

Order Decision

Site Visit on 22 August 2016

by Sue Arnott FIPROW

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

Decision date: 7 September 2016

Order Ref: FPS/P2935/7/48

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Northumberland County Council Definitive Map Modification Order (No 13) 2013.
- The Order is dated 25 November 2013. It proposes to modify the definitive map and statement for the area by recording a restricted byway in the Parishes of Thirston and Longhorsley from the A1 north west of Helm, south east and southwards, crossing the U6004 road and re-joining the A1 near Eshott Burn, as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when Northumberland County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: Confirmation of the Order is proposed, subject to the modifications set out in the Formal Decision below.

The Main Issues

1. There are three main issues here: the first is whether the evidence shows that a public right of way for vehicles was once in existence along the Order route; the second is whether any such rights still exist today and should be recorded on the definitive map and statement. The third matter concerns the width of the way.
2. The Order was made by Northumberland County Council (NCC) under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). If I am to confirm it, I must be satisfied that evidence has been discovered which shows, on a balance of probability, that the public rights intended to be recorded do subsist.
3. If confirmed, the Order would record the route in question (shown on the Order map in two parts as F-G and H-K-J) as a restricted byway, that is a highway over which the public have a right of way on foot, on horseback or leading a horse, and a right of way for vehicles *other than* mechanically propelled vehicles (MPVs).¹
4. On the basis of the historical evidence it discovered, NCC concluded that a public vehicular right of way did once exist along the Order route and that this has never been formally stopped up, despite falling out of use. Further, NCC took the view that any public rights to use the way with MPVs was extinguished as a result of Section 67 of the Natural Environment and Rural Communities Act 2006 (the

¹ Section 48(4) of the Countryside and Rights of Way Act 2000

2006 Act)², so that the appropriate categorisation for the road is now 'restricted byway'; in fact this point is not challenged. One of the objections (from Mr Hogg) disputes the continued existence of *any* public rights of way over the Order route and the other (from Mr Kind) objects to the width of section H-J-K as set out in the Order schedule.

Reasons

5. In support of its case NCC relies on historical evidence dating back to the mid-eighteenth century including old maps, highway plans and schedules and other records held in the County's archives. Mr Kind submits further documentary evidence from a number of sources which leads him to a similar but subtly different conclusion to NCC. The objectors have commented on some of these documents and provided recent photographs. In reaching my own conclusions in this case, I have taken into account the evidence and submissions from all parties where these are relevant to the main issues I have set out above.
6. Following the principle "*Once a highway, always a highway*", if the way is shown to have been a public one at any time in the past, the public's rights will still exist today (unless there is evidence of formal closure) even if it has not been used for many years. In assessing this historical evidence, I note that Section 32 of the 1980 Act provides as follows:

"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

Eighteenth Century evidence

7. There is no doubt that the long-distance route known as the Great North Road has been in existence for centuries. A map by Moll in 1724 clearly shows it between Newcastle and Berwick passing Causey Park and Felton. Armstrong's map³ in 1769 provided a little more detail, showing Helm, the Great North Road and numerous connecting roads along its length. One of these equates to the present U6004 east of the point now identified on the Order map as G/H; this was shown as a crossroads although the side road extended westwards only for a very short distance. However a map in 1776 by M J Armstrong entitled "*A Survey of the Post Roads from London to Scotland*" showed the Great North Road passing through Helm although side roads appear to have been incidental to its purpose.
8. By 1787 and later in 1794, maps by John Cary indicated the Great North Road as a turnpike road⁴. The settlement Helm is not marked on either map, and the

² Sub-section 67(1) of that Act provides that upon commencement on 2 May 2006 any existing public right of way for MPVs was extinguished if it was over a way which, immediately before that date, was not shown in the definitive map and statement or was shown as either a footpath, bridleway or restricted byway, unless such rights were saved by virtue of falling into one of the categories for exemption.

³ Map produced by Andrew Armstrong

⁴ I have noted research by Mr Arthur Cossons in 1934 referred to by Mr Kind in his representation which suggests that this section of the Great North Road was first 'turnpiked' in 1746/7 but the source of this information is not known and I therefore limit the weight I place on this.

precise line of the main road cannot be clarified at this scale but, when compared to Cary's 1827 edition, its distinct curve tends to support the line of the Order route, F-G-H-K-J.

9. In brief, it seems to me that there is good evidence to support the premise that in the eighteenth century the Great North Road was a full vehicular highway that became maintained by a turnpike trust and that it passed through Helm along the line of the Order route.

Nineteenth Century evidence

10. Whilst Smith's map in 1801 showed a similar picture to Cary's 1794 map, the situation was rather different by the time map-makers Fryer (in 1820), Cary (in 1827) and Greenwood (in 1828) surveyed the area. In the intervening years, Helm had been bypassed by a new road on its western side, along the line of the present A1. (I shall refer to this road (F-J) as 'the bypass'.⁵)
11. All three maps imply that the bypass was then of equal status to the original line (the Order route) with both being part of the turnpike road.
12. The Postmaster General's national map of postal routes in 1823 showed the Newcastle to Berwick Road although the scale of this map is such that it is not easy to distinguish between the original and bypass. However Cary did so on his 1827 edition, showing the original line in blue as part of the "Mail Road" and the bypass as a "Turnpike Road".
13. In 1835 proposals to improve the Great North Road were published. A "*Plan of the Present Road showing also the Proposed New Lines of Improvement*" on the "*Cow Causey and Buckton Burn Turnpike Road*" shows the bypass coloured as the present road. The accompanying profile of the proposed new line identifies the Order route as "Old Road by Helm on the Hill".
14. Whilst Mr Kind submits that (although it was never built) this proposal started the ascendancy of the bypass over the Order route, this reference implies that by 1835 this had already occurred: the bypass was now the preferred road. The question that arises is whether, at any subsequent time, the rights of the public over the Order route (which clearly once existed) were formally extinguished.
15. Before leaving the three commercial maps I note that each one shows a road in existence between the cross-roads (G/H) and the bypass along the present U6004, passing between buildings at Helm. NCC suggests this may be in doubt since the 1835 proposals map did not show it in its entirety but it seems to me that this may be simply because the words "Helm on the Hill" masked the road underneath, or alternatively that the road was a private one.
16. No inclosure or tithe documents have been submitted and I therefore presume that, if any such records exist, they offer no relevant information.
17. Moving forward to 1859 and publication (in 1865) of the first Ordnance Survey (OS) map at a scale of 25" to one mile⁶, it is clear that in the middle of the nineteenth century this road was in existence, as was the Order route and the

⁵ I note Mr Kind refers to this as 'the bottom road'. He submits that this is probably of equal antiquity to the Order route, probably pre-turnpike and all lost in antiquity. Although it is of little consequence here, I note there is no evidence to support this and I share the view of NCC that it seems unlikely. I consider it more probable that the bypass was an early 'improvement' instigated by the relevant turnpike trust.

⁶ The 1865 map was based on a survey in 1859, as was the 6" to one mile map published in 1866.

- bypass. A guide post, similar to others found along the original Great North Road was still in place at the crossroads G-H but a milestone had been installed along the bypass. At this time there is little to suggest any difference in status between the Order route and the bypass and indeed the OS surveyors recorded both as 'Public Road' in the accompanying Book of Reference.
18. In contrast, the status of the middle link road between G/H and the bypass was noted as 'Private Road'. That is not conclusive evidence but it is entirely possible that what began as a private accommodation road from G/H into Helm Farm pre-bypass (as suggested by Armstrong in 1769) was linked with the 'new' bypass but retained its private status in 1859. That would not preclude its subsequent dedication as a public road at a later date.
 19. I also note that the 1865 OS map showed a route leading from the northern end of the Order route (just south of F) and heading north towards Eshott Heugh. (This had been recorded by Greenwood in 1828.) The OS Book of Reference noted this road (parcel 134a) also as a public one.
 20. By 1897 the OS 1" edition showed clearly (through shading) that the bypass was the main road, the link road through Helm (also shaded) was part of the road to Eshott and the Order route still in existence but unshaded, as was the connecting road to Eshott Heugh.
 21. This is not conclusive evidence of the status of any of these roads but as a simple matter of logic, even if the Helm Farm road had become a public highway and there was therefore no need for the retention of the Order route, the continued existence of the Eshott Heugh link would require the section F-G at least to remain open to the public. On the other hand, if the road through Helm Farm was still private (despite the OS shading), then it would be extremely unlikely that the public's rights over the Order route would have been removed.
 22. NCC confirmed it had checked the Quarter Sessions records but no evidence has been produced by any of the parties of a formal order to stop up any part of the Order route by the Courts.
 23. It is Mr Hogg's submission that when the road from Eshott was extended beyond G/H to the bypass, the Order route was exchanged in lieu of payment for the land over which the new highway ran. In his view, no landowner would allow a road to separate their farmhouse from its buildings if the track to the north and south (F-G and H-K-J) were still to be used by the public.
 24. That is a plausible theory but there is no proof to support it. No records have been produced to confirm any such exchange, for payment or otherwise.
 25. The conclusion I reach is that during the nineteenth century the bypass gradually superseded the original line of the Great North Road through Helm. Whilst use of the Order route may have declined as a result, there is no evidence to indicate that its status as a public carriageway was ever extinguished.

Twentieth Century evidence

26. In fact that conclusion is reinforced by the evidence provided by the 1910 Finance Act records. The relevant plan shows the bypass, the Order route, the Helm Farm link road and the road leading to Eshott Heugh excluded from adjacent hereditaments for taxation purposes. This is generally accepted as being a strong indication that the routes excluded were highways and most

probably vehicular roads. Again, that is not conclusive but it is consistent with the earlier evidence.

27. I give little weight to the lack of detail on the 1910 Duckhams Oil Motoring Road Map which is limited by its scale, but note that by 1924 the OS was showing a guide post on its 6" map at the junction of the bypass and the U6004. This offers further evidence to confirm that by then the road through Helm Farm had become the route connecting Eshott with the Great North Road, a situation later reflected on the 1947 OS 1" map.
28. When jurisdiction for all highways transferred to the County Councils in 1930, County Surveyors compiled maps recording the public roads for which they were responsible. The Northumberland County Surveyor's Highway Map dated 1938 does not record the Order route in its entirety although it does show the northernmost section from point F as part of the road to Eshott Heugh. The present U6004 is likewise recorded as a publicly maintainable road.
29. These same details also formed part of the records prepared under the Restriction of Ribbon Development Act of 1935.
30. The revised highway record of 1951 shows the Eshott Heugh road (including part of the Order route) crossed through and the present U6002 (now Byway 18⁷) added. No details of any formal diversion have been submitted and it is therefore not clear whether or not any legal order was made that affected the status of part (or all) of the Order route at that time although it is a possibility.
31. The 1947 OS 6" to one mile map is the first to suggest that the section H-K-J was no longer a through-route between the U6004 and the A1. Along the line of the bypass, the depiction of embankment features suggests works had been carried out to alter the level of the main road. At point J it appears the (A1) bypass had changed course, branching north westwards out of the original line of the Great North Road in Longhorsley Parish rather than in Thirston as previously. Whilst this may have brought to an end any likelihood of through traffic along the southern part of the Order route, the inclusion of a guide post near to point F confirms this northern section was probably still open for use.
32. Ten years later, the 1957 OS 6" map illustrated the wartime development referred to in Mr Hogg's objection. Ministry of Defence buildings to the north, south and east of section F-G were said to include staff quarters, the quarry for storing explosives, an underground air traffic control centre, a hospital with medical room and two wards, a pump house for domestic water and a water tank, an underground shelter and latrines. War-time sensitivities may have prevented the showing of the camp buildings in this location on the 1947 edition.
33. It is possible that the Ministry of Defence exercised its powers to exclude the public from the Order route either permanently or temporarily but no evidence of this has been submitted. NCC has confirmed that neither F-G nor H-K-J were claimed as public paths during the preparation of the first definitive map and statement in the 1950s.
34. The 1964 Highways Map reflects the present day position as regards NCC's liability for highway maintenance in the area, now recorded in its Network Management Information System.

⁷ Recorded in the definitive map and statement 2005

35. Lastly, the 1978 OS 6" map confirms that by this date the western boundary of the former road H-J-K had disappeared but that F-G remained defined by boundaries on both sides for the majority of its length.

Summary

36. I am left in no doubt that the Order route was once a public carriageway that formed part of the Great North Road. After the Helm bypass was constructed and came into use around the turn of the nineteenth century, probably as part of improvements by the relevant turnpike trust, the importance of the original road began to decline and the bypass eventually became the main road. In 1835 the Order route was noted as the 'old road' yet in 1859 the OS still recorded it as a public one. Even into the twentieth century, the 1910 Finance Act records give a very strong indication that it retained this same status, despite the addition of a new highway directly through Helm Farm.
37. Evidence indicates that throughout the twentieth century, use declined further still, possibly influenced by an absence of maintenance given that the Order route has never been recorded on the schedule of publicly maintainable highways held by NCC since the 1930s, other than a short stretch at its northern end.
38. No evidence of formal closure or restriction of the public's rights over the Order route has been submitted. I therefore conclude that, until 2 May 2006, a public carriageway was still legally in existence, even if no longer physically available for use. On that date, as a consequence of Section 67(1) of the 2006 Act, as explained at paragraph 4 above (at footnote 2), the public's right to drive MPVs along the old Great North Road ceased to exist, leaving its present status as restricted byway.
39. On a balance of probability, I conclude that the Order should be confirmed in relation to the status and alignment of the route at issue.

Width

40. Mr Hogg submits that "*the track in question has never been used in decades (and) is virtually impassable in places and in some locations can only be navigated by trespass into private woodland*". He believes the track F-G was created by deer and that H-K-J reverted to nature many years ago, this now forming a wildlife corridor where the ground is too wet to be farmed. In his view the track is no more than 2.5 metres wide at most, suggesting that this procedure is little more than a "land-grab", a proposition strongly denied by NCC. To the contrary, Mr Kind refers to "purpresture": the wrongful enclosure of land rightfully belonging to the public at large.
41. It is clear to me that as far back as 1859 when the OS surveyed the area and produced its first 25" to the mile map with remarkable accuracy, both north and southern sections of the Order route were bounded on both sides by fences and/or hedges. At this point in time there is little doubt that the route still did exist as a public carriageway. It seems to me that this is the most accurate indication of the extent of the public's rights along the route.
42. The general presumption in law is that, unless there is evidence to indicate otherwise, all the land contained between boundary features lies within the highway, the public enjoying access over the verges as well as any hard-surfaced road.

43. On this basis, NCC drafted the Order Schedule after a site survey defining the width of section F-G (Thirston Restricted Byway 22) as varying between 8.5 and 9 metres, reflecting the narrowing over part of the track shown on the map and still in evidence today.
44. However for the section H-K (Thirston Restricted Byway 23) and K-J (Longhorsley Restricted Byway 33) a width of 5 metres is recorded. Where a route is not enclosed by boundaries (and where the legal width is not otherwise defined) NCC routinely identifies a width of 5 metres on the basis that this is sufficient for two vehicles to pass. Mr Kind objects to this measurement and submits that the reasoning behind it is irrational. In this instance I tend to agree.
45. A more rationally based method of recording the width of this highway would be by reference to its original physical boundaries as shown in the 1:2500 1st Edition Ordnance Survey map of 1865 when its status as a public road was not in doubt. In my view, a modification to this effect would assist in defining more accurately the extent of the public right of way along the Order route and follows recommended good practice.
46. Scaling from the OS map to establish the historical width of the highway between boundaries should produce the best possible estimation of the extent of the public's lawful rights. For section F-G this exercise produces a measurement varying between 15 metres (at the bend in the vicinity of the old quarry) and 8.5 metres (along the narrower section just north of Helm). For H-K the route varies between 10 metres at its northern end to 18 metres further south. Between K and J the width appears to be a more consistent 18 metres wide.
47. Although I recognise that these measurements may appear hugely discordant both with the site as it exists today and with the likely needs of the public in future, these issues are not relevant in determining the width of the corridor over which people in the distant past once enjoyed a right of way. It is my conclusion that the evidence indicates the width of this highway was greater than the measurements set out in the Order schedule and I therefore propose to modify it accordingly.

Other matters

48. In his objection, Mr Hogg complains that when he bought the farm in 1988, the land search carried out by his Solicitors failed to reveal the existence of this highway.
49. At that time no part of the Order route was recorded on the County Surveyor's list of maintainable highways and to date it has never been included in the definitive map and statement of public rights of way. Consequently a search would not have revealed its existence. Neither is it surprising to find it absent from the OS Pathfinder (and Landranger) maps which rely on these two records.
50. Mr Hogg challenges the claim that the route has been used by the public in recent times and points to the overgrown vegetation which now prevents access over much of its length. Mr Kind argues this was not the case 30 years ago when both sections were passable.
51. I have concluded that the Order route retained all rights for the public until 2006 so that any use by the public in the late twentieth and early twenty-first centuries can be attributed to its existence as a public road. A lack of use over the last 30 years or so would not affect its continued status as a highway.

52. Any future plans for the Order route, or for widening the A1, are not relevant to the determination of this Order which seeks only to establish the present legal status of the route in question.

Conclusion

53. Having regard to the above and all other matters raised in the written representations, I propose to confirm the Order with modifications to amend the status of the Order route as referred to in paragraphs 45 - 47 above.

Formal Decision

54. I propose to confirm the Order subject to the following modifications:

In the Order schedule: Part II

Thirston Restricted Byway No 22: Statement

- In lines 1 and 2, delete "a 9 metre wide restricted byway (incorporating a 2.5 metre wide metalled track)" and substitute "a restricted byway varying in width between 8 metres and 15 metres as shown in the 1:2500 1st Edition Ordnance Survey map of 1865";
- In line 3, delete "thereafter as an 8.5 to 9 metre wide restricted byway";
- In lines 5, 6 and 7, delete "thereafter as an 8.5 to 9 metre wide restricted byway (incorporating a 2.5 metre wide metalled track";

Thirston Restricted Byway No 23: Statement

- In line 1, delete "a 5 metre wide restricted byway" and substitute "a restricted byway varying in width between 10 metres and 18 metres as shown in the 1:2500 1st Edition Ordnance Survey map of 1865";

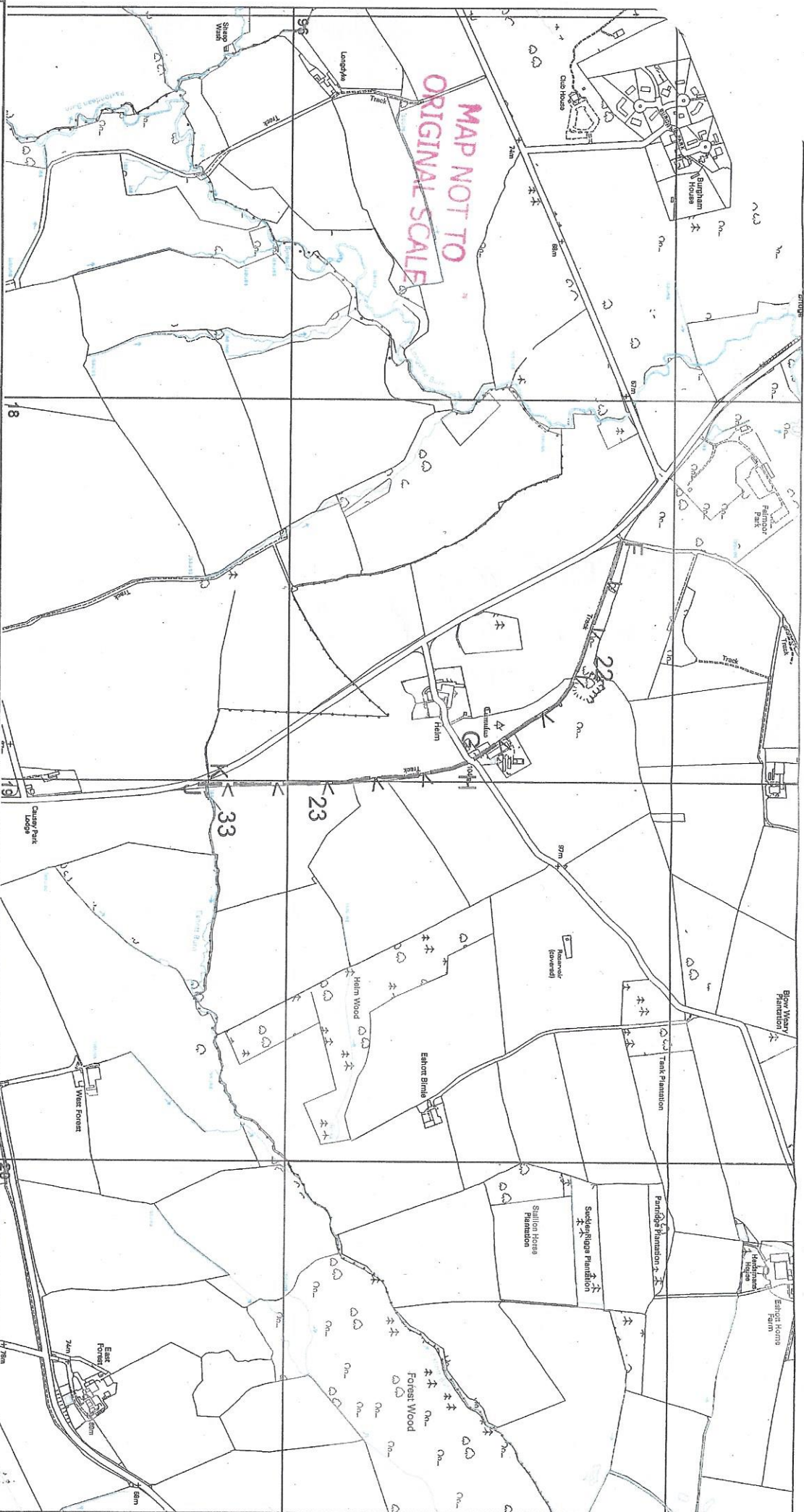
Longhorsley Restricted Byway No 33: Statement

- In line 1, delete "a 5 metre wide restricted byway" and substitute "a restricted byway 18 metres in width as shown in the 1:2500 1st Edition Ordnance Survey map of 1865".

55. Since the confirmed Order (if modified) would affect land not affected by the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Sue Arnott

Inspector



Northumberland

Northumberland County Council

Sustainable Transport

Local Services

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Wildlife and Countryside Act, 1981

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

**The Northumberland
County Council**

Modification Order
(No.13) 2013

Public Right of Way closed

Public Footpath

Public Bridleway

Restricted Byway

Byway Open to All Traffic

O.S. Map NZ 19 NE

Former District(s) **Castle Morpeth**

Definitive Map No 111

Parish(es)	Thirston/ Longhorsley
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Scale: 1/10,000

Date: November 2013