



Order Decision

Site visit made on 26 August 2016

by Michael R Lowe BSc (Hons)

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

Decision date: 23 January 2017

Order Ref: FPS/P2935/7/50

- 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 9) 2015 Byways Open to All Traffic No 51 (Parish of Chatton).
 - The Order is dated 17 August 2015 and proposes to modify the Definitive Map and Statement by adding a byway open to all traffic from the road B6349 east of West Lyham in a generally southerly direction for 2200m to its junction with the road B6348 south of Chatton Park Cottage as detailed in the Order map and schedule.
 - There were 4 objections outstanding when Northumberland County Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
-

Decision

1. I confirm the Order.

Main Issue

2. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i) and (iii). The main issue is therefore whether the discovery of evidence by the Council is sufficient to show, on the balance of probabilities, that a byway which is not shown in the map and statement subsist on the route in question such that the definitive map and statement require modification, and that other particulars contained in the map and statement require modification.
3. Section 32 of the Highways Act 1980 requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

Reasons

4. The Order route is recorded on the Council's list of streets under section 36(6) of the Highways Act 1980 as a 'highway maintainable at public expense' and is known as the road U1058. It is not clear from the 'handover' map of 1932 whether this road was shown as a road transferred from the maintenance responsibility of the rural District Council to the County Council under the Local Government Act 1929. However, the road is clearly recorded under the 1939 schedule prepared under the Restriction of Ribbon Development Act 1935. The Order route is shown on various internal maps and records of the Council in 1951, 1964 and 1974.
5. The route would appear to have been established by at least 1841/1844 as it is depicted on the Tithe maps at that time as a track. These maps show the

Order route as following one side of a field boundary. The northern part may have an earlier origin as a route along a similar alignment is shown on Fry's County Map of 1820, although that map and the earlier Armstrong's County Map of 1769 are produced at a large scale that may exclude minor tracks and ways. The First Edition Ordnance Survey map of 1862 at a scale of 25" to the mile shows the Order route now as an enclosed way between field boundaries in much the same manner as the modern maps, and the book of reference accompanying the map details the way as 'public road'. The 6" editions of 1865, 1899 and 1925 are more or less the same.

6. The Order route is shown on the map produced under the Finance Act 1910 as excluded from the land parcels, that is uncoloured and unnumbered. This is consistent with, but not conclusive of, the status of a public road as such roads were usually excluded from hereditaments.
7. In 1951 the Belford Divisional Surveyor submitted a schedule of fords and reported their condition to the County Surveyor. The schedule detailed two crossings of the Order route across Allery or Lyham Burn and Chatton Park Burn. Both had an adjoining footbridge. The ford crossing of the Allery or Lyham Burn is described as constructed of steel pipes embedded in concrete whilst the Chatton Park Burn ford is described as just sand and gravel. The Council's records indicate that they undertook significant works of repair to the concrete ford in 1990 and minor works in 1992 and 1997. The records also indicate that the footbridge alongside this ford was present until 2009. The footbridges alongside the fords are indicated on the Ordnance Survey maps of 1925 and 1951.
8. A public footpath terminates at the Order route just south of the ford over the Allery or Lyham Burn. It has been so recorded since the first Definitive Map and Statement was produced in 1954. The Definitive Statement records the footpath as originating at the Lyham Road.
9. My assessment of the above evidence is that there is cogent evidence that the Order route is a highway maintainable at public expense. The presumption of regularity applies to the records under section 36 of the Highways Act 1980, the presumption being that a statutory authority has acted lawfully and in accordance with its duty in maintaining the records. There is clear evidence that the County Council has maintained a ford along the way and that such works and the existence of footbridges would have been obvious to the owners and occupiers of the land.
10. Overall, on the balance of probabilities, I conclude that the Order route is a public highway with vehicular rights. That status is consistent with the Council's records, the character of the way, the works of maintenance carried out by the Council, the Finance Act records and manner in which the footpath was recorded on the Definitive Map and Statement in 1954.
11. I am satisfied that the Council has discovered evidence which, when considered with all other relevant evidence, shows that a public highway exists and that it is a public highway for vehicular and all other traffic. Mr Kind's objection is that the Order route does not qualify as a byway. In the case of Masters v Secretary of State for the Environment, Transport and the Regions [2000] in the Court of Appeal Roch LJ said -

30. 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.

31. The definition in section 66(1) is the descendant of the definition of "road used as a public path" which is to be found in section 27(6) of the 1949 Act. That definition read "road used as a public path" means a highway other than a public path used by the public mainly for the purposes for which footpaths or bridleways are so used." "Public path" was defined as meaning a highway being either a footpath or a bridleway. This definition was described by Sir John Pennycuik in Hood's case at p904G as a definition "of outstanding obscurity". Sir John Pennycuik continued "but it appears to denote a public way which is mainly used as a footpath or bridleway but is not exclusively so used, the implication being apparently that there is also occasional but subsidiary use for carts or other wheeled traffic.

41. 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. Parliament did not intend that highways over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders than by vehicles. Indeed, where such ways were previously shown in the maps and statements as roads used as public paths, Parliament made it obligatory that they continue to be shown on maps and statements when these were reviewed after 28 February 1983. For those reasons I would uphold the judgment of Hooper J. and dismiss this appeal.

12. In my view the character of the Order route, as a grassy lane between hedges, more likely to be used by and more suitable for use by walkers and horseriders than vehicular traffic, is consistent with the status of a byway. The finding by Roch LJ that "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" should not, in my view be read so as to imply that ways that are listed as highways maintainable at public expense should not be recorded as byways. The records of highways maintainable at public expense are not mutually exclusive to ways to be recorded on the definitive map and statement. In my view it is useful to ask if there is a benefit to 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. It is also my view, consistent with Rights of Way Circular 1/09, that it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use.

Conclusion

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

Michael R Lowe

INSPECTOR

