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# Appeal Decision

**by Rory Cridland LLB (Hons), Solicitor**

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

**Decision date: 19 December 2018**

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## **Appeal Ref: FPS/P2935/14A/5**

- This appeal is made by Mr Alan Kind ("the Appellant") under section 53(5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the Act") against the decision of Northumberland County Council ("the Council") not to make an Order under section 53(2) of the Act.
- The application is dated 22 November 2016 and was refused by the Council by letter dated 16 November 2017.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by upgrading to a restricted byway Footpath No 26, West Allen from the Cumbria County boundary at Blacklaw Cross to where it joins Byway Open to all Traffic No 37 at Kiersleywell Bank.

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

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## **Preliminary Matters**

1. This appeal has been determined on the basis of the papers submitted.
2. A Definitive Map Modification Order dated 12 May 2003 and known as the Northumberland County Council (Public Rights of Way) Modification Order (No.10) 2003 was made by the Council to upgrade this part of Footpath No 26 to a Byway Open to All Traffic (BOAT). Following a number of objections to that order, a public inquiry was held ("the 2004 Inquiry") after which a decision was issued not to confirm the order. I have been provided with a copy of the Order Decision<sup>1</sup> and have had regard to it in my determination of this appeal.
3. My attention has been drawn to the fact that the Appellant may not have served notice of the application on all of the occupiers of the land affected as required by Schedule 14(2) of the Act. However, Schedule 14(2) does not require strict compliance and I consider the publicity requirements in respect of any order subsequently made would be sufficient to remedy any deficiency in this respect. I do not therefore consider any party would be materially prejudiced.

## **Main Issues**

4. With regard to section 53(3)(c)(ii) of the Act, the main issue is whether the evidence discovered, when considered with all other relevant evidence available, shows that Footpath No 26 ought to be shown as a restricted byway.

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<sup>1</sup> Order Ref: FPS/R2900/7/30.

## Reasons

5. The appeal route is currently shown recorded in the Definitive Map and Statement as forming part of Footpath No 26, West Allen and runs from Blacklaw Cross in a generally northerly direction to the U8039 at Kiersleywell Bank. The application seeks to upgrade this section of Footpath No 26 to a restricted byway.
6. Most of the evidence upon which application is based was considered in detail as part of the 2004 Inquiry. While I note the Appellant has challenged some of the conclusions reached by the Inspector in that case, these were arrived at following detailed consideration of the evidence and with the Inspector having had the benefit of hearing oral arguments. I have seen nothing which would lead me to reach a different conclusion on that evidence. However, the Appellant has identified two additional pieces of evidence – the Alstone Moor Inclosure Act 1803 and a copy of the Ordnance Survey (OS) Boundary Sketch Map of 1858 - which, when taken with the 2004 evidence, he claims shows that Footpath 26 ought to be recorded as a restricted byway.
7. The relevant trigger for section 53(3)(c)(ii) is the 'discovery of evidence' and while I note that the 2004 Inquiry considered the OS evidence available at the time, additional information has been discovered which, for whatever reason, was not available in 2004. Similarly, while I note that the Alstone Moor Inclosure Award was considered as part of the 2004 Inquiry, the 1803 Alstone Moor Inclosure Act itself, now provided by the Appellant, was not. I accept the Appellant's argument that the discovery of evidence in this context should be given its ordinary or literal meaning. As such, I am satisfied that the additional evidence provided is sufficient to constitute the 'discovery of evidence' for the purposes of section 53(3)(c)(ii).
8. Nevertheless, the 2004 Inquiry established that the evidence available at that time was insufficient to show that Footpath No 26 was incorrectly recorded. Indeed, the Inspector commented<sup>2</sup> that the evidence in favour of an all-purpose highway at this location was 'meagre'. I agree with that assessment and as such, consider the central question to be whether the additional or 'newly discovered' evidence, when taken with all the other relevant evidence available, is sufficient to show that Footpath 26 ought to be recorded as a restricted byway. I consider this new evidence further below.

### The OS evidence

9. OS mapping from the nineteenth century shows the claimed route as a double pecked line feature annotated as Carrier's Way. It is described in the OS Book of Reference as a 'cart road' and this evidence was available at the 2004 Inquiry. At that time, the Inspector considered that, while it provided evidence of the physical existence of a route at the time of the survey, no evidence was presented to assist in the determination of why this feature was considered to be a cart road or from whom authority for such a description was sought.
10. As part of the present application, the Appellant has produced additional evidence in the form of the OS Boundary Sketch Book dated 1858 which shows the claimed route as a continuation of Blacklaws Road and annotates it as Carrier's Way. I agree with the Appellant that it supports the proposition that

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<sup>2</sup> At paragraph 32.

there was a continuation of some sort of route over the county boundary. However, it provides no detail as to its status or use.

11. Furthermore, while I note that the Appellant has produced some useful articles including one which indicates field recording was not a chance or casual process but rather one which was carried out by an independent specialist whose main task was to verify the accuracy of the detail of the survey, the accuracy of the work depended very much on the skill of the examiners and their classification of land use was not subject to close scrutiny. While I accept it adds some further weight to this evidence and the suggestion that a highway of some sort has been in long-standing existence on the ground, it does not shed any additional light on its status and provides very little support for upgrading the route to a restricted byway.

#### *The Alstone Moor Inclosure Act 1803.*

12. The Appellant has also submitted a copy of the Alstone Moor Inclosure Act 1803 and extracts from the 1820 award which establishes Blacklaws Road as a highway which runs to the county boundary. Although the 1803 Act itself was not available at the 2004 Inquiry, it is clear from the decision letter that the argument put forward by the Appellant is essentially the same, i.e. that the Commissioners would not have awarded a public road in this location, with the maintenance and repair falling to the Alstone Parishioners, if there was no onward access beyond the county boundary. He refers to the 'through route presumption'<sup>3</sup> which can be summarised as being that where two highways are linked by a short section of uncertain status, it can be presumed that its status is that of the two highways linked by it.
13. However, this argument was considered by the Inspector at the 2004 Inquiry and the decision letter makes clear<sup>4</sup> that, while the presumption is something that can be added into the balance, it does not weigh heavily in favour. I have seen no evidence as part of this appeal that would lead me to reach a different conclusion. As such, I do not consider this additional evidence provides any meaningful support for the Appellant's case or alters the assessment carried out in 2004. As with the OS evidence above, it provides little information as to the status of the route and does not provide any additional support in favour of upgrading it to a restricted byway.

### **Summary**

14. I have found above that the additional, or 'newly discovered', evidence submitted by the Appellant provides some support for the claim that a route of some sort has been in long-standing existence on the ground. However, I have also found that it sheds little light on its status and provides very little support for upgrading the route to a restricted byway. Furthermore, while I accept that it links two other vehicular ways and as such, benefits from the 'through route presumption', I agree with the conclusions of the Inspector in 2004 that the evidence in support is so meagre that this presumption does not weigh heavily in favour.
15. Accordingly, I do not consider that it has been demonstrated on the balance of probabilities that Footpath 26 ought to be shown as a restricted byway. As such, the appeal must fail.

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<sup>3</sup> See *Eyre v. New Forest Highway Board* [1892] 56 JP 517.

<sup>4</sup> at paragraph 32 of the decision.

**Conclusion**

16. Having regard to these, and to all other relevant matters raised in the written representations, I conclude that the appeal should be dismissed.

**Formal Decision**

17. The appeal is dismissed.

*Rory Cridland*

INSPECTOR