



Order Decision

Inquiry held on 16 May 2018

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 07 June 2018

Order Ref: ROW/3182652

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Northumberland County Council Definitive Map Modification Order (No 18) 2016.
- The Order is dated 15 August 2016 and proposes to record a byway open to all traffic running generally south-westerly from the road south of The Nest to the road east of the A1 near the Priestsdean Burn. Full details of the route are given in the Order Map and Schedule.
- There were four objections and representations outstanding when Northumberland County 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. I made an unaccompanied site visit on 15 May 2018 and held a Public Inquiry into the Order on 16 May at County Hall, Morpeth. No-one requested a further site visit following the close of the Inquiry.
2. One statutory objector to the Order in part supported the case made by Northumberland County Council, the order-making authority ("the OMA"), as both believed that the route carried vehicular rights. The objection related to whether or not the evidence presented by the OMA showed that the route should be recorded on the Definitive Map and Statement ("DMS") as a byway open to all traffic ("BOAT"). Given the partial support for each other's case I restricted questions between the parties to matters in disagreement.
3. The other objector who attended the Inquiry was representing the remaining statutory objectors to the Order, relating to the Ellingham Estate ("the EE"). He did not remain for the brief afternoon session of the Inquiry and one matter arose in relation to evidence that he had put forward in the morning session. To ensure fair opportunity was provided to comment on that point I circulated a question immediately following the close of the Inquiry.

Main issues

4. The Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") by reference to section 53(3)(c)(i), which states that an Order should be made to modify the DMS for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to

which the map relates, being a right of way to which this Part applies."

5. The proposed addition of a BOAT to the DMS led the OMA to include section 53(3)(c)(iii) of the 1981 Act, which relates to the modification of particulars of footpaths which terminate on the Order route. The Order map does not show those footpaths, which I would normally expect to be the case. Inquiry Document 2 is a working copy of the DMS showing the relationship of the footpaths to the Order route. Inquiry Document 3 adds additional references to assist identification of relevant points. The recorded public footpath 218/012 ("FP12") runs south from the Order route, point W¹, and then east towards the village of Ellingham. Another public footpath, 218/013 ("FP13"), runs generally north from the Order route from point X.
6. Although two parties to the Inquiry were in agreement that this was a public vehicular route, the alternative argument from EE was that the documentary evidence was indicative of private rights and insufficient to show that there was a public highway. The weight to be placed on some of the documentary evidence, and the interpretation of other parts, was in question through the Inquiry process. The objections from EE initially suggested that the Order should not be confirmed at all; however, it was agreed at the Inquiry that the use of the section Q – X – W by the public on foot was accepted.
7. Most public highways have been accepted by the public since beyond memory and the law presumes that, at some time in the past, the landowner dedicated the way to the public either expressly, with evidence of such dedication now being lost, or impliedly, by making no objection to use of the way by the public. At common law, the question of dedication is one of fact to be determined from the evidence as a whole.
8. In relation to documentary evidence section 32 of the Highways Act 1980 ("the 1980 Act") requires that I take such evidence into consideration "*...before determining whether a way has or has not been dedicated as a highway...*". I am required to give such weight to the document as I consider is "*...justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced.*"
9. On 2 May 2006 section 67 of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") came into effect. From that date an existing public right of way for mechanically propelled vehicles ("MPVs") was extinguished if it was over a way which, immediately before commencement of the 2006 Act, was not shown in the DMS, or was shown as either a footpath, bridleway or restricted byway.
10. Section 36(6) of the 1980 Act requires every highway authority to make, and keep up to date, a list of streets ("LOS") within its area, which are highways maintainable at public expense. It was not disputed that the Order route was recorded on the LOS, although argued by EE that this may have been an error.
11. The OMA indicate that section 67(2)(b) of the 2006 Act saves the rights for MPVs recorded on the LOS, and not on the DMS, at the relevant date. As a result, they said that the appropriate status was BOAT, if I was satisfied that vehicular rights subsist over the route.

¹ Points P – Q are on the Order as made. Points W, X, Y and Z are those added to Inquiry Document 3.

12. Section 66 of the 1981 Act sets out that a BOAT is “...a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used.” It was argued that without sufficient evidence of how the route ‘...is used...’ an Order to record BOAT could not be confirmed.
13. My decision as to whether or not the Order should be confirmed, or modified, will be taken on the balance of probabilities.

Reasons

Physical characteristics

14. The Order route lies to the north-west of the village of Ellingham and runs in a generally south-westerly direction between two accepted public vehicular highways, the U2027, to the east, point Q and the U2022 to the east, point P.
15. At the time of my site visit there were two metal gates at point P. The right-hand gate has a notice relating to the pig unit saying “No unauthorised entry”, which I understand to have been in place for around two years. The sign is not visible when the gates are open, as they were when I visited. I understand that this is usually the case, to allow access to the land and farming enterprise of the pig units just to the south of point W.
16. I understand there to be gate posts near point X relating to a gate which could close across the Order route. It was fairly said not to have been closed for many years, with the gate itself lost in the hedge and overgrowth. Some of the mapping, discussed below, indicates a gate at point P but there appears to be no indication of other gates along the route.
17. The current stoned track appears to have been put in place in early – mid 2014, using stone arising from an EE wind-farm access track. Prior to that EE indicated that the Order route was an earth track with no sign of maintenance, which had been unusable in winter and usable only by certain vehicles in summer. I agree that the relevant judgements submitted indicate that even a publicly maintainable highway may “...have never had a spadeful of gravel thrown upon them...”. An apparent lack of maintenance does not show that the route is not publicly maintainable.
18. The track has hedges along the southern side but is open to the fields to the north with the exception of the eastern end, which is enclosed between hedges and/or walls to a point just south-west of point X. It was agreed that the OMA, in their role as highway authority, provided tarmac/stone from Q to X and just beyond, where access to the property Snipehill² was required, although suggested this may have been no more than offloads from works to repair potholes elsewhere on the network.

Documentary evidence

Eighteenth and nineteenth century mapping

19. There was some agreement that Armstrong’s Map, 1769, showed the Order route to the south of Priestsdean Burn and not the road to the north of the burn. However, EE argued, particularly by reference to the watercourse, that the map was unreliable and may not be showing the Order route. It was

² I understand this is referred to locally as High Nest but I shall refer to it as identified on the Order map, from the OS base map. It was also referred to as ‘Sniperly’ in the Fryer’s Map, 1820

believed that this route had only come into existence as part of estate modernisation in the early – mid nineteenth century, when the EE was developed, with model farms built at Ellingham Home Farm, Wandylaw, Brockham and Tynely.

20. The overlay exercise carried out – with a modern Ordnance Survey (“OS”) map overlaid onto another map by registering common points – is more difficult with the very early maps, produced when survey techniques were quite basic. Taking account of the ‘schematic’ nature of the map, and apparent inaccuracies in relation to watercourses, I am satisfied, on the balance of probabilities, that the route shown is the Order route. It runs past Snipehill, which was noted in the Historic England listing³ to date from the mid-eighteenth century.
21. Smith’s map 1801 continues to show the road layout in a similar manner. Again there are issues in terms of the indication of watercourses with Priestsdean named Tugall Burn. However, watercourses can alter significantly over time, as can local naming conventions. I do not consider this demonstrates an inherent error, making the map unreliable.
22. These earliest maps show Newsteads⁴, to the north of the Order route, to be accessed only from the Great North Road, now the A1, as is the Order route itself. Fryer’s map, 1820, was the first to show the existing public road running north to Newsteads and the relatively straight road running on the northern side of Priestsdean Burn. I agree that the route of FP13 appears to provide access north along with another new road, now recorded as a public vehicular highway, running past Hag House⁵. Cary, 1820-32, shows a similar road layout, with neither indicating the existence of the Order route.
23. Greenwood’s Map, 1828, shows both the road layout referred to above, as well as the Order route, as seen in the two earlier maps. I agree that there appears to have been a change in priorities on the road network over time with changes in the importance of connections to the north on the eastern side of the Great North Road arising in the first part of the nineteenth century. This may well tie in with the development of EE. However, I agree that the Order route was shown on the earlier maps and will not have disappeared and reappeared; I consider that it was the relative importance of the various routes which led to how they were depicted.
24. Commercial maps such as these are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. Combined with evidence from other sources, they can tip the balance of probabilities in favour of such status. In this case I place weight on the depiction of the Order route in the very earliest maps. At that time, before the early nineteenth century changes referred to above, this was an obvious route providing east – west access to and from the Great North Road and, on the balance of probabilities, was likely to have been used by the public in general for this purpose.

Ordnance Survey maps

25. The formation of the OS was in response to a military need for accurate maps. Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to

³ List entry Number: 1234080

⁴ Now Newstead

⁵ Now Newhamhagg

the public became an activity of increasing importance to OS from the early twentieth century. Since 1888 OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way.

26. The Order route continues to be shown in the OS mapping from 1866 on, with the eastern end seen as an enclosed track as far as the western end of Snipehill. The western end of the Order route continues as a track with hedging or fencing to the south and open to fields on the northern side. The OS one-inch, 1945 – 47 indicates it as a minor unfenced road.
27. Although OS maps are reliable in terms of physical characteristics their purpose was not to identify whether routes were public or private. I am satisfied that the Order route has continued to be shown as an available through route.

Finance (1909 - 1910) Act

28. The Finance (1909 - 1910) Act provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. The 'assessable site value' of land allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any public rights of way or any public rights of user, to the right of common and to any easements.
29. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book. The Order route was not excluded from the numbered hereditaments but it was said that this was usual in dealing with such headland routes in this area; however, examples of this were not provided and so I have not placed weight on this argument. The eastern end, enclosed by physical boundaries, was excluded from the adjacent land and this is suggestive of a vehicular right of way.
30. In this instance I do not find that the Finance Act information provides significant support for the existence of public vehicular rights over the Order route as a whole. I accept there is some evidence at the eastern end but this could be seen to be in conjunction with the route of FP13.

Handover and Highways Maps

31. The route was not identified in the 1932 Belford Rural District Council 'handover' map which recorded the routes maintained by them and 'handed over' to the County Council. However, the County Council highways maps and schedules dating from 1951, 1958, 1961, 1964 and 1974 identified the Order route as a publicly maintainable highway. It was numbered as U2050 and the description clearly relates to the Order route. These maps, and the subsequent LOS, can include footpaths and bridleways as 'publicly maintainable highways'. However, it was said that there was no evidence that anything other than vehicular routes were recorded in the maps for this County.
32. In objection the argument was made that the highway maps had no known author and so could not be relied on. Taking account of section 32 of the 1980 Act, I note that these were Council maps, apparently produced and used internally to identify the publicly maintainable highways. There does not appear to have been an opportunity for public scrutiny to ensure reliability but I agree that it would be unlikely for any highway authority to accept

maintenance liability lightly; as noted by the OMA, budget constraints on highway maintenance are not only a recent situation.

33. The LOS has been used to identify routes on OS leisure maps more recently. The 2000 and 2005 Explorer maps show the Order route as "*Other routes with public access*" ("ORPA"). There is no indication that this depiction, which has been in the public domain for at least eighteen years, has been queried.
34. There is an advisory "*No through road for vehicles*" sign at point Q, which the OMA indicate would not be expected on a private road. They said one reason for it to be erected was where there was a physical cul-de-sac, that is where the rights existed but most vehicles would be forced to return the same way as the route was too physically challenging. It is not known when this was erected but it fits the information from EE and the Cyclists Touring Club regarding the previous condition of the route. It also indicates the continued OMA interest in the route.
35. I am satisfied that some weight can be placed on this evidence as indicative of public rights, the balance tipping slightly towards vehicular rather than non-vehicular due to the overall treatment of the route.

Other mapping

36. The route was not shown on the map or schedule produced in connection with the Restriction of Ribbon Development Act 1935. I understand that this was supposed to identify public roads and, as the route was not shown, this provides a little evidence against the status.
37. EE said that there was no evidence on the estate maps to show that the route should be recorded as a BOAT. However, as copies of relevant maps were not provided I have been unable to place any weight on this statement.

The Definitive Map and Statement

38. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS, setting out the procedures to be followed in their production. In the early 1950s the routes now recorded as FPs 12 and 13 were identified as public rights of way. Both are described as running to or from "the Priest's Dean – The Nest Road". The survey map, annotated in around 1952, shows the Order route coloured in the same way as the surrounding acknowledged vehicular highways.
39. Unlike the highways maps referred to above, the DMS procedures ensured public consultation and provided opportunities to object to matters which were incorrect. I consider it would be very unusual for a public right of way to terminate on a private road and that the recording of the footpaths provide some support to the existence of public rights over the Order route itself.

User evidence

40. There was some evidence of use of the Order route P - Q by Trail Rider Fellowship ("TRF"), or former TRF, members in the 1980s and 1990s. I agree with the OMA that this use assists with regard to reputation.

Conclusions as to rights

41. I am satisfied that the route has been a defined feature in the landscape from at least the mid – late eighteenth century. EE suggested that the route arose

as a private estate road. I note that the OMA received dispensation from the Secretary of State to serve notice on-site as they were unable to ascertain the ownership of the land crossed by the Order route⁶. It may be the case that as an ancient estate none of the EE lad is registered.

42. I consider, on the balance of probabilities, that the evidence as a whole is supportive of the route being an old public vehicular highway. Alterations to road priorities in the early – mid nineteenth century suggest that it became less important and less used from then, with the road to the north taking over.
43. Although not shown in the highways handover map in the early twentieth century, it has been recorded by the Highways Authority as a publicly maintainable highway from the middle of the twentieth century, with public rights of way recorded as terminating on it from the same period. This evidence has been publicly available, and so open to challenge, since that time.

Whether the Order route should be recorded on the DMS with the status BOAT

44. It was argued that the evidence presented was insufficient to determine that the status BOAT should be recorded. The OMA noted the difficulties in carrying out surveys to determine such matters in terms of time and resources and argued that matters of status should be looked at holistically.
45. Despite the argument that the user must relate to both footpaths and bridleways Kay, J, as he then was, in *Buckland and others v Secretary of State for the Environment (2000)*⁷ set out “*I equally reject the argument that there needs to be demonstrated both pedestrian and equestrian use.*” This case, including this specific comment, was mentioned in the higher court in *Masters v The Secretary of State for the Environment, Transport and the Regions [2000]* (“*Masters*”)⁸ with no criticism.
46. In *Masters*, “*...the sole issue for this court’s consideration [was] whether the predominant use on foot and horseback over vehicular use is required to be established by the evidence to fulfil the definition of byway open to all traffic in section 66(1) of the 1981 Act, before the way can be shown on the definitive map and statement...*”. As a result I consider that all relevant matters were before the court. It has not been shown that there is a requirement for use on foot and horse, or potentially bicycle, in order to record a route as a BOAT.
47. In *Masters*, Roch LJ said “*Parliament’s intention was to preserve rights of way giving access to the countryside for walkers and horse riders. Parliament intended to include ways over which the public had vehicular rights of way, which rights were rarely if ever exercised by the public. The last thing that Parliament intended was that once a way was shown on the definitive map as a byway open to all traffic, it could be the subject of applications to remove it from the definitive map and statement altogether because the use made of the way by the public had ceased or the balance between the various uses made by the public of the way had changed...The purpose of the definition was to identify the way Parliament intended should be shown on the definitive map and statement by its type or character...*”

⁶ Paragraph 3(4) of Schedule 15 to the 1981 Act

⁷ [2000] 3 All ER 205

⁸ [2000] 4 All ER 458

48. *"The intention of Parliament in passing the Acts of 1949, 1968 and 1981 is in my judgment clear. That purpose is that county councils should record in definitive maps and statements ways, including what Lord Diplock called "full ways or cartways" for the benefit of ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside. Parliament intended that "full highways or cartways" which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement so that rights of way over such highways should not be lost. Parliament's purpose was to record such ways not to delete them...*
49. At paragraph 32, *"It is, in my judgment, clear from those provisions that Parliament did not contemplate that ways...should disappear altogether from the definitive maps and statements simply because no current use could be shown or that such current use of the way as could be established by evidence did not meet the literal meaning of the definition in section 66(1). In my opinion it is much more likely that Parliament intended the way to be shown in the definitive map and statement..."*
50. In conclusion, *"I consider that in defining a byway open to all traffic in the terms set out in section 66(1) of the Wildlife and Countryside Act 1981, Parliament was setting out a description of ways which should be shown in the maps and statements as such byways. What was being defined was the concept or character of such a way."*
51. *Masters* related to an order under section 53(2)(b) of the 1981 Act modifying the status of a road used as a public path ("RUPP") to that of BOAT. However, it is not considered that the Court of Appeal was providing an interpretation of section 66(1) only to be applied in cases dealing with RUPPs; the interpretation of the definition of BOAT applies in the case of all modification orders made under sections 53(3)(c)(i) & (ii). I consider it to be relevant to this case that *Masters* sets out the intention of Parliament was to record routes on the DMS and that it was not simply a 'balance of user' test that was to be defined, as this may alter over time, but the concept or character of the way. I consider that recent public use may be relevant in determining the status but it is not necessarily the defining factor; the *"...current use of the way as could be established by evidence [may] not meet the literal meaning of the definition..."*.
52. I accept that the recording of routes on the LOS and, subsequently on OS maps as ORPA, provides some means for users to identify routes potentially open to them. However, I do not consider that this means such routes should not be recorded on the DMS where appropriate.
53. I was referred to *Baroness Cumberlege of Newick & Patrick Cumberlege v SSCLG & DLA Delivery Limited* [2017]⁹. This was a claim against the Secretary of State for Communities and Local Government ("the SoS") granting conditional permission on a s78 appeal for a residential development, with the claimants arguing that there had been inconsistent treatment of a saved Local Plan policy in relation to another relatively recent decision. The judge set out that it was "plainly desirable" in the public interest that the SoS avoid reaching a conclusion that was apparently inconsistent with another one of his own decisions without any explanation.

⁹ [2017] EWHC 2057 (Admin)

54. In relation to this, I was referred to recent decisions made by other Inspectors in response to the same, or similar, arguments having been made by the objector. I note the findings in the decisions referred to, although bearing in mind that only those involved in each decision can know the totality of evidence before the Inspector in a particular case.
55. In this case there was some evidence of vehicular use of the Order route in the past but I agree with the OMA that this use some thirty or forty years ago does not assist with regard to the question of how the route 'is' used now. There is evidence of current public vehicular use of the Order route; however, that use is atypical of a public vehicular highway as it is wholly associated with the adjacent land, businesses and properties, all part of or tenants of EE. The main MPV use is apparently with tractors and/or trailers, with other vehicles are turned off the land to prevent poaching. There is no evidence of current wider public MPV use.
56. There was clear evidence of current pedestrian use on FPs 12 and 13, as referred to by the OMA and acknowledged by EE in connection with the section W – X – Q. There is no evidence before me of current use on foot, horse or bicycle over the section P – W.
57. The current character of the route arises from works carried out by EE in around 2014. In general it appears to be a privately made and/or maintained track, which EE indicate was only designed for occasional farm traffic, and does not look like the surrounding public roads. There is a little evidence on the section X – Q that there may have been some highway patching at some point. However, these works do not appear to be recent and contribute to the character of the route as an 'old road' in this location.
58. I agree with the objector that the purpose of the legislation was not to record rights of way on the DMS which were part of the ordinary road network; as he indicates these would be expected to be 'obvious'. I do not consider that the Order route physically appears as, or is actually used as, part of the ordinary road network. I am satisfied from the evidence as a whole that the way in which the route is used, along with its appearance, show on the balance of probabilities that it has the "...concept or character..." supporting the recording of the route as a BOAT on the DMS.

Other matters

59. The law does not allow me to consider such matters as the desirability of the route in question or concerns regarding possible future use and management. Although I am well aware that these are the important matters for people living locally and using the land, I have not been able to take account of these issues.

Conclusions

60. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be confirmed as made.

Formal Decision

61. The Order is confirmed.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Mr A Bell Definitive Map Officer, Northumberland County Council

In Support and Objection to the Order:

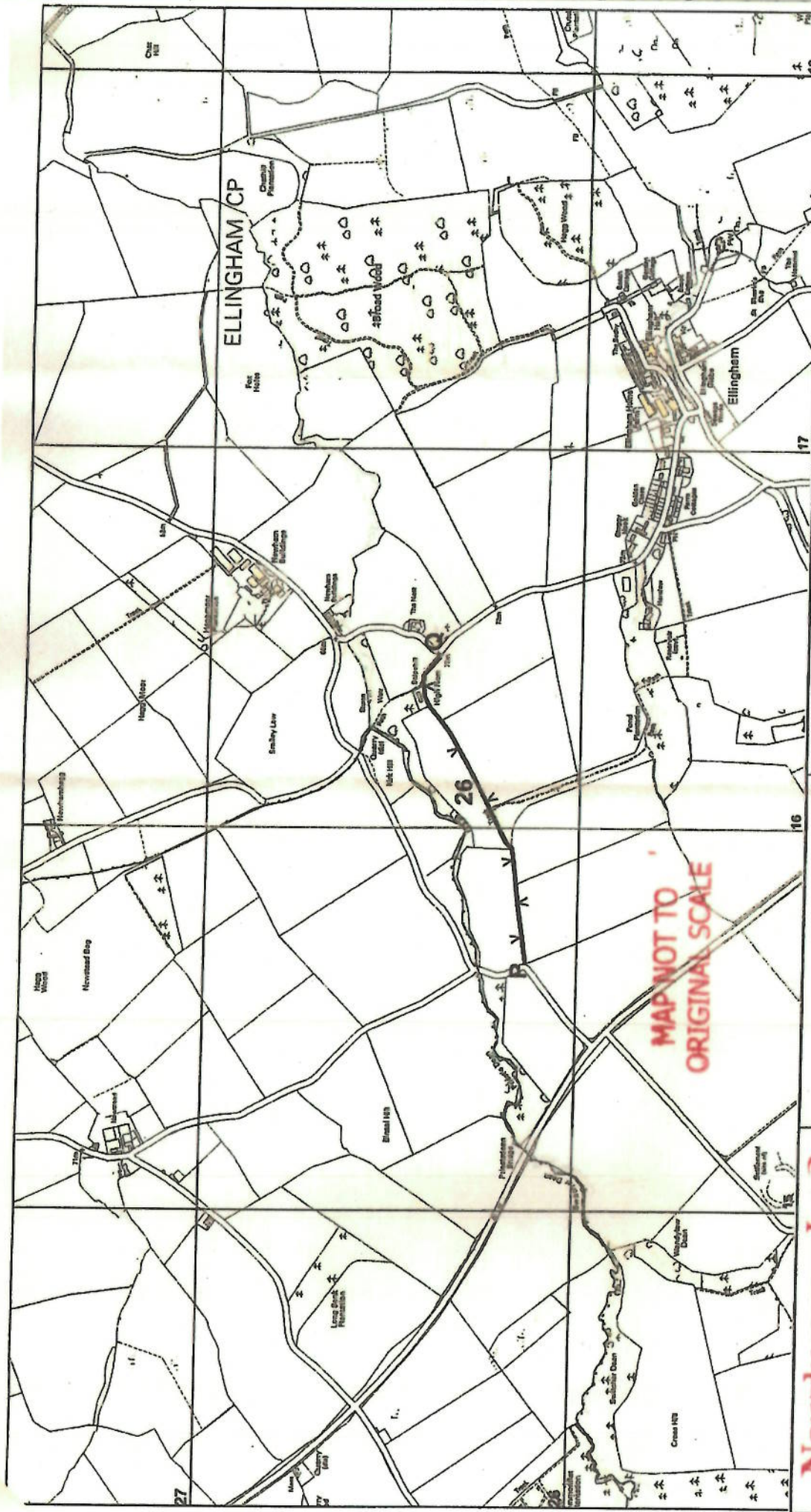
Mr A Kind

In Objection to the Order:

Mr L Fell *obo* The Ellingham Estate

INQUIRY DOCUMENTS

- 1 The Order
 - 2 Working copy of the Definitive Map and Statement
 - 3 Annotated copy of the Order map
 - 4 Title block and map, 1964 highways records map
 - 5 OS Explorer Map 340, 2000 & 2005
 - 6 Historic England listing, Snipehill and attached stable
 - 7 Historic England listing, The Nest
 - 8 Title block, 1961 highways records map
 - 9 Addendum to the Legal Submission of Alan Kind
 - 10 Addendum #2 to the Legal Submission of Alan Kind
 - 11 Summary in closing, Alan Kind
 - 12 Letter from Lady Belinda Gadsden
 - 13 Letter from Graham Simpson
 - 14 Information regarding Sir Thomas Haggerston
 - 15 British Listed Buildings, Snipehill and Attached Stable
 - 16 British Listed Buildings, The Nest
-



- Public Footpath to be deleted
- Public Footpath
- Public Bridleway
- Restricted Byway
- Byway Open to All Traffic

o.s. Map NU 12 NE	Definitive Map No 41	Scale: 1/10,000
Former District(s) Berwick	Parish(es) Ellingham	Date: April 2016

**The Northumberland
County Council**

**Modification Order
(No.18) 2016**

Wildlife and Countryside Act, 1981

**Definitive Map of
Public Rights of Way
for the
County of Northumberland**

Northumberland
Northumberland County Council
Infrastructure
Local Services
County Hall, Morpeth, Northumberland
Telephone 0845 600 6400 NE61 2EF

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NJ Hoar