



Appeal Decision

Hearing held on 30 March 2005

By Philip Pinney

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

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25 May 2005

Appeal Reference: CROW/8/M/04/3491

Land at Millington Pastures (9 compartments), Millington, East Riding of Yorkshire

- The 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 Mr J A Burley, and is dated 2 September 2004.
- The provisional map was issued by the Countryside Agency (the Agency) under section 5 of the Act, and relates to the East of England (Region 8).
- The ground of appeal is that the appeal site does not consist wholly or predominantly of mountain, moor, heath or down, and to the extent that the 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 allowed in part, and the provisional map is modified accordingly.

The Appeal Site

1. The appeal site covers 68.7 ha on both sides of the road through Millington Dale, which it follows for about 2.4 kms. The appellant sub-divides it into nine compartments (called 1-9) and the Agency into six parcels (A-F).
2. For clarity, I will use the appellant's numbering in my considerations. His compartments are shown on a reduced extract of the provisional map at page 8 of this decision. All areas (in hectares from the appellant), distances, directions (N, S, E & W) are approximate.

The Main Issue

3. The main issue is the extent to which the appeal site qualifies as mountain, moor, heath or down (MMHD) 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 this aspect of the statutory ground of appeal need not be considered.
4. In this decision, I will consider compartment 4 first. Then, in relation to compartments 1-3 and 5-9, I will look at the evidence about the vegetation (the first test above) in general terms and then assess how it affects each compartment. Finally, I will consider the general character and openness of the appeal site (the second test).

Reasons

Compartment 4

5. Compartment 4 (Agency G and H) covers 5.20 ha east of the road in the south of the site. The appellant says it has 100% non-qualifying (NQ) vegetation, including about 62% improved and semi-improved grassland (IG & SIG), 11% dense scrub/woodland and 26%

marshy ground. He also says it had a heavy application of slurry some years ago. The Agency say it is predominantly SIG and woodland, and is not MMHD or open country.

6. Although I consider compartment 4 has less NQ vegetation than claimed by the appellant, it is obvious to me that the relevant qualifying vegetation occupies less than half of its land. Therefore, in accordance with Defra Guidance¹ paragraph 5.16 (DG 5.16), I conclude that it does not qualify as down under the first test. As it follows that it is not necessary for me to consider its general character, I conclude that compartment 4 is not open country.

Vegetation:

General Comments relating to Compartments 1-3 and 5-9:

7. The appellant runs a breeding herd of highland cattle and has agistered sheep and cattle on the appeal site, and says the predominant SIG is the result of the grazing regime employed over the last few years. He says the appeal site should not be mapped as down and/or open country as its compartments have 60-100% cover of NQ vegetation (except compartment 7 with only 41.2%). The appellant says these figures come from an analysis undertaken by a consultant from Environet Consulting Limited (ECL), who drew a sketch map depicting the vegetation in Phase 1 habitat parcels.
8. The Agency say these compartments are down and open country with a predominance of qualifying vegetation, namely unimproved calcareous grassland, variously supplemented by scattered trees and/or scrub on a qualifying habitat (henceforth I will abbreviate unimproved grassland, with or without the terms calcareous and/or chalk, as UIG). The Ramblers' Association (RA) also say the site is down and open country, predominantly consisting of semi-natural UIG in an area of chalk geology. Quoting from the SSSI citation, they say that much of the (larger) valley system is occupied by UIG exhibiting a range of community types on the varying slopes and aspects. They also refer to the results of the Phase II survey derived in part from a survey of quadrats (in compartments 1, 2, 3 and 6), and report the presence of CG2 and CG4 NVC vegetation characteristic of UIG as defined in documents relating to the Act.
9. Noting that the percentages and assessments of qualifying and NQ vegetation submitted by the appellant differ significantly from those submitted by the Agency and RA, I examined the differences at the hearing (which continued on site). It soon became apparent that the ECL consultant often uses the terms IG and SIG to describe vegetation, which the Agency and RA call SIG and UIG. Having now seen the site and listened to the evidence, in most instances, I consider that the assessments submitted by the Agency and RA offer a more accurate and robust interpretation of the guidance given in the Agency's MME² than the assessments put forward by the ECL consultant. Indeed, I consider that many parcels marked as IG on the ECL habitat sketch map are SIG, and that most of the sketched SIG parcels are UIG under the terms of the MME guidance. Whilst the difference between IG and SIG need not affect my findings as both count as NQ vegetation, the difference between NQ SIG (as assessed by the ECL consultant) and qualifying UIG (as assessed by the Agency and RA) is crucial.

¹ *Guidance on Appeals under Section 6 of the Countryside and Rights of Way Act 2000: Appeals against the showing of land as Open Country or Registered Common Land on the Provisional Map* [Department for Environment, Food and Rural Affairs, July 2003] (henceforth DG).

² The Agency's *Mapping Methodology for England* (MME) paragraphs 68-73.

10. The ECL consultant questions the RA's use of SSSI and NVC Phase II information and says their findings are dated. He also questions some aspects the methodology used by the Agency and acknowledges that, at times, he uses his own methodology and says that he often calls a habitat SIG if it does not have the diversity of vegetation that he expects to find in UIG. In evidence relating to compartments 1-3 and 5-9, his report mentions a dominance of tor grass (and often false oat grass as well) on most sloping parts. He calls these areas SIG because of this dominance, whilst also acknowledging that many parcels have some indicator species and characteristics typical of UIG. He says the MME³ calls SIG a transition category with a range of species, which is often less diverse than UIG and considers the NVC to be a poor methodology for separating SIG from UIG. Responding, the RA say the lack of diversity in these compartments cannot be attributed either to a partial modification with artificial fertilizers, or to a reversion towards a more natural composition following a reduction in intensive treatment. As the above MME paragraph highlights these caveats, and the appellant does not claim that the site has had any such treatments and/or modifications in the past (except on compartment 4 as mentioned above), I prefer the RA's interpretation of this MME paragraph.
11. Mindful that the NVC and SSSI assessments are dated, I will base my judgement on the observations and evidence given at the time of my visit as demanded by DG 5.21. I will also follow the guidance given in the MME and other documents available to the public relating to the Act. In this respect, if a parcel has UIG with or without scattered scrub as its typical vegetation, perhaps with scattered trees as well, and the land comprises semi-natural grassland in an area of chalk geology, I note the MME says it should qualify as down⁴. I also note that grazing is a traditional method of managing downland (even though the appellant, who mentioned it, suggests otherwise).
12. On site, all parties noticed that the ECL sketch map (from which the appellant's percentages were derived) does not portray accurately either the extent or the position of some Phase 1 habitats. The consultant now acknowledges that some of these areas were not drawn accurately and agrees that some of the tracks should not have been assessed as bare ground (and NQ). For these reasons, I also consider it unsafe to place undue reliance upon either the degree of precision and/or general nature of some of his percentages.

Compartment 1

13. Compartment 1 (Agency C) covers 29.35 ha west of the road in the middle of the site. The Agency say it consists predominantly of UIG with scattered regenerating trees and scrub (some dense) on a qualifying habitat. The RA makes similar observations and the Agency's surveyor (in conjunction with compartments 7-9) says compartment 1 has more than 75% qualifying vegetation and less than 50% NQ SIG and gorse. These figures differ significantly from those presented by the appellant, who says it has 63.9% NQ (10.2% IG, 48.7% SIG and 5.0% dense scrub) and 36.1% qualifying UIG.
14. The appellant now acknowledges that, even though he called some vegetation SIG because it was not sufficiently species rich, these parcels may be UIG under the terms of guidance given in the MME and other documents relating to the Act (much as related at paragraph 10 above). Be that as it may, I found many NQ areas of SIG and/or IG, especially on some lower and/or flatter parts in the northern parts of this compartment and a few, quite

³ MME paragraph 72.

⁴ MME paragraph 68.

extensive areas of NQ dense scrub and/or trees. Elsewhere though, especially on the steep slopes in the NW arm and along the narrower southern parts of this large compartment, I found extensive cover of qualifying UIG vegetation, much as suggested by the Agency and RA. For these reasons, it is obvious to me that more of compartment 1 is occupied by the relevant qualifying vegetation than is not. Therefore, in accordance with DG 5.16, I conclude that it qualifies as down under the first (vegetation) test.

Compartments 2 and 3

15. Compartments 2 and 3 (Agency E and B) cover 9.91 and 8.07 ha east of the road, which they follow for about 1.8 kms. The Agency say these compartments consist predominantly of UIG with some scattered regenerating trees and scrub on a qualifying habitat, and the RA assessment is similar. The Agency's surveyor says these compartments have more than 75% qualifying vegetation whereas, in written evidence, the appellant says compartments 2 and 3 have slightly less than 34% and 16% qualifying UIG. He says the remaining parts consist of NQ vegetation with about 59% IG/SIG and 8% dense scrub/bare ground in compartment 2, and about 61% IG/SIG and 24% dense scrub in compartment 3. Nevertheless at the hearing, his ECL consultant agreed that the track was not bare ground and acknowledged that some of the vegetation, which he had called SIG because it was not sufficiently species rich, might count as UIG under the MME definitions.
16. Be that as it may, I found that the often-steep and mostly west-facing slopes are extensively covered with qualifying vegetation, namely UIG interspersed with patches of scattered trees and scrub, much as reported by the Agency and RA. Whilst I also found a few significant areas of NQ dense scrub in both compartments, it is obvious to me that more of the land in each compartment is occupied by the relevant qualifying vegetation than is not. Therefore, in accordance with DG 5.16, I conclude that compartments 1 and 2 qualify as down under the first test.

Compartment 5

17. Compartment 5 (Agency F) covers 10.06 ha west of the road in the north of the site. The Agency say it consists predominantly of UIG with scattered regenerating trees and scrub on a qualifying habitat, and their surveyor says it has 50-75% qualifying vegetation and less than 50% NQ SIG and gorse. The RA say it is predominantly UIG, even though it is not species rich in places.
18. These assessments differ greatly from those presented by the appellant, who says this compartment has 91% NQ (namely 32.4% IG, 58.1% SIG and 0.5% bare ground) and only 9% qualifying UIG. On site, the ECL consultant acknowledged the track was not bare ground and agreed that some of the vegetation shown as SIG, because it was not sufficiently species rich, may be UIG under MME definitions.
19. Be that as it may, I found a wide strip of NQ SIG/IG through the lower and flatter parts of this compartment. I also saw that the often-steep east facing slopes were significantly greener and had much less scrub than other sloping compartments on the appeal site. Nevertheless, on close examination and notwithstanding the presence of some patches of SIG, I agree with the Agency and RA that these slopes qualify as UIG under MME guidelines. Noting also that the sloping area is larger than that covered by the flatter ground, it is obvious to me that more of the compartment is occupied by the relevant

qualifying vegetation than is not. Therefore, in accordance with DG 5.16, I conclude that compartment 5 qualifies as down under the first test.

Compartment 6

20. Compartment 6 (Agency A) covers 4.60 ha west of the road at the south end of the site. The Agency (and RA in general terms) say it consists predominantly of UIG with scattered regenerating trees and scrub on a qualifying habitat, and the Agency's surveyor says it has more than 75% qualifying vegetation and less than 50% NQ SIG. These figures differ significantly from the written evidence presented by the appellant, who says it has 81% NQ vegetation (68.1% SIG and 12.9% dense scrub) and 19% qualifying UIG.
21. On site, it became evident that the ECL consultant's sketch map does not accurately portray some parcels. Indeed, he now agrees that some areas of scrub are much smaller than depicted and that most are not dense. He also acknowledges that some parcels shown as SIG, because of the predominance of tor grass and lack of diversity, may be closer to qualifying UIG than he had first thought.
22. Be that as it may, whilst I saw a few areas of NQ SIG and some of dense scrub, I consider that most of the remaining land consists of qualifying UIG and scrub as reported by the Agency. It is therefore obvious to me that more of this compartment is occupied by the relevant qualifying vegetation than is not. In accordance with DG 5.16, I conclude that compartment 6 qualifies as down under the first test.

Compartments 7, 8 and 9

23. Compartments 7, 8 and 9 (Agency D) cover 1.51 ha (0.85 + 0.41 + 0.25 ha) west of the road in the north/centre of the site. As they have no internal boundaries, I will consider them as a single compartment.
24. The Agency and RA say these compartments are predominantly UIG with some scattered regenerating trees and scrub on a qualifying habitat, and the Agency's surveyor says they have more than 75% qualifying vegetation. In written evidence, the appellant says these compartments have about 60% NQ vegetation (56% SIG and 4% bare ground) and 40% qualifying UIG. Subsequently at the hearing, the ECL consultant agreed the track should not be called bare ground and felt the poor SIG maybe nearer to UIG than suggested above.
25. I found extensive areas of UIG across these compartments and only a few patches of NQ SIG. In the light of my observations and the evidence from the parties, it is obvious to me that more of the land is occupied by the relevant qualifying vegetation than is not. Therefore, in accordance with DG 5.16, I conclude that compartments 7-9 qualify as down under the first (vegetation) test.

General Character, including openness - Compartments 1-3 and 5-9:

26. In assessing the site's general character, all parties agree that the external and internal boundaries (except between compartments 7, 8 and 9 as discussed above) are clear and appropriate within the terms of MME guidance⁵. They also agree that compartments 1-3 and 5-9 have steep-sided valleys and lie in an area of chalk geology. Nevertheless, whilst the Agency and RA say variously that the site has an open character with extensive vistas

⁵ MME paragraphs 59-60.

across the surrounding and undulating chalk landscape, the appellant says it is enclosed and not open country. He also says the steep-sided dales do not combine with surrounding land to create an open vista and that the site is not part of a downland landscape.

27. Be that as it may, I consider the large size, considerable vertical extent, steep-sided scarp slopes and dry valleys of the appeal site as a whole combine to give these compartments the open aspect and general characteristics expected of down in MME guidance⁶.
28. Even though the NW end of compartment 6 does not have open vistas to the north and NW, as it lies alongside Millington Wood, I saw open and extensive downland vistas from most other parts of this compartment. I also saw that most parts of the remaining compartments (1-3, 5 and 7-9) lie within a generally open landscape and offer many extensive vistas across undulating countryside.
29. I conclude therefore that compartments 1-3 and 5-9 have the general character and openness needed to qualify as down under the second test. As they also qualify under the first test, I conclude that the land covered by these compartments is MMHD and open country.

Other Matters

30. The appellant questions some points made by the RA concerning an aerial photograph. He also considers that some photographs from the Agency and RA are of a selective nature. Be that as it may, as I saw the site on a clear day, I have not relied on either the aerial or other photographs in the considerations leading to my decision.
31. The appellant says public access would severely prejudice his small, prestigious shoot (which has release pens on or near the site). He also says that it could affect the conservation of the SSSI and prejudice the considerable wildlife on the site. As these issues deal with matters that are not material to the outcome of appeals under section 6 of the Act, I have not allowed them to influence the considerations leading to my decision. Nevertheless, the appellant may wish to note that there are other provisions within the Act that may be relevant.

Conclusions

32. Having regard to these and all other matters raised, I conclude that on the appeal site:
 - a. compartment 4 does not qualify as MMHD and should not be mapped as open country; and
 - b. compartments 1-3 and 5-9 qualify as MMHD and should be mapped as open country.

⁶ MME paragraph 68, footnote 10.

Formal Decision

33. For the above reasons, I hereby allow the appeal in part and, in so far as it relates to the appeal site, approve the provisional map subject to the deletion therefrom of compartment 4 (shown cross-hatched) on the map extract at page 8.



INSPECTOR

APPEARANCES

For the Appellant:

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For the Ramblers' Association:

Mr M Biggs	Area Access Officer, East Yorkshire and Derwent Area, Wynstow, 7 Caedmon Close, York YO31 1HS
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Interested Parties:

Ms M Greenwood	Whinny Hill Farm, Kiln Wick Percy Lane, Millington YO42 1TH
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DOCUMENTS

1. Attendance list 30 March 2005.
2. Ramblers' Association response to Dr McLellan's comments (dated 29 Mar 05).

REDUCED EXTRACT OF THE PROVISIONAL MAP (approximate Scale - 1: 12,000)

Key:

Area outlined by red line

The appeal site (with blue lines between some compartments).

Cross-hatched area

The land to be deleted from the map of open country.

