



Order Decision

Hearing held on 16 September 2014; site visit on 21 November 2015

by Sue Arnott FIPROW

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

Decision date: 17 December 2015

Order Ref: FPS/P2935/7/37M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Northumberland County Council (Public Rights of Way) Definitive Map Modification Order (No 12) 2012.
- The Order is dated 27 April 2012. It proposes to modify the definitive map and statement for the area by recording a restricted byway between Coalcleugh and Carrshield in the Parish of West Allen as shown on the Order map and described in the Order schedule.
- There were four objections outstanding when Northumberland County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.
- In accordance with Paragraph 8(1) of Schedule 15 to the Wildlife and Countryside Act 1981 I gave notice of my proposal to confirm the Order with modifications to clarify the alignment of a part of the Order route and to delete the southernmost section from the Order. One objection was submitted in response to advertisement of these proposed modifications.

Summary of Decision: The Order is confirmed subject to one but not all of the modifications previously proposed, as set out below under 'Formal Decision'.

Preliminary Matters

1. If confirmed with the modifications proposed in paragraph 105 of my interim Order Decision issued on 4 March 2015, the Order would record on the definitive map and in the definitive statement a restricted byway along the Order route between points B and D (passing to the east of the garden boundary wall at Sunnyside) but omitting the section proposed between points A, C and D.
2. These modifications have been duly advertised and one objection has been submitted from Mr Kind who was the applicant for the first Order¹. Whilst he opposes the deletion of A-D-C, he supports the decision to confirm the route D-B in principle although he disagrees with some of the reasoning.
3. Northumberland County Council (NCC) regards clarification of the route at Sunnyside as helpful. Since no submissions have been made opposing this minor alteration to the Order map and no further issues have arisen in relation to it, I intend to confirm the Order with the modification as previously proposed.
4. The 'new' evidence now before me is limited to a coloured copy of the 1825 plan showing the continuation of the proposed new turnpike road from Coalcleugh over the county boundary to the Alston Turnpike (A689). However in addition to submissions that relate to this southern section of the Order route (proposed for

¹ As explained at paragraph 7 of the Interim Order Decision

deletion), other arguments are made in relation to the evidence for the route as a whole.

5. For cross-reference, numbers in square brackets are used in this Decision to refer back to paragraphs in the interim Order Decision.

The Main Issues

6. I previously noted that the main issue was whether the evidence shows that in the past a public highway existed along the Order route and, if so, whether this was a public right of way with vehicles or a bridle road [2].
7. On the basis of the evidence then considered, I reached the conclusion that the route was once a public carriageway but that these rights ceased to exist over the section A-C-D south of Sunnyside. I concluded that, taking account of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act), the route between B and D should be recorded on the definitive map and statement as a 'restricted byway'. No evidence or submissions have been made since the issue of my interim Order Decision to dispute this finding.
8. The outstanding matter now at issue here concerns my conclusion that the Order route between points A, C and D should not be recorded at all.
9. The main issue for me to consider now is whether the evidence before me is sufficient to show, on a balance of probability, that the historical rights of the public over this section A-C-D do still exist and therefore whether this part of the Order route should be added to the definitive map and statement as a restricted byway as originally intended.

Reasons

Armstrong's Map of 1769

10. Mr Kind's first point of objection concerns interpretation of the map published in 1769 by Armstrong. He takes issue with my conclusion at paragraph [10] that "*it is possible that Armstrong was showing this main valley route along the line of the present bridleway westwards towards Roughside or even some other alignment between the two.*" He highlights the representation of the Order route on other relevant maps and plans and "*the total absence of any trace of any other road*". In his submission, Armstrong's map has to be considered alongside all the other evidence, rather than in isolation.
11. I completely agree that no one map should be taken in isolation and indeed Armstrong was just one of many maps examined and analysed by me in the interim Order Decision, both individually and collectively.
12. On the particular question as to whether Armstrong was showing the southern section of the Order route, I retain the same doubts as previously expressed. I do not have before me any corresponding map produced by Armstrong for the Cumbria side of the county boundary so as to be able to fully put into context the two branches he shows continuing westwards on his Northumberland map. Even so, it seems to me that this arrangement of roads on the Cumbria side does not fit easily with that shown on the 1770 map by Hodskinson and Donald. In fact it is this 1770 map which in my view lends more support for the Order route (A-C-D), since the road up from Nent Head appears to cross the county boundary closer to the line of the (pre-turnpike) valley road shown on the 1800 inclosure map as well as on maps by Fryer and by Greenwood in the 1820s.

13. In 1800 the inclosure map showed two routes to the county boundary. It is not inconceivable that Armstrong showed one on his Northumberland map but Hodskinson and Donald showed the continuation of the other in Cumberland; however, I acknowledge that is conjecture. Nevertheless, taking all the evidence into account, I have few doubts that the Order route continued south westwards from Coalcleugh in the late eighteenth century but I am still not wholly convinced this was the road shown by Armstrong.

Interpretation of the statute: inclosure

14. Mr Kind's second main criticism is not of my interpretation of the Allendale and Hexhamshire Inclosure Award and Plan of 1800 but of my reasoning in reaching my conclusions.

15. He referred to the recent decision of the Court of Appeal in the case of *R on the application of John Andrews v SSEFRA (2015)*² [*the Andrews case*']. In particular he notes the judgement of Lord Dyson MR who (at paragraphs 33 and 34) discusses the "purposive interpretation" of statute, a phrase he refers to as used "as a shorthand for an interpretation which reflects the intention of Parliament". Lord Dyson continued:

"The Court presumes that Parliament does not intend to legislate so as to produce a result which (i) is inconsistent with the statutory purpose or (ii) makes no sense or is anomalous or illogical. A purposive interpretation is all the more appropriate in a statute which is couched in language which is less consistent and more imprecise than that generally found in modern statutes."

16. He added:

"... We accept that a 21st century Court should exercise care before reaching a conclusion as to what Parliament must have intended in enacting a statute at the beginning of the 19th century. But the question of what Parliament must have intended has to be addressed."

17. In relation to interpretation of this inclosure award, Mr Kind's point is that I should consider whether, in passing the 1792 Inclosure Act³, Parliament could possibly have intended, for example, that inclosure commissioners should set out dead-end and landlocked roads. If that is unlikely, then he submits that arguments put to me previously by Mrs Sobell must fall.

18. I find the judgement in *the Andrews case* helpful in terms of the overall approach to legislation dating from periods when the processes and practices of everyday life were in many ways quite different from those today. In this particular context, adopting "a purposive interpretation" of the late eighteenth century legislation seems to me to support the conclusions I previously reached in the interim Order Decision rather than change them and does not alter the outcome of my analysis of the inclosure evidence when evaluated alongside all the other pre-turnpike documents.

19. In short, prior to considering the Turnpike Act of 1826⁴, I concluded at paragraph [58] that since the Order route is the only possible extension of the awarded Whiteleyshield Road, on a balance of probability, it would likewise have been a full vehicular highway. That conclusion has not changed.

² R on the application of John Andrews v Secretary of State for Environment, Food & Rural Affairs [2015] EWCA Civ 669

³ Identified in full at paragraph [23] of the interim Order Decision

⁴ Likewise identified in full at paragraph [59] of the interim Order Decision

Interpretation of the statute: turnpike

20. However, Mr Kind invites me to consider this approach also in relation to the nineteenth century legislation and in particular the 1826 Act.
21. In essence, he challenges the conclusion I reached in paragraph [99] of my interim Order Decision which begins: "*Although there is no conclusive proof of the closure of the old road between points A, C and D by the Turnpike Trustees through the process provided by the 1826 Act⁵, it is my view that the provisions of that Act did allow such a closure despite being ambiguously worded.*"
22. He considers my reasoning at paragraph [78] (that "*there could have been no reason **not** to extend the same powers to the Trustees under the 1826 Act in relation to all the branches of the proposed turnpike as well as the main subject road ...*") is not rational and argues instead that a proper construction of the Act is what is required.
23. I fully take on board the helpful guidance offered in *the Andrews case* and accept that 'a purposive interpretation' is an appropriate approach to be taken here, rather than the perhaps ill-defined "*liberal interpretation of the 1826 Act*" expressed at paragraph [79].
24. Yet given the inconsistencies within the Act, noted in paragraphs [71] to [75], I remain convinced that a 'purposive interpretation' of the 1826 Act should lead to a conclusion that it was intended the same powers to stop up old roads rendered 'useless and unnecessary' should apply to all three branches of the new turnpike.
25. Mr Kind challenges my second conclusion in paragraph [99] (based in interim findings in paragraph [79]⁶). This reads: "*I further conclude that the brown colour applied to this part of the Order route on the 1825 plan of the proposed turnpike most probably delineated this as a 'useless and unnecessary' part of the old road that was to be stopped up by the Trustees.*"
26. In his objection Mr Kind contends "*there is a fundamental distinction between sections of road marked 'useless and unnecessary' on a turnpike plan, and those not so marked. It is not open to the Inspector to apply her view ('likely') of what was then 'useless and unnecessary' in the absence of evidence that this is how the commissioners did proceed. 'Likely' is a degree of probability, and a probability can only be drawn from evidence, and not from surmise.*"
27. There is no doubt that the standard of proof to be applied in cases such as this is the balance of probability. Evidence is before me here in the form of the turnpike plan deposited in 1825, now supplemented by a coloured copy showing the section passing over into Cumbria; in a number of places this shows a yellow route (depicting the proposed turnpike branch road) duplicating a section of brown route (which represents a 'present old road').
28. In the context of this document, and after examining all the extracts provided to me, I do not consider it unreasonable, irrational or inappropriate to deduce that in such instances the plan is probably showing an old road that would be rendered 'useless and unnecessary' by the new turnpike road. However with no indication on the plan to explain what is shown, I recognise this is my interpretation, not a fact.

⁵ The interim Order Decision erroneously referred to "the 1926 Act".

⁶ That the brown road was likely to qualify as 'useless and unnecessary'

29. Mr Kind draws attention to paragraph [77] in which I considered one of these examples at Whiteley Shield. Whilst I do not regard it as in any way improper to have examined other aspects of the turnpike road on a document submitted in evidence⁷, I do accept that to have further stated: "*This is a road which does not exist today and which therefore could be presumed to have been stopped up by the Trustees*" overlooked the possibility, highlighted by Mr Kind, that the formal procedures necessary to lawfully close the highway may not have been completed. It should not be presumed that the lack of any physical manifestation of a road means that no public right of way exists.
30. In accepting this point made in relation to a section of road that is not the subject of this Order, I recognise that it is also of fundamental importance to my analysis of the turnpike evidence at Coalcleugh.
31. In challenging aspects of my paragraphs [79] and [80], Mr Kind highlights the dangers of presuming extinguishment of a highway. In practical terms he points to the effect of closure of the brown road on what is now recorded as Bridleway 32, and questions whether "*turnpike commissioners should be able casually to stop up a major cross-road (ie the road from Allenheads to Coalcleugh to the county boundary, and on to Alston Moor)*". I can see the difficulty this presents.
32. On this topic, Mr Kind refers to three cases in support of his submissions. In *Logan v Burton (1826)*,⁸ concerning the interpretation of an inclosure award, Bayley J said: "If the construction be doubtful, that construction should be adopted which, whilst it gives the greatest power to the commissioners, most effectually guards the rights of the public." In *Dawes v Hawkins (1860)*⁹, Byles J said: "It is also an established maxim, – once a highway always a highway: for, the public cannot release their rights, and there is no extinctive presumption or prescription." Finally, in *Williams v Eyton (1859)*¹⁰ no order of the justices could be found to support the formal closure of an old road, yet in that case the Court found that it could be presumed from the combination of facts that the justices' order stopping up the road had been duly made.
33. Mr Kind recognises that *Williams v Eyton* may have some relevance here but argues there is no compelling evidence that an order was made by the Trustees and therefore no basis for applying a presumption of stopping up to the brown road.
34. It is a fact that no evidence has come to light to show that any of the procedures required by the 1826 Act (and previously noted at paragraphs [73] to [75]) were actually followed. Even if I am right to deduce that the brown road at Coalcleugh shown on the 1825 plan was intended to depict a section rendered 'useless and unnecessary', I recognise there is still no evidence before me that the Trustees made an order to stop up the unnecessary road.
35. Having considered these submissions, and re-examined the historical evidence before me, it must follow that my finding at paragraph [99], that the balance tipped towards the conclusion the southern section of the Order route (A-C-D) was formally closed to the public by the Trustees, cannot be sustained.

⁷ And being an interim decision, further advertisement provided an opportunity for interested parties to make submissions or comment.

⁸ *Logan v Burton (1826)* 5 B&C 513

⁹ *Dawes v Hawkins (1860)* 8CB (NS) 847

¹⁰ *Williams v Eyton (1859)* 4 H&N 358

Alignment

36. The question then arises as to whether the route shown on the Order plan south of point D is the correct historical line of this highway. NCC submits that it is, since it is based on the route which appears on the 1895 Ordnance Survey (2nd edition) map at 25" to 1 mile. Mr Kind had previously highlighted a 'holloway' visible on the ground¹¹ to the south east of A-C which he suggested may have been the line of the old road. This straighter alternative route fits more closely the direct line to the county boundary which appears on the inclosure plan, whereas the Order route reflects the curves of the brown road shown on the turnpike plan, also discernable on the hillside. Certainly by 1865 the OS was still showing the Order route A-C-D as a recognisable track.
37. All the pre-turnpike maps show this road taking a straight line south-westwards from Coalcleugh. I might be inclined to take these as being more representative of the eighteenth century highway but (a) these early commercial maps did not have the accuracy of the Ordnance Survey and (b) the inclosure award did not set out this route and therefore it may not necessarily have been recorded on the plan with precision. On balance I conclude that the evidence points to the Order route being the 'old road' recognised on the 1825 deposited turnpike plan and that this follows the OS track shown in 1865 (and later on the 25" edition).

Summary and conclusions

38. I now find my previous proposal to delete from the Order the section of the route shown as A-C-D cannot be supported by the evidence but my proposal to modify the alignment of D-B in the vicinity of Sunnyside should remain.
39. In summary, having examined and considered the further material and submissions, it is my conclusion that the evidence is sufficient to tip the balance of probability in favour of the continued existence of a vehicular highway over the whole of the Order route. As I previously noted, the effect of the 2006 Act now means that any rights of the public to use it with mechanically propelled vehicles have been statutorily extinguished by Section 67(1) of that Act so that the route should be recorded as a restricted byway.

Conclusion

40. Having regard to all matters raised in connection with the hearing and in all subsequent written representations, I conclude the Order should be confirmed subject to the modification that has been advertised in respect of the proposed alignment of the Order route at Sunnyside but not those relating to the proposed deletion from the Order of section A-C-D.

Formal Decision

41. I confirm the Order subject to the following modification:
- On the Order map, amend the alignment immediately north of point D by moving it to the east of the garden boundary wall at Sunnyside.

Sue Arnott

Inspector

¹¹ As noted in paragraph [1] of the interim Order Decision, I looked at Mr Kind's alternative route on my accompanied site inspection with Mr Tomkins but I took the opportunity to view it again on my recent visit.