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# Order Decision

Inquiry held on 10 May 2016

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 15 June 2016**

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## Order Ref: FPS/X1355/7/3

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the County Council of Durham Public Rights of Way Modification Order No. 2 (Public Footpath No. 77 Consett) 2015.
- The Order is dated 4 June 2015 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order schedule.
- There was 1 objection outstanding at the commencement of the inquiry.

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

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## Procedural Matters

1. I held a public local inquiry into the Order at the Hamsterley & Low Westwood Community Centre on Tuesday 10 May 2016 having viewed the claimed footpath the previous evening. After closing the formal proceedings, I made a further inspection of the footpath in the company of Miss Christie, the Senior Rights of Way Officer of Durham County Council ('the Council') and the objector, Miss Garrington.

## The Main Issues

2. The Order was made in consequence of an event specified in section 53 (3) (c) (i) of the 1981 Act which provides that the Definitive Map and Statement ('DM&S') should be modified where evidence has been discovered which shows, when considered with all other relevant available evidence, that a public right of way which is not currently shown in the DM&S subsists or is reasonably alleged to subsist over the land in question.
3. Whilst the evidence discovered by the Council need only be sufficient to *reasonably allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. For me to be able to confirm the Order, I must be satisfied that the evidence discovered demonstrates, on a *balance of probabilities*, that the claimed right of way subsists<sup>1</sup>.
4. The case put forward by the Council in support of the confirmation of the Order is based on the dedication of a public right of way being deemed to have occurred under the provisions of section 31 of the Highways Act 1980 ('the 1980 Act'). Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that

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<sup>1</sup> *Todd & Bradley v the Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Admin

way is deemed to have been dedicated as a highway unless there is sufficient evidence that during that period the landowner had no intention to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.

## **Reasons**

### ***The date on which the right of the public to use the way was brought into question***

5. Although the possibility that use of the route was brought into question at an earlier date will need to be considered, it is not disputed that use of the claimed path was brought into question on 12 February 2012 when complaints were made to the Council of the obstruction of the path by tree cuttings, a wooden fence and stacked up paving slabs which had been removed from the surface of the path.
6. If public use of the claimed path had been brought into question on 12 February 2012 then the relevant retrospective 20-year period for the purposes of section 31 (2) of the 1980 Act would be 13 February 1992 to 12 February 2012.
7. There is however another possible date on which use of the route may have been brought into question as there is evidence that a fence had been erected in the vicinity of the path at some point around the time when the objector bought her property. There was no consensus between the parties as to the date when this earlier fence had been erected, although it was not disputed that the fence had been in existence for a short period of time during 1992.
8. The erection of the fence led to a complaint being made to Derwentside District Council by a member of the Hamsterley Mill Residents Association. The complainant claimed that the fence had been erected without planning permission and that the fence was in breach of the restrictive covenants relating to the grass verges on the housing estate. The complaint led to a site visit from the planning enforcement officer with the result that the fence was removed and re-aligned so as not to encompass the grass verge outside the objector's house. The available evidence suggests that the fence was present for 3 or 4 days in total.
9. The notes retrieved from the district council's archive show that the complaint regarding the fence had been made on 29 January 1992, that a site visit had been made on 31 January 1992, that the planning enforcement officer had spoken to the objector on the telephone on the same day and had received a further telephone call later that day from the objector's husband who stated that the fence had been taken down. The objector contends that the fence was erected at some point after 14 February 1992, that being the date on which the property had been conveyed to her and that the district council records are incorrect.
10. Whereas the objector claims that she had been visited by a planning enforcement officer who had informed her that the fence could not be erected on a public footpath, there is nothing in the file note regarding the existence of a footpath or a complaint being made of a path being obstructed. Furthermore,

the file note records that contact with the objector was via telephone and the only person spoken to on site was the builder carrying out the works.

11. There is a clear conflict between the recollections of the objector and the district council file note with regard to the enforcement officer's visit and with regard to the date the fence was present. Although the objector may not have been the owner of the property until the completion of her purchase on 12 February 1992, it was the objector's evidence that the vendors of the property (a Mr & Mrs Nicholls) had moved to Arran some time prior to the sale being completed. The conveyance of title to the verge to Mr & Mrs Nicholls dated 14 January 1992 was witnessed on the Isle of Arran which suggests that the Nicholls were not resident in High Hamsterley at that date.
12. As the property appears to have been vacant as the sale proceeded and as the person named as the owner on the district council's complaint sheet was the objector, it is likely that as part of the contract of sale the objector had been granted access to the property to undertake certain works (such as the erection of boundary fences) prior to the completion of the sale. To my mind, this is the only probable explanation which would resolve the conflict between the subsequent recollections of the objector and the contemporaneous notes made by the planning enforcement officer as to the dates when the fence had been erected, who had been responsible for its erection and when it had been removed. I conclude, on a balance of probabilities that the fence complained of had been erected not later than 29 January 1992 and that it had been removed on 31 January 1992.
13. The evidence points to the fence having been present on site for a period of around four days at the most before it was removed; given that 24 years have passed since then it is unsurprising that recollections of the existence of such a transitory feature are few and far between. However, it is by no means certain that the fence had the effect of obstructing the claimed path; as noted above, the complaint was made on planning grounds and on an alleged breach of a restrictive covenant. None of the users recalled the path being obstructed prior to 2012 although one witness<sup>2</sup> interviewed by the Council stated that she had not seen an obstruction herself but was aware that others may have done so. At its best this written and uncorroborated evidence is little more than hearsay and I can attach little weight to it.
14. The evidence relating to the effect of the fence erected in January 1992 is inconclusive and I am not persuaded that the fence had the effect of preventing access along the path. Consequently, I do not consider that public use of the path was brought into question in January 1992.
15. Given that use of the claimed path was brought into question on 12 February 2012, and that the objector's fence had been removed on 31 January 1992, a full period of 20 years use would have been possible between those dates.
16. Accordingly, I conclude that the relevant 20-year period for the purposes of section 31 (2) is 13 February 1992 to 12 February 2012.

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<sup>2</sup> Mrs Morris

***Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public's right to do so was brought into question***

17. A presumption that a public right of way has been dedicated will arise where there is evidence of the enjoyment of the way by the public for a period of not less than 20 years ending at the date when the right to use the way was brought into question. Such use has to be as of right; that is, without force, without secrecy and without permission. In addition, the use must also have been without interruption.

*The public*

18. There is also no legal interpretation of the term "the public". A dictionary definition is "*the people as a whole, or the community in general*". Coleridge CJ (1887)<sup>3</sup> commented that use by 'the public' "*must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge*".
19. The objector questioned whether those who had completed user evidence forms could be regarded as being representative of 'the public' as they were drawn from the Hamsterley Mill and Parklands housing estates; there was no supporting evidence from residents of other places in the immediate vicinity.
20. I acknowledge that of those who completed user evidence forms, or who were interviewed by the Council or who appeared at the inquiry, the overwhelming majority reside at Parklands or Hamsterley Mill. However, none of the supporters have any connection with the land crossed by the path, either in terms of ownership, tenancy (see paragraphs 32 to 38 below) or a business relationship with the owner of the land. Despite the close proximity of the residences of supporters to the claimed path, and the narrow geographic area from which the supporters are drawn, there is no reason, in my view, why the supporters should be regarded as other than "the public". In this respect the individuals who submitted user evidence forms, being "*residents in the neighbourhood*" can be regarded as members of the public.

*Use by the public for not less than 20 years*

21. In total, 99 user evidence forms were submitted in support of the footpath being added to the DM&S which represent the evidence of use of 106 individuals. The majority of these individuals (89) are from the Hamsterley Mill estate, 14 are from Parklands with the remaining 3 living elsewhere. Of these users, 49 state that they have used the path throughout the relevant 20 year period with 12 people giving evidence of use of the path between 1972 and 1992.
22. I heard from 5 witnesses at the inquiry. Dr Nichols has been resident at Parklands since Christmas 1969 and has used the claimed path around 4 times per week since that date to access the bus stops and the post box on the A694. The claimed path was a convenient link to the Newcastle road as the alternative route along the B6310 had no footway and the road verges were uneven.

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<sup>3</sup> R. v. Inhabitants of Southampton (1887) 19 QBD 590; RWLR April 1998 S6.3 pp55

23. Mrs Jack has been resident at Parklands since 1972 and uses the claimed path for similar purposes to Dr Nichols and for circular walks around the Hamsterley Mill and Parklands estates. Mrs Jack said that her husband had used the path every day to catch the bus to work in Newcastle.
24. Mrs McCormack has been resident at Parklands since March 1976 and has used the claimed path once or twice per week to access the bus stops on the A694, to post letters and to visit friends on the Hamsterley Mill estate.
25. Mr Longrigg has lived at Hamsterley Mill since 1966 and recalled the construction of the Parklands estate having occurred during the late 1960s and early 1970s. Prior to the building of the Parklands estate, he had used the claimed path two or three times per week to access to fields which Parklands had been built on, to walk around the grounds of Hamsterley Hall and to access the former railway line that became the Derwent Walk. Mr Longrigg has frequently seen walkers and cyclists passing his house on the way to or from the claimed footpath.
26. Mr Graham has been resident at Hamsterley Mill since 1961 and had initially used the path to access the grounds of Hamsterley Hall as the late Lord Gort had been supportive of access to his estate. With the development of Parklands and the Derwent Walk Mr Graham has regularly used the path to visit friends and for recreation on the former railway line.
27. None of the witnesses I heard from recalled any obstruction of the path during their use of it. The steps and handrail leading down from the B6310 had always been present, and the belief was that the steps and handrail had been installed by Lord Gort's estate to enable Lord Gort to reach the bus stop on the A694. Dr Nichols recalled that the path had initially been grass and earth but had been paved around 1990 which was described as a "welcome improvement".
28. The oral evidence given at the inquiry is of unchallenged use of the path since 1961 and reflects and supports the remaining written user evidence. I am satisfied that the user evidence when considered as a whole, demonstrates use of the claimed path by the public throughout the relevant 20-year period.

*Without force*

29. The claimed path leads from the B6310 to the southern end of High Hamsterley Road through a gap in the roadside fence, over a flight of steps and over a strip of ground which belongs to the objector. The available evidence is that the path has always run through a gap in the fence on the B6310 and there has never been a barrier, gate or fence at the High Hamsterley Road end during the relevant 20-year period. There is no evidence that the public has had to climb or cross any structure to use the footpath or had to break down a gate or fence in order to do so. I conclude that use of the path has been without force.
30. The objector submitted that the action of laying paving stones on her land had been an act of force and any use that flowed from it had been forceful. I do not agree. Whilst the action taken by the Resident's Association in laying the paving stones may have been a trespass against the owner of the land and may have resulted in damage to that property, the use made of the path subsequent to its paving was not forceful as there was no impediment for the public to overcome in order to be able to use the path.

*Without secrecy*

31. It is not disputed that the claimed use took place at all times of the day and in full view of anyone who cared to look. I conclude that the claimed use was not secretive.

*Without permission*

32. It is the objector's case that use of the claimed path by those residents of the Hamsterley Mill estate was use with permission arising from the terms by which the individual plots of land on the estate were sold as the housing estate was developed. In support of her contention the objector places reliance upon the terms of the 1949 Abstract of Title to her own property. The objector submits that the abstract granted a block easement for all the residents of the Hamsterley Mill estate over the lands which were retained by Lord Gort; the retained lands were the estate roads and the grass verges at the side of the roads. It is asserted that similar terms would have been applicable to all the plots of land sold as part of the development of the Hamsterley Mill estate.
33. The objector submits that use of the claimed path by those who are in possession of an existing permission in the form of an easement over the land cannot be use as of right and cannot therefore raise a presumption of dedication. I have no difficulty in accepting that legal proposition. However, the clause in the abstract of title on which the objector places reliance does not grant permission to walk on the grass verge between the southern end of High Hamsterley Road and the B6310.
34. Clause 4 of the Abstract reads (after describing the objector's property as it then was) *"AND TOGETHER with right of way for the Purchasers (in common with the vendor and other persons for the time being authorised by him) on foot and with or without horse carts and other carriages including mechanically propelled vehicles over and along the road or roads from the said piece of land to the public highway from Newcastle upon Tyne to Shotley Bridge for access and egress from the said piece of land from and to the said public highway"*.
35. What clause 4 granted to the objector's predecessors was a private right of access over the estate roads between her property and the A694 Newcastle – Shotley Bridge road that lies to the north of the estate. That right was granted to ensure that the demised premises were not landlocked from the public highway. Although the B6310 lies immediately to the south of the objector's property, the abstract does not grant a right of way to the B6310 as no road was constructed to link the estate with the B6310.
36. I have no reason to doubt that the terms of the objector's Abstract of Title were replicated in the titles to other properties on the Hamsterley Mill estate. Other residents would therefore benefit from a right of way to and from the Newcastle – Shotley Bridge road but were not granted a right of access to the B6310.
37. The grass verge which is crossed by the claimed path was part of the land retained by Lord Gort over which no right of access was granted. Use of that grass verge as a means of access to High Hamsterley Road from the B3610 by residents and others would therefore have involved trespassing over Lord Gort's retained land in such a manner as to assert that they had a public right to do so.

38. In conclusion, the Abstract of Title did not create a blanket easement by which the residents of the Hamsterley Mill estate walked over the claimed route with permission. There is no evidence that permission to use the path was sought or granted; consequently the use of the footpath by residents of Hamsterley Mill and Parklands estates during the relevant 20-year period was without permission.

*Without interruption*

39. With regard to Section 31 of the 1980 Act an interruption in use must be some physical and actual interruption which prevents enjoyment of the path or way and not merely some action which challenges that use but allows it to continue. For any action taken to qualify as an interruption of use there must be some interference with the right of passage.
40. Whether any action can be regarded as an interruption is also dependant upon the circumstances of that action; temporary obstructions of a minor nature such as the parking of vehicles on a road<sup>4</sup> or the storage of building materials on a path<sup>5</sup> have been held not to amount to relevant interruptions.
41. In this case, there is no evidence of the use of the footpath being interrupted in any way until the objector took steps to prevent access along the path by lifting the flags and obstructing the route. It is not disputed that the objector had fenced the path in 1992 as part of works undertaken to the property, but as that fence had been removed on 31 January 1992 any obstruction of the path that the fence may have caused would have been outside of the relevant 20-year period under consideration. I conclude that use of the route by the public between 13 February 1992 and 12 February 2012 was uninterrupted.
42. In summary, there is a body of user evidence which is sufficient to demonstrate that use of the claimed footpath occurred throughout the 20-year period prior to 12 February 2012 and that such use was as of right and without interruption. The user evidence before me demonstrates that the footpath at issue has been in continuous and continuing use by the public since at least 1961. It follows therefore that the evidence adduced by the Council is sufficient to raise a presumption of dedication under Section 31 of the 1980 Act.

***Lack of intention to dedicate***

43. In order to take advantage of the proviso to section 31 (1) of the 1980 Act, the owner of the land has to provide evidence of overt and contemporaneous action having been taken against those using the claimed path.
44. In the case of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Hoffman LJ held that in terms of the intentions of the landowner, the "*intention*" means *what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is.... objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending to disabuse him of the notion that the way was a public highway*". The most common way that the owner's intentions could have been

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<sup>4</sup> Lewis v Thomas [1950] 1KB 438

<sup>5</sup> Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360

brought to public attention would have been by the erection on the path of a suitably worded notice or notices denying the existence of a right of way.

45. There is no evidence of the objector having taken any steps to communicate to users of the path there was no intention to dedicate a public right of way over the land. Until the removal of the paving slabs and the obstruction of the route in February 2012 the objector appears to have tolerated and acquiesced in the use of the path by the public throughout the relevant 20-year period.
46. It follows that I conclude that there is insufficient evidence of a lack of intention to dedicate a public right of way for the landowner to be able to take advantage of the proviso to section 31 (1) of the 1980 Act.

### **Conclusions**

47. I conclude that the user evidence adduced is sufficient to raise a presumption of dedication and there is insufficient evidence of a lack of intention to dedicate a public right of way over the Order route for that presumption to be rebutted.
48. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed.

*Alan Beckett*

Inspector



## APPEARANCES

### For Durham County Council

Miss Laura Renaudon	Solicitor, Durham County Council, County Hall, Durham, DH1 5UL
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### Who called:

Miss Audrey Christie	Senior Rights of Way Officer.
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Dr Roy Nichols

Mrs Georgina Jack

Mrs Audrey McCormack

Mr James Longrigg

Mr Lawrence Graham

### Objecting to the Order:

Miss Nicola Garrington

### Inquiry documents

1. Paginated evidence bundle submitted on behalf of Durham County Council.
2. Extract from Met Office weather report for January 1992.
3. Closing submissions made on behalf of Durham County Council and reference bundle.



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**The County Council  
of Durham  
Public Rights of Way  
Modification Order  
No 2 (Public Footpath  
No. 77 Consett) 2015**

Footpath to be added to  
the Definitive Map and  
Statement



Scale 1: 1,000

Public Rights of Way /  
Highways not affected by  
the proposal

Footpath

Bridleway

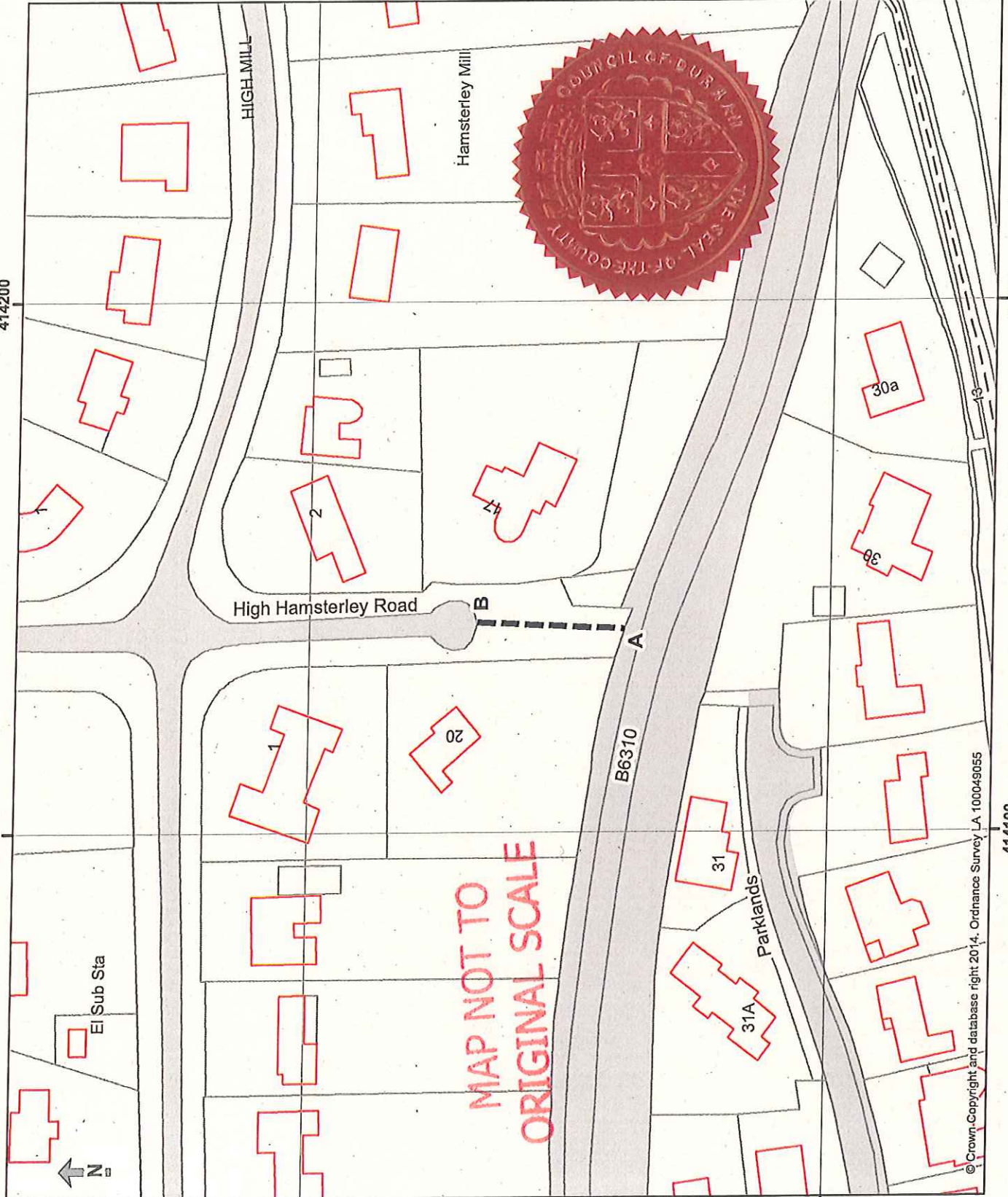
Byway

Adopted  
Highway

Drawn: 20 May 2015

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*David Taylor*



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