
Order Decision

Site visit made on 4 August 2015

by Susan Doran BA Hons MIPROW

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

Decision date: 8 June 2016

Order Ref: FPS/Y2003/7/23M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Definitive Map Modification (Restricted Byway 21, Crowle) Order 2014 (1).
- North Lincolnshire Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 19 June 2014.
- The Order proposes to modify the Definitive Map and Statement for the area by adding to them a restricted byway as shown in the Order plan and described in the Order Schedule.
- In accordance with paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of my proposal to confirm the Order with modifications.
- Two objections were received in response to the notice.

Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision

Procedural Matters

1. The effect of the Order if confirmed with the modifications that I previously proposed¹ would be to amend the alignment of the Order route between point A on the plan attached to the Order and Crook o' Moor Farm in accordance with the route as shown on the Finance Act 1910, and to correct a reference regarding the Definitive Map to which the Order refers.
2. The objections concerned both the modified and unmodified parts of the Order. Mr Seymour agrees that the proposed modification to the alignment is correct, however, he maintains that it should not be recorded as a Restricted Byway. He further contends that, in the public interest, the Order should not be confirmed. Mr Carney contends that the Order route is a carriageway forming part of the ordinary highway network and that it is inappropriate that a definitive map modification order be made in respect of it. I note that the Order route is presently recorded on North Lincolnshire Council's (the Council) list of streets under Section 36(6) of the Highways Act 1980. However, I see no reason to consider that highways recorded on the list of streets should be precluded from also being recorded on the Definitive Map and Statement (DMS). Equally, I see no reason to consider that ways shown on the DMS should be precluded from also being recorded on the lists of streets. I am content, therefore, that it is open to me to determine this Order.

¹ In my interim decision dated 9 October 2015

3. The matter is being dealt with by the written representations procedure. Further to the submissions, I agreed to accept late correspondence from Mr Seymour which was circulated to the parties for comment. In reaching my decision I have taken all of the material available to me into account.

The Main Issues

4. The main issues are whether there is any new evidence or argument which might cause me to reconsider my findings in respect of the unmodified part of the Order; and whether there is any evidence or argument which has a bearing on the modifications I proposed, and which might indicate that those modifications should be amended or not pursued.
5. As stated in my interim decision (paragraph 9), it is not disputed that the Order route is a public vehicular highway. What is in dispute is its status: whether it is a Byway Open to All Traffic (BOAT), a carriageway that should not be recorded in the DMS, or a restricted byway as described in the Order. In this respect and relevant to my decision is the effect of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) and its provisions.

Reasons

New evidence or argument in respect of the unmodified part of the Order

6. Mr Seymour argues that those parts of the Order route forming the level crossing of the railway and canal bridge, its approaches and the two bridges over the drains fall within the provisions of the canal and railway statutes, are not maintainable by the Highway Authority, and are required to be maintained for ever to accommodate public vehicular traffic. Accordingly, such rights cannot be extinguished by the 2006 Act.

The 2006 Act

7. Part 6 of the 2006 Act extinguished public rights of way for mechanically propelled vehicles (MPVs) over every highway not already shown on the DMS as a BOAT unless saved by one or more of five exceptions. Of these, all but subsection 67(2)(d) are relied on, such that the Order route should be recorded as a BOAT, or that it forms part of the ordinary road network.

Subsection 67(2)(a)

8. This subsection excepts ways whose main lawful use by the public during the 5 years preceding commencement of the 2006 Act² was by motor vehicles rather than by other users, e.g. walkers, cyclists, horse riders or horse-drawn vehicles. The intention being to except highways that are part of the ordinary roads network. I considered this exception at paragraphs 16-26 of my interim decision.
9. Mr Carney disagrees with my findings in this regard, and refers to the fact that cctv recordings are made at the railway level crossing. Whilst that may be so, to satisfy the exception it is necessary to demonstrate that the main lawful use by the public for the 5 years prior to commencement was by MPVs rather than by other types of use. The Council does not dispute that there probably was some use by the public with MPVs before enactment of the 2006 Act. However, whilst Mr Carney asserts that the main use is by vehicles, there is insufficient

² 2 May 2006

evidence available to me from which I can conclude that the requirements of the exception in Section 67(2)(a) have been met.

The character of the way

10. Mr Seymour argues that the ordinary road network includes untarred country lanes, and a made-up carriageway may have a surface of small stones but may or may not have a sealed (tarred) surface. In 2005, he says, the Order route was repaired with gravel to the standard of a made-up carriageway, so can reasonably be regarded as an integral part of the ordinary road network of the area, like Jacques Bank to which it connects. It formerly led to a railway station and a chapel³, and now leads to a canal bridge and railway crossing. The post box between them, together with the canal bridge which accommodates vehicular traffic, and the level of maintenance afforded by the canal and railway legislation, are features Mr Carney says are consistent with an ordinary road, as are the temporary closure orders put in place to enable repairs to the canal and railway crossings.
11. The Council accepts the Order route is a highway of carriageway status, but disagrees with Mr Seymour and Mr Carney as to whether it is a public right of way carriageway (a BOAT or restricted byway) or a non-public right of way carriageway. The Council distinguishes between what they describe as tarmacked routes which may reasonably be expected to form part of the ordinary road network and a roughly surfaced gravel route that a reasonable person would consider to be of an inadequate level of maintenance for a non-public right of way carriageway. However, I do not think it follows that all tarmacked routes form part of the ordinary road network, and all non-tarmacked routes do not.
12. The character of the way relates to the definition of a BOAT and the exception in subsection 67(2)(a), referred to at paragraphs 23 to 25 of my interim decision. At paragraph 24 I concluded that the Order route had the same character as Crook o' Moor Road or BOAT 21 (to which it connects, at point B).
13. The *Masters* case⁴ held that when considering the definition of a BOAT, it was the concept or character of the way that was being described. However, Mr Carney argues that *Masters* concerned a Road Used as a Public Path, which the Order route has never been, and one that had fallen into disuse, unlike this route which continued to be used, as reflected in the maintenance of bridges for traffic and the presence of the railway station until 1966. It is the case that *Masters* concerned an order made under a different subsection of the Wildlife and Countryside Act 1981 (the 1981 Act). Nevertheless, the judgement provided an interpretation of the definition of a BOAT at Section 66(1) of the 1981 Act, and as such, I consider, is equally applicable to orders such as made here under Section 53(3)(c)(i) of the Act.
14. I have considered the points raised by Mr Seymour and Mr Carney about the Order route and their belief that it forms part and parcel of the ordinary roads network. Nevertheless, for me to reach that conclusion it would be necessary to demonstrate that the requirements of the exception have been met. There is, however, very little factual evidence before me as to the nature and balance of the use in the 5 years prior to 2 May 2006. Accordingly, on the available

³ The former chapel is located to the east of point A on the Order plan on Chapel Road

⁴ *Masters v Secretary of State for the Environment, Transport and the Regions* [2000]

evidence I am unable to reach a conclusion that this exception in the 2006 Act has been met and rights for MPVs have been saved as a consequence.

Subsection 67(2)(b)

15. This subsection excepts ways that, immediately before commencement of the 2006 Act, are both recorded on the LoS as being maintainable at public expense and which are not recorded in the DMS as public rights of way. The intention here is to except highways that do not have clear motor vehicle rights by virtue of classification but are generally regarded as part of the 'ordinary roads network'. I considered this exception at paragraphs 27-38 of my interim decision.
16. Mr Seymour quotes the case of *Chesterton Commercial (Oxon) Limited v Oxford County Council (2015)*⁵ (*Chesterton*), which held that, "...the statute requires the list of streets which are highways maintainable at public expense to be kept corrected up to date. Had the list been correct and up to date it would have been marked as showing that there was an investigation going on". Here, it is argued the failure of the Council to keep its list of streets corrected and up to date has, or may, result in public rights for MPVs being extinguished.
17. The Notices served on the Council under Section 56 of the Highways Act 1980 in 2003 and again in 2005, for Crook o' Moor Road and the Order route, to which I referred in my interim decision, are cited by Mr Seymour. In accordance with *Chesterton*, he says these should have been noted on the list of streets before 2 May 2006 as proof the Council had admitted the Order route, or at least (from point B on the Order plan) as far as the southern bank of the South Soak Drain, was a publicly maintainable highway; or that this part of the Order route should have been added to the list of streets in 2003.
18. The *Chesterton* case concerned the purchase of property; whether there had been a breach of statutory duty and/or negligence by the highway authority as regards its list of streets; and whether the purchaser was entitled to compensation. The case does not address the exception in Section 67(2)(b) of the 2006 Act, but does reaffirm the highway authority's duty as regards its list of streets.
19. I consider that my role is to determine the Order and thereby the status of the Order route against the relevant tests, rather than, as both Mr Seymour and Mr Carney contend, to determine whether or not the Council should have kept its list corrected up to date; an issue also referred to by Mr Duffield.
20. Rightly or wrongly, the Order route was not added to the list of streets until 2010 (with the exception of the railway crossing maintainable by Network Rail), when the Council responded to the re-submitted 2005 Notice which for some reason it had not received when first served. Plainly, this was after the commencement date of the 2006 Act. In 2003 the Council says it accepted liability only with regard to Crook o' Moor Road as described in the 1879 Thorne Moors Drainage and Improvement Award (from a point north of the railway line), apparently in accordance with a decision it had reached in 1999, although this is not specifically stated in their response. In any event, it was only BOAT 21 that was added to the list at the time.

⁵ EWHC 2020 (Ch)

21. To satisfy the exception the Order route must be recorded both on the list of streets and not on the DMS. Mr Seymour argues that it cannot have been the intention of the legislation that MPV rights be extinguished in such circumstances. However, it remains the case that, whilst not shown on the DMS, no part of the Order route was shown on the Council's list of streets as of 2 May 2006.
22. Mr Carney reiterates that the Order route was not claimed for inclusion in the DMS, the previous Highway Authority⁶ regarding it as a public carriageway and part of the ordinary road network. Yet there is no evidence before me that, prior to 2010, it has ever been included in a list of streets. He also refers to its depiction on Ordnance Survey Maps: the extracts provided (both from the 1:50,000 Landranger Series) show it uncoloured as 'other road, drive or track'.
23. Mr Seymour raises a further point that the 2006 Act cannot have intended to omit a class of highway - those maintainable by reason of a special enactment or by reason of tenure, enclosure or prescription⁷. In only referring to the list of streets maintainable at public expense, he says, this exception ignores thousands of vehicular highways and bridges which are privately maintainable, meaning the exclusion of such highways may lead to their extinguishment. Nevertheless, I must apply the 2006 Act as made and consider whether or not any of the exceptions set out in Section 67(2) apply. From my reading of the 2006 Act and evaluation of the evidence, this exception has not been met.

Subsection 67(2)(c)

24. This subsection excepts from extinguishment ways that have been expressly created or constructed for motor vehicles, and was not considered in my interim decision.
25. The case of Attorney General v Sharpness New Docks Company (1914) and the subsequent appeal in 1915, Sharpness New Docks and Gloucester and Birmingham Navigation Company v Attorney General (*Sharpness*) which concerned the improvement of a bridge so as to keep it in a condition suitable to meet modern needs, are cited by Mr Seymour.
26. Mr Seymour believes the *Sharpness* judgement qualifies as an "instrument" which expressly provided for canal bridges to be maintained to a standard suitable for use by MPVs, and is applicable to the canal bridge and the bridges across the public drains on the Order route. Along with the statutory maintenance obligation was the obligation to improve the canal bridge for modern traffic, together with its rededication to accommodate that traffic, in this case for MPVs. Similarly, Mr Carney refers to the responsibility by virtue of the 1793 Stainforth and Keadby Canal Act to improve the approaches, bridges and so forth for use by the normal traffic of the area.
27. The *Sharpness* judgement confirmed that such structures were required to be maintained suitable for the traffic of the day, by that time MPVs. Indeed, Mr Carney points out that originally the canal bridge would have been a wooden structure, whereas today it is constructed of steel to accommodate vehicular traffic. However, the Council remarks, no enactment or instrument has been provided stipulating the Order route (itself) was created on terms that expressly provide for it to be a right of way for MPVs. Further, in their view

⁶ West Riding of Yorkshire County Council

⁷ Section 56(1) of the Highways Act 1980

'creation' refers to when the way first came into being, and Mr Seymour is referring to ongoing maintenance subsequent to that creation. Mr Seymour, though, argues that in accordance with *Fortune*⁸ a purposive interpretation should be given to the exceptions in Section 67 of the 2006 Act. Accordingly the *Sharpness* judgement as an "instrument" should be deemed sufficient to satisfy the exception.

28. *Defra* guidance⁹ states that this exception ensures that where a public right of way for MPVs was expressly created by primary or secondary legislation, or by an instrument, it will not be extinguished by Section 67 of the 2006 Act. However, there have to be express words in order for the exception to apply. The guidance further clarifies that 'creation' occurs at the point in time when the public right of way comes into being, either through a legal instrument such as a creation order or dedication, or through a qualifying period of use (deemed dedication).
29. In this case, the way pre-dates MPVs and so was not expressly created for their use by the relevant canal or railway legislation. Maintenance of the Order route, or specifically part of it in relation to its structures, has been on-going in accordance with the requirements of the 1793 Canal Act. The *Sharpness* judgement has clarified that maintenance has to keep up to date with the changes in the type of traffic using the way. Nevertheless, the 2006 Act states that Section 67(1) does not apply to an existing public right of way if it (the existing public right of way) was *created* (my emphasis) by an enactment, instrument or otherwise, that expressly provide for it (the existing public right of way) to be a right of way for MPVs. Notwithstanding Mr Seymour's reliance on *Fortune*, I consider there is a difference between what the 2006 Act says in terms of creation and express words for use by MPVs, and the continuing maintenance and repair of structures to accommodate changing traffic needs over a way originally created or constructed for non-MPVs.
30. I therefore understand the exception to mean that the way, the Order route, must have been brought about or built (created) by way of an Act or instrument or otherwise which plainly provided for it to be a right of way for MPVs. It seems to me that the Canal Act does not satisfy this requirement, and the *Sharpness* judgement, simply ensured that the maintenance of bridges over canals (in this case bridges already in existence) kept pace with changing needs, including those for MPVs. Neither created it on terms that expressly provided for it to be a right of way for MPVs. It follows in my view that the exception is not engaged.

Subsection 67(2)(e)

31. This subsection excepts from extinguishment ways that had been in long use by MPVs before 1930, when it first became an offence to drive "off-road". For this exception to apply, the rights for MPVs must have been created by inference of dedication at common law through use by MPVs before 1 December 1930. I considered this exception at paragraphs 39 to 43 of my interim decision.

⁸ *Vera Fortune, Rosemary Ayres and John Heselden v Wiltshire Council and Taylor Wimpey* [2010] at paragraph 1073, set out at paragraph 31 of my interim decision

⁹ Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners, Version 5 – May 2008, at paragraphs 33 and 37

32. As above, Mr Seymour relies on the *Sharpness* case. He argues that it is reasonable to assume that when a canal bridge was improved to accommodate MPVs it was then dedicated for such use by the canal undertakers. Therefore, if a reasonable presumption of rededication during the period 1915 and 1930 is disputed, the Council must provide evidence to rebut that presumption by showing the route was not used by MPVs before 1930. The Council, on the other hand, argues it is necessary to consider whether the Order route was created for MPVs during a period ending before 1 December 1930, and the onus is on Mr Seymour to demonstrate that it has been.
33. For rights for MPVs to have been saved, they must have been created by use at common law before 1 December 1930. However, I am not convinced that re-dedication or dedication following the improvement or maintenance of existing structures along the Order route to accommodate MPVs, equates to the creation of a public right of way for MPVs through an inference of deemed dedication at common law, such that rights for MPVs are saved.
34. However, even if I were convinced on this point, *Defra* guidance¹⁰ is that evidence of long use by MPVs before 1930 would not, of itself, except rights of way from extinguishment. Further, where pre-1930 use relied upon an earlier creation of vehicular rights through use by non-MPVs by express dedication or by some other means, then the pre-1930 use by MPVs cannot be regarded as having created the right of way for MPVs and the exception will not be engaged. Here, the Order route's origins lie with non-MPVs. Accordingly, it seems to me that any pre-1930 use by MPVs cannot be regarded as having created a public right of way for MPVs and the exception does not apply.

The Public Interest

35. Mr Seymour believes that the extinguishment of public rights for MPVs over the Order route cannot be justified as being in the public interest. He points to what he believes to be errors made by the Council that should not be allowed to work against the public interest by interpreting the 2006 Act in such a way as to extinguish MPV rights for the public. Neither, he says, can it have been Parliament's intention to extinguish public rights for MPVs over the crossings of railways, canals and public drains established by public statute. The Council believes that Parliament decided the public interest lay in the eradication of as yet unrecorded public rights of way for MPVs.
36. I understand Mr Seymour's argument. However, it is clear that Section 67(1) of the 2006 Act extinguished public rights for MPVs over every highway not shown as a BOAT on the DMS as of 2 May 2006. There is a clear presumption that this will be the case unless it can be shown that one or more of the exceptions in subsections 67(2) or 67(3) applies¹¹. I consider that to interpret the 2006 Act otherwise would be inappropriate.

Conclusions

37. I remain satisfied that the Order route was, prior to commencement of the 2006 Act, a public highway for MPVs. I have carefully considered the submissions as to whether or not rights for MPVs have been saved. However, I

¹⁰ Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners, Version 5 – May 2008, at paragraph 36

¹¹ Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners, Version 5 – May 2008, at paragraph 17

am unable to conclude from the evidence available to me that any of the exceptions that would preserve such rights have been engaged. I do not share Mr Seymour's view that the 2006 Act does not supersede or override the 1793 Canal Act, since its effect under Section 67(1) was to extinguish public MPV rights over every highway (subject to the exceptions in Sections 67(2) and (3)). Accordingly, public rights for MPVs have been extinguished. It follows that I am not persuaded to depart from the findings in my interim decision in this regard, that the Order route should be recorded as a restricted byway.

Evidence relating to the proposed modifications

38. At paragraphs 44-46 of my interim decision, I concluded that the alignment of the Order route should be amended to follow a course to the south of the loading ramp shown on the Order plan¹². I reached this conclusion on the basis of the depiction of the historic route on the documents provided, in particular as shown uncoloured on the 1910 Finance Act Map. Support for this being the correct alignment was provided in a petition from a number of local residents.
39. Mr Carney contends that the loading ramp has been constructed in the middle of the Order route and this can be seen from examining both the Finance Act Map and the 1889 Sheffield and South Yorkshire Navigation Act plan¹³. He says the loading ramp forms a 'turning circle' to enable modern farm vehicles and trailers to manoeuvre to and from Jacques Bank and to access the Canal: the proposed modification would prevent them from doing so.
40. Both the historic plans referred to above appear to me consistent in their depiction of the Order route's alignment. If it is the case, as Mr Carney asserts, that the loading ramp (a later structure) encroaches upon the width of the Order route¹⁴, then this will be a matter for the highway authority to address in the event the Order is confirmed.
41. Mr Carney also asserts that the route north of the loading ramp¹⁵ has been used by the public for over 20 or 40 years, and has been dedicated as a highway without objection. However, Mr Carney has not supported his assertion with evidence from which I can reach such a conclusion. I note that it is this route, on the north side of the loading ramp, which is shown on the Council's list of streets.
42. As regards Mr Seymour's objection to the status of the alignment as proposed, I have already addressed this above.
43. I am not persuaded by the submissions that the modifications proposed in my interim decision should be amended or not pursued.

Other matters

44. Mr Carney asserts that several documents submitted by the Council have been altered without legal authority. This is not a matter on which I can comment.

¹² Shown as a rectangular feature mid-way between the words South Drain and Crook o' Moor Farm

¹³ Although elsewhere in his submissions he states the route of the approach road to the canal and railway crossing is on the south side of the loading ramp and not on the north side

¹⁴ Defined in the modification proposed to the Order "as shown uncoloured on the map prepared by the Valuation Office under the Finance Act 1910", at paragraph 52 of my interim decision

¹⁵ The alignment of the Order route as shown on the Order as made

45. As regards future maintenance of the Order route, this is not a matter relevant to my decision, but is best addressed to the Council as highway authority and/or to those responsible for the structures crossing the canal and railway.
46. As regards those having vehicular access along the Order route, subsection 67(5) of the 2006 Act provides a private right of way for MPVs for those persons who have a reasonable need for access where rights for MPVs have been extinguished by subsection 67(1). Such a private right of way for MPVs extends to landowners, occupiers and tenants and their lawful visitors including, for example, business visitors, postal and other deliveries, and utilities¹⁶.

Conclusion

47. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed with the modifications previously proposed.

Formal Decision

48. The Order is confirmed subject to the following modifications:

- Delete the words "County of Lincoln, Parts of Lindsey (Isle of Axholme)" wherever they occur in the Order, and replace with the words "West Riding of Yorkshire (Thorne Rural District)"

In Part I of the Schedule to the Order, with regard to the width

- in the first line after the words "...on the map", insert "and on the Map prepared by the Valuation Office under the Finance Act 1910"
- in the second line after the word "as" insert "shown uncoloured on the Map prepared by the Valuation Office under the Finance Act 1910 and"
- at the end of the fourth line replace "north-east" with "south-east"

In Part II of the Schedule to the Order,

- in the fourth line replace "north-east" with "south-east"

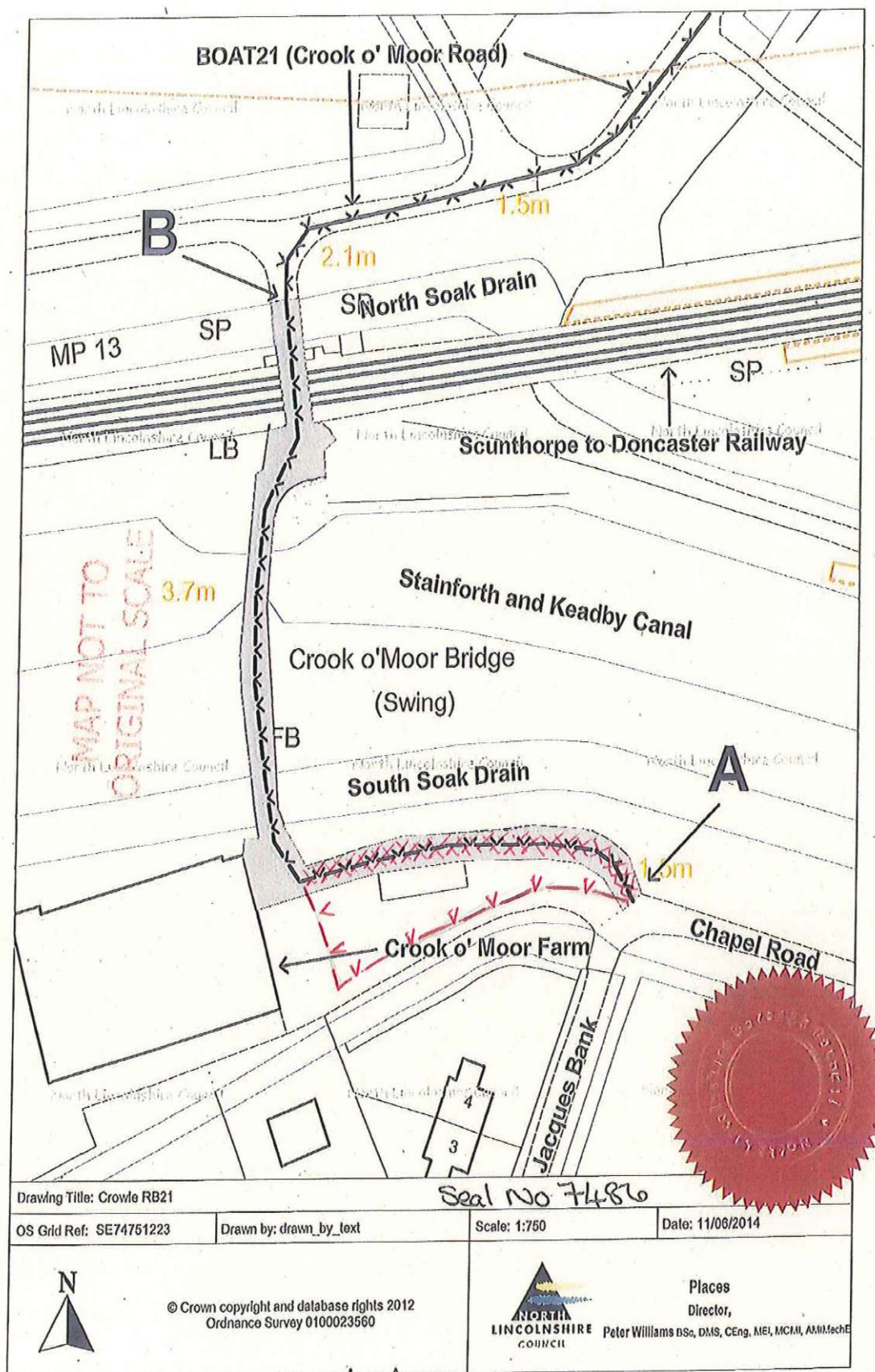
On the Order plan,

- delete the route as shown between point A and where it turns to the north and replace it with a route from point A in a generally westerly direction to the south-east corner of Crook o' Moor Farm, then turning north to join the unaffected continuation of the Order route

S Doran

Inspector

¹⁶ Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners, Version 5 – May 2008, at paragraphs 55-57



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