

## Order Decision

Site visit made on 24 May 2016

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 16 June 2016**

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### **Order Ref: FPS/P2935/7/47**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Northumberland County Council Definitive Map Modification Order (No 21) 2014.
- The Order is dated 18 December 2014 and proposes to modify the Definitive Map and Statement for the area by adding a Byway Open to All Traffic ('BOAT') as shown in the Order plan and described in the Order Schedule and by modifying the particulars currently recorded in the definitive statement for bridleways 6 & 8 and footpath 7, all in the Parish of Corsenside.
- There were 2 objections outstanding when Northumberland County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is confirmed.**

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#### **Procedural Matters**

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I carried out an accompanied site visit on Tuesday 24 May 2016 when I was joined by Mr Bell of the Council, by Mr & Mrs Cross and by Mr Graham (the objectors).

#### **The Main Issues**

2. If I am to confirm the Order (with or without modifications) section 53 (3) (c) (i) requires that I must be satisfied that the documentary evidence adduced is sufficient to demonstrate that a public right of way with vehicles subsists over the Order route. If I conclude that such a right subsists, I will additionally have to have regard to (a) whether the use of the route or the character of the route is such that it satisfies the definition of a BOAT and (b) whether the public's right to use mechanically propelled vehicles (MPVs) over the route is subject to the provisions of section 67 of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act').
  3. The modifications to the particulars contained within the definitive statement in respect of bridleways 6 & 8 and footpath 7 are dependant upon the Order route being shown to be a public carriageway. If I am satisfied that the evidence adduced demonstrates that the Order route is a BOAT, then I will also be satisfied that the proposed modifications to the definitive statement for bridleways 6 & 8 and footpath 7 are necessary.
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## **Background**

4. This is the second modification order to be made which seeks to add the route to the definitive map and statement as a BOAT. The earlier order was made by the Council in 1995 ('the 1995 order') and was the subject of a public local inquiry held in October 2002. In her final decision (issued on 17 December 2003), the Inspector declined to confirm the 1995 order in respect of the claimed BOAT for want of positive evidence to support the assertion that the route carried public vehicular rights.
5. Although the objectors submit that the objections made to the 1995 order were accepted as reasonable, it is clear from a reading of the Inspector's decision that the evidence advanced at the inquiry was considered insufficient to demonstrate on a balance of probabilities that public vehicular rights subsisted over the Order route.
6. At the 2002 inquiry, the Council had only advanced the Order route's inclusion in the List of Streets in support of the existence of public vehicular rights. The Inspector at that inquiry had concluded that inclusion in the List of Streets was insufficient, on its own, to demonstrate that public vehicular rights subsisted. In her decision, the Inspector had stressed that she did not feel that all the available evidence had been put forward in respect of the Order route.
7. It is clear from paragraphs 15 – 21 of the decision of 17 December 2003, that the Inspector had been provided with a copy of Armstrong's map of 1769 and although it had been asserted that the route was set out as a public carriageway in an '*inclosure award of 1795*', no evidence of the inclosure award had been put before the Inspector. In addition, the Inspector had taken into consideration the maps produced by Fryer (1820), Greenwood (1828) and Cary (1832).
8. It is generally accepted that a second consideration of the status of a route cannot be based only on a re-interpretation of evidence which had previously been put forward. In addition to the List of Streets and copies of the maps by Fryer, Greenwood and Cary, the Council has submitted a number of other documents in support of its contention that the Order route can be recorded as a BOAT. I consider that the documents which the Council have submitted in addition to those documents placed before the Inspector in 2003 demonstrate that the Council has 'discovered' evidence sufficient to justify the making of a further Order to add the route as a BOAT.
9. No evidence of use of the route by the public has been submitted and the Council places reliance upon the documentary evidence it has adduced. In support of the confirmation of the Order, Mr A D Kind submits that he has used the route with a motor vehicle and has seen others doing so. Whilst Mr Kind had provided an additional analysis of the documentary evidence, no details as to the duration or frequency of his personal use of the route were submitted.
10. The evidential test to be applied in this case is the civil standard of proof; that is, the balance of probabilities.

## **Reasons**

11. The earliest document to depict the Order route is Armstrong's County Map of 1769. This shows a road which passes through Wood House (now Woodhouse) to cross the River Rede to the north-west of the Roman fort of Habitancum

- before passing through or close to site of the fort. Armstrong depicts the Order route as being part of the general road network in the area and at the time the map was produced, the Order route appears to have formed part of the principal north-south route for all traffic passing through this part of Northumberland on the course of the Roman Watling Street.
12. Cary's map of 1794 shows the Order route as part of Watling Street but on a straighter alignment in the vicinity of Habitancum. Cary shows the route crossing the Rede to the north-west of the Roman fort as Armstrong had done 30 years earlier. The road is shown by means of double peck lines with the eastern set of pecks being bolder than those on the west. The key to Cary's map shows that this notation was used to depict an unenclosed turnpike road. Cary's map shows that the Order route was considered to be part of an important through route which could carry vehicular traffic and which had been turnpiked at some point between 1769 and 1794.
  13. The plan attached to the Corsenside and East and West Woodburn Commons Inclosure Award of 1795 shows that part of the Order route north of Crawden Sike as part of Watling Street Road, a road which is described in the inclosure award as a Public Turnpike Road. The inclosure award documents add weight to the contemporaneous depiction of the route by Cary. The eighteenth century documents suggest that the Order route formed part of a public vehicular way which had been taken over by a turnpike Trust for maintenance and improvement.
  14. Fryer's County Map of 1820 shows the turnpike road as having been diverted to run on an alignment to the east of Habitancum between Woodhouse and Risingham. This diverted route crosses the Rede at West Woodburn Bridge. The copy of Cary's map which the Council dates to between 1820 and 1832 shows the turnpike on the same alignment as Fryer did; Greenwood's map of 1828 shows the turnpike on the same alignment. Of these small scale maps, only Greenwood depicts any part of the Order route; a stub of road shown to lead to a group of buildings likely to be Woodhouse (although not named as such) which is not shown to extend beyond the settlement.
  15. The early nineteenth century small scale maps show that by 1820 a new road had been created to the east of Habitancum to serve as the principal route through the area. This more easterly route is on a similar alignment to the modern A68. No evidence relating to the turnpike trust which took over the maintenance of the original alignment of Watling Street has been provided nor has any detail of the terms on which the alternative easterly route was constructed. It is not known therefore whether in providing the alternative route, the turnpike trust had been empowered to stop up the former route of Watling Street and extinguish any public rights in existence over it, or whether the effect of diverting the line of Watling Street was that the turnpike trust ceased to have any liability for the maintenance of the former road which would have reverted to its original status.
  16. Subsequent mapping produced by Ordnance Survey demonstrates that the alignment of Watling Street depicted by Cary in 1794 remained an observable feature in the landscape. The 1866 6-inch map shows an unenclosed track running between Woodhouse and Redesdale and the 1898 edition of the 6-inch map shows this track annotated as "*Watling Street ROMAN ROAD (site of)*". On the 1925 6-inch edition, the description of the Order route has been modified to record the unenclosed track as having been part of Dere Street.

Although these Ordnance Survey maps do not demonstrate the status of any route depicted, they demonstrate the continued existence of a track which had once formed part of a significant route for all traffic.

17. Under the provisions of the Local Government Act 1929 ('the 1929 Act') liability for the maintenance of roads was transferred from rural district councils ('RDC') to county councils. The northern half of the Order route is recorded on one map sheet as having been maintained by the RDC, whereas the southern half is not shown on the other sheet which makes up the handover map.
18. I place little weight upon the omission of part of the route from the handover map as the whole of the Order route was included in the schedule drawn up in 1939 under the provisions of the Restriction of Ribbon Development Act 1935 ('the 1935 Act'). Road 34 in the schedule is described as "*Road from a point on the Corbridge – Jedburgh road A.68 3/8 mile north-west of West Woodburn Bridge via Woodhouse to the West Woodburn – Bellingham road at Little Redesdale*". I consider it unlikely that the whole of the Order route would have been included in this document if only part of it had been publicly maintainable.
19. Under section 2 (2) of the 1935 Act, the Bridges and Roads Committee of the Council resolved to apply the restrictive provisions of section 2 (1) to a number of unclassified roads within Bellingham Rural District. Although it is not impossible that footpaths or bridleways may have been inadvertently included in the schedule, it is unlikely that there would have been any danger of ribbon development of the kind contemplated by the 1935 Act taking place along anything other than a public carriageway. It is therefore unlikely that the routes described in the schedule were other than routes open to the public with vehicles. I concur with the Council that the inclusion of the Order route in the Bridges and Roads Committee schedule is evidence of some weight that in 1939 public vehicular rights were considered to exist over the Order route.
20. The Order route was not included in the survey of public rights of way conducted under the provisions of the National Parks and Access to the Countryside Act 1949 ('the 1949 Act'). The parish survey records for footpath 18 and bridleway 21<sup>1</sup> note that the paths start at "Woodhouse"; bridleway 38<sup>2</sup> is said to start at "Little Ridsdale". The survey map shows the Order route coloured in the same way as the remainder of the public carriageway network. The draft, provisional and definitive maps all show footpath 18 and bridleways 21 and 38 as terminating on the Order route. The omission of the Order route from the survey and the three maps produced under the 1949 Act suggests that the Order route was considered to be of a status that did not require depiction in the record of public rights of way; that is, it was considered to be part of the ordinary road network.
21. The Order route has been recorded as publicly maintainable on the Council's highways maps and schedules dated 1951, 1964 and 1974. The Order route is also recorded in the Council's current List of Streets compiled under section 36 of the Highways Act 1980 which is based upon its highways list of 1974. The Order route is currently recorded as U5023 and is described as "*West Woodburn – Little Ridsdale Road. From A68 near West Woodburn (NY889872) via Woodhouse to C201 at Little Ridsdale (NY888867)*". The Council submits that there is no evidence to suggest that in Northumberland footpaths and

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<sup>1</sup> Now footpath 7 and bridleway 6

<sup>2</sup> Now bridleway 8

bridleways were deliberately shown in the List of Streets (other than metalled link paths in urban areas). If that is the case (and I have not been presented with any evidence which challenges the Council's assertion), then the inclusion of the Order route in the List of Streets is evidence of some weight that public vehicular rights were considered to exist when the List of Streets was compiled.

22. In paragraph 15 above, I left open the question of whether the diversion of Watling Street between 1794 and 1820 by the turnpike trustees had the effect of stopping up the Order route or whether the turnpike trustees had ceased to have liability for maintenance of the old course of Watling Street. On the basis that maintenance liability was accepted by Bellingham RDC and was subsequently transferred to the Council under the provisions of the 1929 Act and remains maintainable at public expense, I consider that the turnpike trustees had simply abandoned the old course of Watling Street when it set out the new route and that the liability to maintain the old road had reverted to the relevant local authority. On the basis of the available evidence, I do not consider that the old road was stopped up, and that any right the public had to use the former course of Watling Street with vehicles had not been extinguished.

#### *Summary of the documentary evidence*

23. In the late eighteenth century the Order route was part of the principal route between Corbridge and Jedburgh. Although the alignment of that major route was changed in the early nineteenth century with the Order route thereafter being of only local importance, the public vehicular rights which existed prior to the route being turnpiked do not appear to have been extinguished by any formal process. The twentieth century evidence suggests that maintenance of the route had always been a matter for the public authorities and that for much of the twentieth century what was considered to be publicly maintainable was a public carriageway.
24. When considered in isolation, none of the documentary sources described above demonstrates the existence of public vehicular rights over the Order route. However when considered collectively, the evidence adduced by the Council amounts to a highly persuasive case for the long-standing existence of public vehicular rights over the Order route. The objectors did not submit evidence to challenge the Council's interpretation of the documents considered and I conclude that the evidence shows, on the balance of probabilities that a public vehicular right of way subsists over the Order route.

#### ***Whether the Order route can be recorded on the Definitive Map and Statement as a BOAT***

25. A BOAT is defined by section 66 of the 1981 Act as "*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*". Whether the route satisfies the definition of a BOAT is therefore dependant upon the balance of use made of it by the public. In this case, other than the assertion made by Mr Kind that he has used the Order route with a motor vehicle, and the use of parts of the Order route by residents to access their properties, no evidence of use by the public has been submitted. I am unable therefore to make a determination as to the balance of public use as I have no information from which a comparison can be made.

26. In circumstances where there is no current use of a claimed route the Courts have determined<sup>3</sup> that what should be assessed is the character of the route and whether the public use on foot and on horseback would be greater than vehicular use because the route was more suitable for use by walkers and horse riders than by vehicles. I consider that this test can be applied equally to those routes where there is some public use but where there is insufficient evidence from which to draw a conclusion as to where the balance of use lies.
27. The section of the route leading to the residential properties at Woodhouse has a sealed surface as does the southern end of the Order route between the Bellingham road and bridleway 8. The remainder of the Order route is an unenclosed track over pasture with a rough stone surface which is subject to erosion by rainwater and the passage of agricultural vehicles. Given the gradient of the route, its other physical attributes and the fact that a footpath and two bridleways commence on it, I consider that the character of the route is such that if it were to be used by the public, its main use is likely to be by pedestrians and horse riders, such that it could be recorded as a BOAT.

### ***The impact of Section 67 of the 2006 Act***

28. Section 67 (1) of the 2006 Act extinguished, as of 2 May 2006, any right the public had to use MPVs over a route that was not shown in the definitive map and statement or over a route that was shown in the map and statement but only as a footpath, bridleway or restricted byway.
29. The general provision of section 67 (1) is however subject to a number of exceptions which are set out in subsections (2) to (8). Subsection (2) (b) preserves MPV rights over a route which, immediately before 2 May 2006, "*was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense)*". The Council relied upon the exception found in section 67 (2) (b) for the order to be confirmed as a BOAT.
30. As noted in paragraph 21 above, the Order route is recorded in the Council's current list of streets and was so recorded before 6 May 2006. The Order route is not shown in the definitive map and statement but is shown on the list of streets as a highway maintainable at public expense. Consequently the exception found in section 67 (2) (b) of the 2006 Act is engaged and public MPV rights over the Order route were not extinguished on 2 May 2006. It follows that the Order route can be recorded on the Definitive Map and Statement as a BOAT.

### **Other matters**

31. The objectors expressed their concerns regarding the suitability of the Order route for modern vehicular traffic and drew attention to the narrow, curved, sunken, enclosed nature of the metalled track from the A68 to Woodhouse. Furthermore, they submit that the bridge over Crawden Sike was not constructed to contend with increased vehicular traffic and that there were no points along the single track road which could serve as passing places. Concerns were also expressed regarding the safety of residents and the security of livestock who may come into contact with vehicles using the road.

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<sup>3</sup> Masters v Secretary of State for the Environment, Transport and the Regions [2000] EWCA Civ 249

32. Whilst I appreciate these concerns, the process under section 53 of the 1981 Act is not one of recording what may be considered suitable or preferable, but of recording those public rights which have been demonstrated to subsist. Issues such as the safety or suitability of the route for use by the public in vehicles are not matters which I can take into consideration in arriving at my decision.

### **Conclusions**

33. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed.

### **Formal Decision**

34. The Order is confirmed.

*Alan Beckett*

Inspector

