
Order Decision

Hearing held on 18 January 2017

Site visit made on 17 January 2017

by Martin Elliott BSc FIPROW

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

Decision date: 16 February 2017

Order Ref: FPS/P2935/7/53

- 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 11) 2015.
- The Order is dated 28 September 2015 and proposes to modify the Definitive Map and Statement for the area by adding a byway open to all traffic as shown in the Order plan and described in the Order Schedule with consequential amendments to the definitive statement.
- There were three objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a hearing at Ingram Village Hall on 18 January 2017. I carried out an unaccompanied inspection of the Order route on the afternoon of 17 January 2017. I did not carry out any further site visit as there were no new issues which required me to do so. None of the parties required me to revisit the site accompanied or unaccompanied.
2. Mr Kind is a statutory objector to the Order. However, he appeared partly in support of the Council and the case for the Order route carrying rights for mechanically propelled vehicles. The objection relates to whether or not the route should be recorded on the definitive map and statement as a byway open to all traffic.
3. Correspondence was received by three new parties outside the deadlines set out in the Notice of Order. This correspondence was circulated to the parties and there is no evidence of prejudice. Messrs Hardy and Spoors, two of the correspondents, raise concerns as to the publication and the wording of notices in respect of the inquiry. Whilst I note the concerns the notices accord with the statutory requirements.

The Main Issues

4. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of events specified in section 53(3)(c)(i) and (iii). The main issues are whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates (53(3)(c)(i)). Further whether there is no public right of way over land shown in the map and statement as a

highway of any description, or any other particulars in the map and statement require modification (53(3)(c)(iii). In this case the second part of this latter section applies.

5. The test to be applied to the evidence is on the balance of probabilities.
6. On 2 May 2006, section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) came into effect. This provides that an existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement of the Act was not shown in the definitive map and statement, or was shown as either a footpath, bridleway or restricted byway. However, section 67(2)(b) saves rights for mechanically propelled vehicles that are both recorded on the list of streets at the relevant date of 2 May 2006 and where such rights are not recorded on the definitive map as a footpath, bridleway or restricted byway.
7. The Council contend that rights for mechanically propelled vehicles have been saved in consequence of section 67(2)(b) of NERC. It is not disputed that the Order route was recorded on the list of streets at 2 May 2006. Should the evidence show that, on the balance of probabilities, vehicular rights exist then rights for mechanically propelled vehicles will have been preserved. The issue raised by Mr Kind and then to be considered is whether the route should be recorded on the definitive map and statement as a byway open to all traffic.

Reasons

Documentary evidence

8. Armstrong's map of 1769 shows a route leading from Ingram to Great Ryal (shown on later maps as Great Ryle) and is identified as a 'Country Road'. Cary's maps of 1787 and 1794 also show a route between Ingram and Great Ryal. Fryer's County map 1820 shows a route between Ingram and Prendwick, identified as an 'other road' in the key, on an alignment, given the scale, which corresponds with the Order route. Greenwood's County map of 1828 and Cary's map of 1827 also show a route between Ingram and Prendwick which again, given the scale corresponds with the Order route.
9. Ordnance Survey maps from 1866 show the whole of the Order route and the book of reference accompanying the 1860 map identifies the road in the parish of Ingram as being part of 'Rough Pasture, road & stream' and 'Rough pastures, roads & streams'. The Ordnance Survey maps record the physical existence of a route between Ingram and Prendwick. The book of reference is indicative of a route for vehicles but provides no information as to whether the route was considered public or private.
10. The Order route is not marked up on the 1932 Glendale Rural District Council 'handover map' nor identified on the schedule prepared in June 1939 for the Glendale Rural District Council under the provisions of the Restriction of Ribbon Development Act 1935 (the 1935 Act). This does not support the existence of public vehicular rights but nevertheless it does not preclude the existence of such rights. The 'handover map' and schedule prepared under the 1935 Act do not appear to have survived for the Rothbury Rural District.

11. The Order route is identified as a publicly maintainable road on the County Council highways maps and schedules dated 1951, 1958, 1964 and 1974. It is noted that there is no impediment to the inclusion of footpaths and bridleways in the Schedules or the list of streets. However, the Council stated that in Northumberland there is no evidence that footpaths and bridleways were shown on the 1958, 1964 and 1974 Schedules. This is supportive of the fact that the Schedules indicate the existence of public vehicular rights but this must be considered with all other relevant evidence. The route is shown on the List of Streets as at 2 May 2006.
12. It is recognised that in preparing the Schedules some reliance would have been placed on the 'handover map' and the schedules prepared under the 1935 Act but as noted above the absence of the route does not preclude the existence of a vehicular highway. Although there is no evidence as to why the route was included in the schedules there must have been some reason for doing so. It would be unlikely for the County Council to have taken responsibility for a route which was not a public highway. It may be the case, as suggested by Mr Kind, that the road was 'adopted' under powers contained in the Public Health Act 1875. However, I have not been provided with evidence that this may have been the case in respect of the Order route.
13. In the absence of evidence to the contrary it must be presumed that the addition of the route to the highway schedules was in compliance with the appropriate procedures and that the route was correctly recorded. As such some weight should be given to the consistent inclusion of the route as a highway maintainable at public expense. Given that the 1958, 1964 and 1974 Schedules did not show footpaths and bridleways the schedules are supportive of the existence of a public vehicular highway.
14. The minutes of the Council's Bridges and Roads Committee, 19 February and 20 May 1968 show that the Prendwick Estate approached the County Council with a view to improving the Order route for their own purposes. The County Council consulted with Rothbury and Glendale Rural District Councils with a view to making an application to the Magistrates' Court to close the route. Rothbury Rural District Council agreed to the proposal subject to the reservation of public footpath and bridleway rights being reserved. Glendale Rural District Council supported the view of Rothbury Rural District Council. The National Park Planning Committee also agreed to the closure on the basis that the interests of walkers and pony trekkers would be protected.
15. The implication from the minutes is that the County Council considered the route to be a public vehicular highway otherwise it would not have promoted an Order to stop up vehicular rights. The minutes also suggest that the Rural District Councils and the National Park Authority were happy for vehicular rights to be stopped up subject to the retention of bridleway and footpath rights. There is nothing to indicate that they did not consider the route to carry vehicular rights.
16. There is no evidence that the proposal to extinguish vehicular rights on the Order route was carried out. It is of note that the Order route continued to be shown on the County Roads Schedules and is shown on the current list of streets. This supports the view that the Order was not confirmed. Mr Gray advised that a hearing relating to the proposal was to take place on 14 October

1968 but the application was dismissed on administrative grounds. A hearing was rearranged for 18 December 1968, an objection was raised and the application was withdrawn. This again indicates that the proposal to extinguish vehicular rights was not carried out.

17. The Order route was not identified on the draft and provisional maps prepared under the National Parks and Access to the Countryside Act 1949. However, footpath 9 and bridleway 10 have a junction with the Order route forming a cross roads. It is unlikely that bridleway 10 was a cul-de-sac and this suggests that the Order route carried at least bridleway rights. However, given that bridleway rights were recorded on bridleway 10, had the Order route been only the status of bridleway then it would be more likely than not that the Order route would be recorded as such. The fact that bridleway 10 terminates on the Order route is more indicative that the Order route was considered to be a public road.
18. Having regard to all of the above, the historic map evidence indicates the existence of a significant route between Ingram and Prendwick from 1820. When considered with the other evidence the commercial maps from this date show a public highway, most likely vehicular. Although the route is not recorded on the 'handover map' and the map prepared under the 1935 Act the route has been shown on the highways maps and schedules since 1951 and on balance the route recorded is a vehicular highway. The minutes of the Council's Bridges and Roads Committee and the associated evidence is strongly indicative of the route being a vehicular highway. The definitive map records are supportive of the existence of vehicular rights.
19. In reaching my conclusions I am mindful of the submissions of Mr Kind which in my view are relevant in weighing the historical evidence. Whilst the evidence is not substantial, in the absence of evidence to the contrary, it is sufficient to show, on the balance of probabilities, that the way is a vehicular highway.
20. I note the point that the route is a private track to gain access to adjacent land and to maintain livestock. Further that the topography of the route raises the question as to public utility and the historic vehicular use. However, the evidence indicates a significant through route which carries vehicular rights.

Whether the route should be recorded on the definitive map and statement as a byway open to all traffic

21. A byway open to all traffic is defined in 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.
22. Mr Kind made submissions as to the statutory test for a byway open to all traffic. I do not intend to repeat those submissions here. However, in essence Mr Kind submits that current use of the Order route is a relevant component of the definition of a byway open to all traffic. If there is a lack of current use, or positive evidence that current use is unlikely to shed significant light on whether the route is a byway open to all traffic then the decision maker is entitled to determine the application by reference to the character of the route.

23. Having considered the submissions of Mr Kind and those of the Council I take the view that in the first instance the decision maker should have regard to the definition provided by section 66 of the 1981 Act. For the route to be recorded as a byway open to all traffic the current use is relevant. In the event that there is no use of the route then it is appropriate to consider the character of the way. I do not consider that this approach is contrary to advice in Defra Circular 1/09¹. The circular refers to the definition of a byway open to all traffic as set out in the 1981 Act and that it is not a precondition for equestrian and pedestrian use to be greater than vehicular use. However, the Circular says that the test also relates to character. The use of the word also is in my view significant in that it implies that the balance of user is relevant in determining whether a way should be regarded as a byway open to all traffic. It was the case of *Masters*² which introduced the character test where there was no actual use of the way concerned.
24. I note the Council's concerns regarding the difficulties in gathering evidence of use in determining the balance of user and the fact that in consulting in respect of the Order the views as to balance was not canvassed. However, as the decision maker it is appropriate and necessary for me to consider that balance.
25. The Council had recently received correspondence from four individuals, including Mrs Dinsdale and Miss Rogers whose evidence as to their use and knowledge of the way I summarise below. Caroline Fuller has ridden the Order route many times over the years and has used the route with friends and as part of an organised ride. When using the route she has passed horse riders and walkers and on several occasions groups of 5 or 6 walkers. Mr Mitcham of Northumbria Ramblers outlines that two thirds of the route is included in walk number 9 of the guidebook 'Walks in the High Hills Country'. He first walked this route in 1995 or 1996 (no later than 1997) and since then has walked the route many times occasionally with friends. Mr Mitcham provides evidence as to the use of the route by Ramblers colleagues. It is noted that the correspondence does not refer to use by vehicles but as stated by the Council the correspondence gives information as to individual use of the way. The correspondence indicates use by equestrians and pedestrians but is not helpful in respect of the balance of user.
26. Mr Kind indicted that he had used the route with a motor vehicle and had only ever seen other members of the public driving vehicles. He had no knowledge of other use by the public. Mr Kind's knowledge is from the 1980s although he said that he had used the route with others who had used vehicles before that time.
27. Miss Rogers moved to the area in 2003 although had ridden the route before that time. When using the route she has seen walkers, cyclists and horse riders but no vehicles apart from those used by the farmer. Miss Rogers was nevertheless aware that vehicles use the Order route. She said that the route had been used since 1990 by a large number of equestrians (between 40 and 100 riders) as part of an endurance ride. Three members of her family are mountain bikers and have used the route by bicycle. Ms Harries outlined that her main use was equestrian, she referred to use by 120 riders over an Easter

¹ Department for Environment, Food and Rural Affairs

² *Masters v Secretary of State for the Environment, Transport and the Regions* [2000] EWCA Civ 249

- period. She also regularly walked the route and had taken Duke of Edinburgh groups over the route. Ms Harries had not seen groups of motorcycles but had seen the farmer's quad bikes. Mr Urwin had only seen half a dozen trails bikes but had only walked the route four times in total. Mrs Dinsdale came to the area in 2002 and used the route as a horse rider four to five times a year sometimes with others. She had also walked the route and continued walking the route after 2010 when she stopped riding. She had seen walkers, cyclists and runners during the summer but had not seen use by vehicles. Mrs Pardoe used the route a few times on a horse 4 to 5 years ago and said that she probably saw other walkers. Mr Liddle used the route on a mountain bike from the late 1980s. He has met horse riders, walkers and cyclists but the only vehicles he had seen were quad bikes. He was commissioned by Sustrans to develop a cycle route known as the Sandstone Way which uses the Order route. Mr Dixon moved to the area 18 months ago and has used the Order route half a dozen times and has seen runners and other walkers. He had seen four-wheeled vehicles but not on the Order route and had heard but not seen motorcycles.
28. Mr Wood said that there was not much use by vehicles, around once every six weeks. Trail bikes did use the route although not as a through route but to get access to other land. Use varies throughout the year but in summer the route was used by walkers and horse riders. Mr Gray advised that the route had been used by walkers, equestrians and cyclists with an increase in use by four wheeled drive vehicles more recently.
29. Correspondence from the new interested parties (paragraph 3) refers to use by these individuals and others by vehicle for a number of years. Reference is also made to the value of the route for those with disabilities who are unable to walk the route but are able to access the route by vehicle. However, no reference is made to use by other types of user. The correspondence appears to have been prompted by concerns over the loss of the route to vehicles and does not assist in determining the issue of balance of user.
30. The evidence before me suggests that the Order route is used by pedestrians, equestrians, cyclists and vehicles. However, on balance, the route is used more for the purposes for which footpaths and bridleways are so used and the vehicular use appears more limited. As such it is appropriate for the route to be recorded on the definitive map as a byway open to all traffic. Mr Gray said that the preferred option would be to record the route as a restricted byway. Mr Wood had no objection to the route being recorded as a footpath, bridleway or restricted byway. Whilst I note these preferences my decision must be made on the evidence before me. I have concluded that the route is a vehicular highway which should be recorded on the definitive map and statement as a Byway Open to All Traffic and that those rights have been saved by section 67(2)(b) of NERC. In view of these conclusions I am not in the position to modify the Order to record a footpath, bridleway or restricted byway.

Other Matters

31. Concerns are raised in respect of the use of the Order route in vehicles and the misuse of surrounding land by unauthorised vehicles. The point is also made that the route is impassable by the majority of vehicles and impassable to all

vehicles in winter. Further, that in some areas vehicles bypass the route due to wet conditions thereby trespassing onto adjacent land. Whilst I note these concerns they are not matters which can be taken into account in respect of orders made under the 1981 Act.

Conclusions

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

Formal Decision

33. I confirm the Order.

Martin Elliott

Inspector

APPEARANCES

For the Northumberland County Council:

Mr A Bell	Definitive Map Officer, Northumberland County Council
-----------	---

Supporters and interested parties:

Miss S Rogers	British Horse Society
Ms T Harries	
Mr A Urwin	
Mrs H Dinsdale	
Mrs D Pardoe	
Mr T Liddle	
Mr D Dixon	

In opposition to the Order:

Mr J Wood	Landowner
Mr B Wood	Landowner and Statutory Objector
Mr A Gray	Strutt and Parker in support of Messrs Wood
Mr A D Kind	Statutory objector, partly in support of Northumberland County Council

Documents handed in at the hearing

- 1 Additional Submissions of Mr Kind
- 2 Response of Northumberland County Council

PLAN 2



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

Wildlife and Countryside Act, 1981

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

**The Northumberland
County Council**

Modification Order
(No.11) 2015

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

O.S. Map NU 01 SW

Former District(s) Berwick/Alnwick

Parish(es) Ingram/Alnham

Scale: 1/10,000

Date: September 2015