

---

## Order Decision

Hearing held on 19 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/P2935/7/54**

- 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 two objections outstanding at the commencement of the hearing.

**Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision.**

---

### **Procedural Matters**

1. I held a hearing at Ingram Village Hall on 19 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 will 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 (1769) shows a route from Ingram via Branton leading to Powburn. It is not clear from the map that this follows any part of the Order route and there is no indication that the route goes through Fawdon, the southern end of the Order route. Nevertheless the map provides good evidence of a through route from Ingram to Powburn. Cary's map of 1787 shows a route leading east from Ingram to the south of the River Breamish and Cary's map of 1794 shows a route from Ingram to Powburn via Branton. In the absence of evidence as to any other route between these settlements it is possible that the map shows a route which in part corresponds with the Order route. Fryer's map (1820) and Cary's map (1827) do not show any route between Ingram and Fawdon and the remainder of the route to Powburn follows the current unclassified road.
9. A route which corresponds to the Order route, subject to the scale and the accuracy of the mapping, is shown on Greenwood's map of 1828 and is identified in the key as a 'cross road'. However, the route to Powburn is not shown and the route continues southwards. It would seem unlikely that a route to Powburn would have disappeared given the earlier depiction on the various maps.
10. The historic map evidence shows the existence of a significant through route and, on balance, the existence of the Order route from at least 1828. However, on its own it is insufficient to demonstrate the existence of a public

vehicular highway. This evidence needs to be considered with all other available evidence.

11. Ordnance Survey maps from 1862 show the whole of the Order route and the book of reference accompanying the 1862 map identifies the route as a 'road'. The Ordnance Survey maps record the physical existence of a route between Ingram and Fawdon but give no indication as to status. 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.
12. Although the Order route is not excluded from the adjacent hereditaments on the maps prepared under the 1910 Finance Act the Order route is annotated 'public'. Some weight should be given to the view of the surveyor that the way was public. Again this needs to be considered with all other evidence.
13. The route is not shown on the Glendale Rural District 'handover map' of 1932 or identified in the schedule prepared in 1939 under the provisions contained within the Restriction of Ribbon Development Act 1935 (the 1935 Act). However, this does not preclude the existence of public vehicular rights on the Order route. Nevertheless the evidence does not support the same.
14. The route is identified on the 1951, 1958, 1964 and 1974 County Road Schedules as a highway maintainable at public expense. 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. The route is shown on the List of Streets as at 2 May 2006 as a highway maintainable at public expense.
15. 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 a 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 the maintenance of 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.
16. 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.
17. Council Highways Committee minutes during the period 1960 to 1961 indicate that consideration was given to improving the Order route and replacing four gates on the road with cattle grids. This was under the Agriculture (Improvement of Roads) Act 1955 which provided grants for publicly maintainable roads. Grants could also be made available for routes which were

not highways providing that the Minister was satisfied that such routes would become highways maintainable at public expense. The minutes indicate that the scheme was not supported by the Duke of Northumberland's agent due to limited agricultural benefit and the desirability of not encouraging easier access and trespass. The improvements did not take place but there is no indication that this was in consequence of any disagreement as to the status of the road. The minutes indicate that the Committee still considered proceeding with the improvements although withdrew the scheme. It would appear unlikely that the Committee would have considered proceeding with the proposal if the route was not a highway maintainable at public expense. The minutes give a good indication that the Order route was regarded as a public road and this evidence is consistent with the 1958, 1964 and 1974 schedules.

18. The definitive map shows footpath 11 commencing from the Order route to the north of its junction with the U1094 at Fawdon and footpath 12 leaving, crossing and re-joining the Order route. Neither the draft nor provisional maps identify the Order route as a footpath, bridleway or road used as a public path. The definitive map records are suggestive of the fact that the Order route was regarded as a public vehicular highway that need not be recorded on the definitive map. Had this not been the case then the route would have been recorded as a footpath, bridleway or road used as a public path. In the absence of public rights along the Order route then footpath 11 would have been a lengthy cul-de-sac and footpath 12 would be isolated from any other public route.
19. The objection on behalf of the Northumberland Estates Limited suggests that the route provides access for residents at Ingram Mill who have the benefit of private rights. Northumberland Estates have not provided any evidence as to the existence of private rights but in any event such rights do not preclude the existence of public rights.
20. Having regard to all of the above, and the submissions of Mr Kind as to the weighing of evidence, the commercial maps show the existence of the Order route from at least 1828. The route is identified on the 1910 Finance Act map as being public and the highway schedules from 1951 record the route as a highway maintainable at public expense. It is more likely than not, bearing in mind the minutes of the Highways Committee that the schedules depict a vehicular highway. The definitive map records suggest that the route was a public vehicular highway which need not be shown on the definitive map. Whilst the evidence is not substantial it is, when considered as a whole and in the absence of evidence to the contrary sufficient to show, on the balance of probabilities, that a vehicular highway subsists.

***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 1/09<sup>1</sup>. 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 also relevant in determining whether a way should be regarded as a byway open to all traffic. It was the case of *Masters*<sup>2</sup> 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 I summarise below, as to their use of the way. Caroline Fuller has ridden the Order route alone or with friends on average 5 times a year since 2002. She recalls seeing walkers, cyclists and other horse riders over the years. Mr Mitcham has not used the route but refers to limited use by others on foot. 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. A number of individuals gave evidence to the hearing as to their knowledge and use of the Order route and their experience of use by others. Mrs Dinsdale has used the route as a walker and horse rider with others since 2002. Between 2002 and 2004 this was every week. She had seen the landowner using the route but other vehicles only once or twice and recalled the route being used by a carriage to a wedding in Ingram. Ms Rogers used the route as her daily ride when she kept her horse in Branton. She often rode the route with friends. Miss Rogers had seen walkers and more recently cyclists but had not seen vehicles other than those used by hang gliders. However, she was aware of use by vehicles along the initial part of the Order route to the second gate. Ms Johnson used the route as part of a riding loop, she rode the route with friends and met walkers. She had not seen any vehicles other than on the initial section leading to Ingram Mill.

---

<sup>1</sup> Department for Environment, Food and Rural Affairs

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

27. Mr Whitehead, living at Ingram Mill Cottage since 2002, indicated that the route was used by vehicles, horse riders, cyclists and on foot. Horse use was in double figures in a week and at weekends there were often 6 motorcycles using the route. He said that there were around 16 vehicles a day going to Ingram Mill but much less vehicular use over the remainder of the route. Mr Dixon has only lived in Ingram for 18 months but said that he saw a lot of walkers and also horse riders and cyclists. He had not seen but had heard motorcycles and had seen other vehicles going over the hill.
28. Mr Bell advised that he had carried out a site visit on the route four times and on three occasions had seen walkers. Mr Kind 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.
29. Correspondence from the new interested parties (paragraph 3) refers to use by these individuals and others by vehicle for a number of years and 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 address the issue of balance of user.
30. The evidence of use 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. This is with the exception of the section of Order route from point A to the junction of the route which provides access to properties at Ingram Mill. The evidence suggests that this section is used to a greater extent by vehicles and on balance that vehicular use is greater than the use of the way as a footpath or bridleway. As such it would not be appropriate to record this section as a byway open to all traffic. It should be noted that this section is surfaced and is more akin to a route forming part of the normal vehicular highway network. Although unfenced this section is similar in character to the remainder of the U1094 to the west of the village hall. Notwithstanding the fact that the route should not be recorded on the definitive map this has no effect on any public rights. As I have concluded, the evidence, on the balance of probabilities, demonstrates that a public vehicular highway subsists.

### **Other Matters**

31. Northumberland Estates Limited raise the point that given that the route is not fenced from the adjacent field that the route is wholly unsuitable to cater for public rights of way. I note this concern but this is not a matter which I can take into account in determining the Order.

### **Conclusion**

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 subject to modification.

### **Formal Decision**

33. The Order is proposed for confirmation subject to the following modifications:

- At Part 1 of the Schedule to the Order relating to Byway Open to All Traffic No 37 at line 2 delete '10 metres south-west of Ingram Village Hall' and insert 'at the junction with the spur of the U1099 leading to Ingram Mill'. At line three delete '1870' and insert '1550'.
  - At Part II of the Schedule to the Order relating to Byway Open to All Traffic 37 delete 'from the U1099 road, 10 metres south-west of Ingram Village Hall, in an easterly direction for a distance of 285 metres, then in a south-easterly direction for a distance of 400 metres' and insert 'from the junction with the spur of the U1099 leading to Ingram Mill in a south-easterly direction for 350 metres'.
  - From the map delete point A and insert a new point A at the junction of the spur of the U1099 leading to Ingram Mill. Delete the section of Byway Open to All Traffic to be added from the original point A to the new point A.
34. Since the confirmed Order would not show a way in the Order as submitted 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.

*Martin Elliott*

Inspector

## APPEARANCES

### **For the Northumberland County Council:**

Mr A Bell

Definitive Map Officer, Northumberland County Council

### **Also in support of the Order:**

Mrs H Dinsdale

Miss S Rogers

Ms J Johnson

### **In opposition to the Order:**

Mr A D Kind

Statutory objector, partly in support of Northumberland County Council

### **Interested persons:**

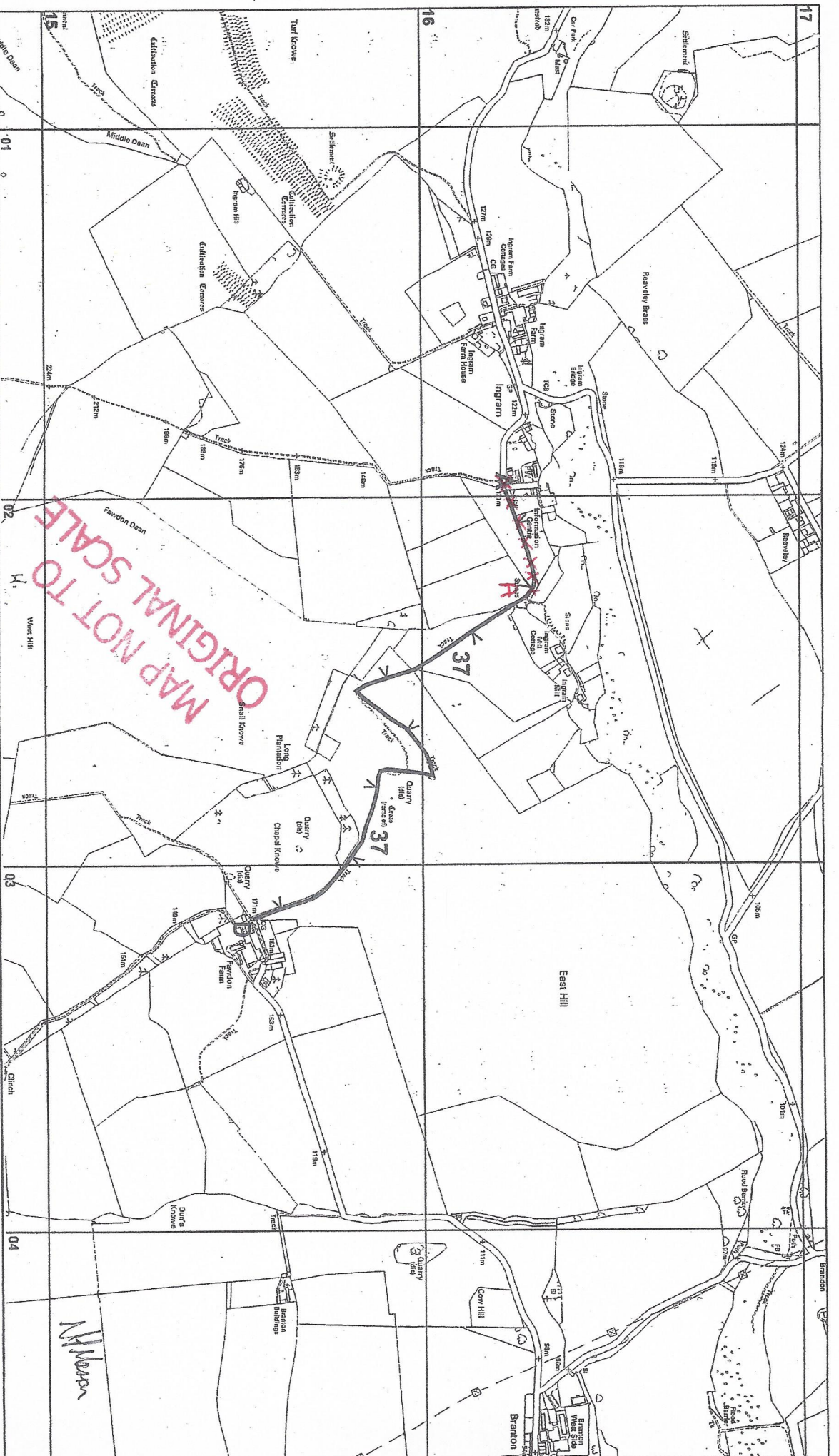
Mr D Whitehead

Mr D Dixon

Documents handed in at the hearing

- 1 Additional submissions of Mr Kind
- 2 'Alternative Adoption' Powers submitted by Mr Kind
- 3 Response of Northumberland County Council on additional submissions of Mr Kind





**Northumberland**

Northumberland County Council

Infrastructure  
Local Services  
County Hall Morpeth Northumberland  
Telephone 0845 800 6400 NE61 2EF

This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationary Office © Crown Copyright. Unauthorised reproduction infringes Crown Copyright and may lead to prosecution or civil proceedings.  
NORTHUMBERLAND COUNTY COUNCIL - OS Licence No. 100048048

Wildlife and Countryside Act, 1981

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

**The Northumberland  
County Council**

**Modification Order  
(No. 12) 2015**

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



0.5 Map NU 01 NW

Definitive Map No 55

Scale: 1/10,000

Former District(s) Berwick

Parish(es) Ingram

Date: September 2015