Agency) under section 5 of the said Act, and relates to the North East of England (Region 5).
- The ground of appeal is that the land does not consist wholly or predominantly of mountain, moor, heath or down, and to the extent that the Countryside Agency have exercised their discretion under section 4(5) (b) of the Act to treat land which is not open country as forming part of an area of such country they should not have done so.

**Summary of Decision: The appeal is dismissed.**

## Preliminary Matters

1. During the hearing it became apparent that evidence would be most usefully presented at the appeal site. At an appropriate point in the proceedings the hearing was therefore adjourned to continue on site.

## The Appeal Site

2. The appeal site consists of two parcels, the larger of which is a fairly steep sided dale, running north-east to south-west, which at its southern end adjoins a shallower southerly facing dale running approximately east to west. The whole of the appeal site has a surface area of approximately 30 hectares.

## The Main Issue

3. The main issue is the extent to which the appeal site qualifies as down as a result of its vegetation and general character, including openness. There is no evidence that the Agency have exercised their discretion under section 4(5) (b) of the Act, so the second part of the ground of appeal does not need to be considered.

## Reasons

4. Dealing firstly with vegetation, the appellants present evidence from an ecological and landscape assessment and detail the previous land management of the appeal site. They say that the site was aerially fertilised up until 1993, when it was entered into a countryside stewardship under the rules of which fertilisation has ceased and the land has been grazed by stock. The ecological and landscape assessment concludes that the site consists entirely of improved or semi-improved grassland and therefore it is not down.

5. The ecological and landscape assessment draws attention to paragraphs 54-56 of the Agency's published Mapping Methodology for England (the methodology), but the Agency points out that these paragraphs apply only to the draft map stage and not to appeals against the provisional map. Be that as it may, Defra guidance at paragraph 5.16 advises that the test to be applied on appeal, is whether or not the land consists wholly or predominantly of (in this case) down. The guidance also interprets 'predominantly' suggesting that if an Inspector considers that in his or her judgement it is obvious that more of the land consists of the relevant qualifying habitat than does not, then the conclusion is likely to be that the land consists predominantly of down. This decision will follow Defra guidance.
6. The ecological evidence submitted by the appellants acknowledges the presence of tor grass, salad burnet and thyme species, associated with anthills. These are listed as key downland indicator species at section 7.3 of the Access Inspectors Handbook. However, the appellants suggest that although tor grass would be expected in unimproved calcareous grassland, where it is prevalent it may indicate improvement. Ecological evidence submitted by the Ramblers' Association challenges this and they suggest that many of the species identified by the appellants are present in natural chalk grassland. They point out that tor grass tends to grow on infertile soil and areas of land such as the appeal site that are difficult to fertilise because of steep slopes.
7. The Agency say that when considering whether or not to map land as open country they do not conduct ecological evaluations, but follow their methodology. The methodology was produced following wide consultation and is based on landscape assessment rather than an ecological approach. The Agency correctly points out that Defra guidance suggests that the methodology should form the basis for the consideration of all mapping appeals.
8. All parties agree that in line with the methodology, improved and semi-improved grassland should not be mapped as open country. The appellants suggest that in judging whether grassland is semi-improved it is helpful to place it on a continuum between improved grassland, at one end of a scale, and natural grassland at the other. They contend that the vegetation on this site is nearer the 'improved' than the 'natural' category. The Ramblers' Association agree that judging whether or not grassland is natural or improved is a matter of scale, but that the presence and frequency of calcareous plant species, including those identified by the appellants, indicates that the appeal site is much nearer natural, than improved.
9. At the appeal site, the appellants and the Ramblers' Association pointed out some of the plant species described in their ecological evidence. I saw that the flatter areas of the site contain areas of semi-improved grassland with some clover, but that the valley sides are dominated by tor grass and scattered scrub. I also saw a fair frequency of downland indicators including wild thyme, salad burnet and devils bit scabious on areas of the valley side where the grasses are shorter, also noting the presence of anthills. I note that fertilisation of the site ceased in 1993 and adopting the concept of a sliding scale suggested by the appellants, I conclude that the predominant vegetation on the appeal site is now very much more akin to natural, than improved or semi-improved, grassland. This finding is broadly consistent with the views of the agency and the Ramblers' Association, and also accords with the description of down contained within the methodology. I conclude that very much more than a half of the appeal site contains a predominance of qualifying vegetation and that by reason of this it is down.

10. Turning to general character, the appellants suggest that the appeal site is fully enclosed and that the western boundary is within 20 metres of nearby housing. I saw that although the boundaries are marked by well maintained fencing, given its size and topography these do not detract from a sense of openness. Although views are sometimes restricted by steeply sloping valley sides, the site forms a part of a typical limestone landscape and provides views across undulating countryside, within the site itself, across the valley to the south and along the valley to the east. This finding is broadly consistent with the views of the Agency and also accords with the open character definition contained in the methodology. I therefore conclude that the appeal site is down by reason of its general character, including openness.

#### **Other Matters**


11. The appellants point out that the western boundary of the appeal site is within 20 metres of a dwelling. This does not provide a relevant ground of appeal, although the part of the appeal site in question may become excepted land, as listed in schedule 1 to the Act.

#### **Conclusion**

12. Having regard to the above and also to all other matters raised I conclude that by virtue of its vegetation, character and openness, the appeal site is down and correctly shown as open country on the Provisional Map. The appeal therefore fails.

#### **Formal Decision**

13. For the above reasons I hereby dismiss the appeal and, in so far as it relates to the appeal site, approve the Provisional Map without modification.



INSPECTOR

**APPEARANCES**

**FOR THE APPELLANT**

Dr M McLellan	1 Plexfield Road Rugby Warwickshire CV22 7EN
---------------	---

MR M Willoughby	Estate Office Birdsall, Malton North Yorkshire NYO17 9NU
-----------------	---

Mr S Fairbank	As above
---------------	----------

MR G L Bell	The Old Vicarage Thixendale, Malton North Yorkshire YO17 9TG
-------------	---

**FOR THE AGENCY**

Mr C Smith	Appeals Officer Countryside Agency 1 Redcliff Street Bristol BS1 6NP
------------	--

**THE RAMBLERS' ASSOCIATION**

DR T Halstead	1 Derwent Drive Wheldrake York YO19 6AL
---------------	--

Ms S Donaghy	The Bungalow Back Lane Osgodby, Selby North Yorkshire YO8 5HS
--------------	---

**DOCUMENTS**

Document 1.	List of persons present at hearing.
-------------	-------------------------------------