



Order Decision

Site visit made on 6 September 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 18 September 2017

Order Ref: ROW/3172059

- 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 6) 2012.
- The Order is dated 15 October 2012 and proposes to modify the Definitive Map and Statement for the area by (a) changing the status of part of footpath 13 (between points E and F on the Order plan) and part of footpath 16 between points C and D on the Order plan) to bridleway; (b) by adding a bridleway between point A and bridleway 5 near Hillhead Cottage and between points D and E and (c) to make consequential modifications to the definitive statement. The effect of the Order is set out in the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when Northumberland County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I carried out an unaccompanied site visit on Wednesday 6 September 2017.
2. As noted above, two objections were outstanding when the Council submitted the Order to the Secretary of State for confirmation. The objections were based on the lack of use of the Order route by the public; the unsuitability of the Order route for equestrian or cycle use; that gates and other furniture would have to be constructed through boundary hedges and fences; and that the commencement of the route at point A on the A696 posed a serious risk to users of the way and to users of the A696.
3. Whilst I acknowledge that the objectors have legitimate concerns regarding the impact the Order route may have on their land, the grounds of objection raised are not ones which I can take into account in reaching my decision. The process under section 53 of the 1981 Act is concerned with the recording of those public rights which on a balance of probabilities are shown by the available evidence to subsist and is not concerned with recording what might be considered to be preferable or desirable by one party or another. The objectors' concerns regarding the safety or suitability of the Order route for public use and other environmental concerns are not matters which I can take into account.

4. The case put forward by the Council and the applicant for the Order is based on the interpretation of documentary evidence and not on recent use by the public. That there may have been no use of the Order route by the public during the period in which the objectors have owned the land is not a relevant matter if the documentary evidence demonstrates on a balance of probabilities that a public right of way had come into existence at some point in the past and which had not subsequently been formally extinguished.
5. Although the objectors do not agree with the Order they have not challenged the Council's or the applicant's interpretation of the documentary evidence or the conclusions that have been drawn from that evidence.

The Main Issues

6. The Order was made in 2012. Prior to the Order being submitted to the Secretary of State for determination the Council had discovered that the part of the Order route north of Raylees Burn had been set out as a public road under the Elsdon Common inclosure award of 1731. The Council has requested that the Order be modified to record the Order route as a Restricted Byway; the applicant for the Order also contends that the Order route is a public vehicular way which should be recorded as a Restricted Byway as opposed to a bridleway.
7. There appears to be a dispute between the Council and the objector as to the width of the Order route if it were to be recorded as a restricted byway. It is the Council's case that only the section of the route between point F and Raylees Burn is supported by documentary evidence as to the width of the route and that beyond the Raylees Burn the width to be recorded should be 5 metres; that is, a width sufficient to allow two vehicles to pass each other. The applicant for the Order considers that the width specified in the inclosure award for the section of the route north of the Raylees Burn should be used for the whole of the Order route as historically a width greater than 5 metres would have been available as the whole of the Order route formed part of the same significant driving road.
8. I consider the main issues in this case to be the status and width of the Order route. With regard to the question of status, if I conclude that the Order route is subject to vehicular rights for the public, I will additionally have to consider (a) whether the character of the route is such that it satisfies the definition of a Byway Open to All Traffic and (b) whether the public's right to use mechanically propelled vehicles (MPVs) over the route is subject to the provisions of section 67 of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act').
9. The modifications to the particulars contained within the definitive statement in respect of footpath 13 and 16 and bridleway 18 are dependent upon the Order route being shown to be a public way. If I am satisfied that the evidence adduced demonstrates that the Order route is a public vehicular route, then I will also be satisfied that the proposed modifications to the definitive statement for footpath 13 and 16 and bridleway 18 are necessary. Furthermore, if the Order route is a public vehicular way, it will be necessary to also modify the definitive statement for bridleway 5; the Council has provided me with suggested form of words for this modification.

Reasons

Status of the Order route

10. That part of the Order route north of the Raylees Burn is described in the Elsdon Common inclosure award and plan. The award was made under the provisions of the Elsdon Common Inclosure Act of 1729. In the inclosure award, that part of the Order route north of Raylees Burn is described as follows: *"And we do hereby appoint a publick highway or road of fourteen yards in breadth in every part thereof from that part of the said public highway or road hereby appointed between Elsdon town and Sting Cross aforesaid adjoining upon the southeast corner of the fence or hedge hereby directed to be made for Elsdon Town Foot Farm aforesaid westwards along the northern end of the said allotment for the said tenement in Elsdon aforesaid now enjoyed by the said William Charleton unto the northwest corner thereof and from thence westwards unto the said allotment for the Shaw aforesaid and then southwards along the eastern side thereof unto the now common highway or road leading to Knightside aforesaid and along the same unto the northernmost allotment for Knightside and John's Croft aforesaid and then southwards thro' the said last mentioned allotment unto the corner of the said hedge or dike called Bournhead Dike and from thence southwards along by the eastern side thereof unto the Raylees Burn aforesaid."*
11. The award also specified that those public highways or roads set out by the Inclosure Commissioners were for public use with all classes of traffic. The position of the public road set out over those parts of Elsdon Common is shown on the inclosure award plan and is shown to continue southwards from Raylees Burn over Ravenscleugh and Raylees Common. I consider it more likely than not that the award of a public carriageway was a recognition of the pre-inclosure existence of public rights over that part of Elsdon Common which was subject to the inclosure process.
12. The Order route is shown as part of an unenclosed route over Elsdon and Ravenscleugh Commons on Fryer's map of 1820 and Cary's map published between 1820 and 1832. The route appears to be part of a major north-south way between Elsdon and Sweethope Lough which pre-dates the construction of the current A696. The applicant submits that the route shown by Fryer and Cary corresponds with part of the route shown on the 1792 Corsenside Inclosure plan annotated as the 'Great Drift Road'. The applicant argues that as the Order route formed part of the 'Great Drift Road' and was recognised as a public carriageway at inclosure, and as another public vehicular way awarded by the Corsenside inclosure commissioners terminated on the 'Great Drift Road', it was more likely than not that the whole of the Order route would have been of the same status throughout its length.
13. Greenwoods map of 1828 shows the Order route and its continuation over the commons to Sweethope Lough. Whilst Fryer's, Cary's and Greenwood's maps do not provide direct evidence of the status of the route shown, as maps which post-date the inclosure process by around 100 years they demonstrate the continued physical existence through time of a route capable of accommodating public vehicular traffic.
14. The first edition Ordnance Survey 25" to 1-mile map of 1864/65 shows the section of the Order route between points F and C as a unenclosed track coloured ochre and annotated '256'; that part of bridleway 5 running past

Hillhead Cottage is annotated '261'. The corresponding entries in the relevant book of reference describe parcels 256 and 261 as 'Public Road'. The continuation of the order route to the Raylees Burn is enclosed by walls or fences and is annotated '262' which in the book of reference is described as a 'Private Road'. The map shows the existence of a ford in the Raylees Burn. The remainder of the Order route is shown to run over Ravenscleugh to the A696 is shown as an unenclosed track running within parcel no 58 which is described as 'rough pasture'.

15. Ordnance Survey 6" to 1-mile maps of 1866, 1898, 1925, 1951/52 and 1957 all show the Order route running over the common by means of a double peck line. On the 1898, 1925, 1951/52 maps the Order route is annotated 'BR' whereas on the 1957 map it is annotated 'FP'. On the 1982 1:10,000 scale OS map that part of the Order route south of the Raylees Burn is not shown indicating that at the time of the survey, there was no observable feature on the ground between the A696 and Raylees Burn.
16. The Order route was not shown in the draft, provisional or definitive maps of public rights of way produced by the Council under the provisions of the National Parks and Access to the Countryside Act 1949. A number of public footpaths and bridleways were recorded in the vicinity of Hillhead as part of the survey but none of these included the Order route. The omission of the Order route from the survey suggests that by the middle of the twentieth century, any reputation the Order route had as a public carriageway had passed from memory.
17. No evidence has been submitted to show that the public carriageway rights set out under the 1731 Elsdon Common inclosure award have been formally stopped up; consequently, those public rights awarded as part of the inclosure process remain and should be recorded. Although there is no conclusive evidence with regard to the status of the remainder of the Order route, the evidence from the Corsenside inclosure award and plan and early nineteenth century small scale maps provides persuasive evidence, on a balance of probabilities, that the Order route formed part of a pre-inclosure long distance public road which would have been available to the public with vehicles and animals.
18. Taken collectively, the documents adduced provides highly persuasive evidence that the public vehicular rights set out over the inclosure award section of the Order route have not been lost in the intervening 280 years. Furthermore, those documents demonstrate, on a balance of probabilities that public vehicular rights exist upon that section of the Order route that was not subject to the inclosure process. It follows that I conclude that the whole of the Order route is a public carriageway.

Whether the Order route can be recorded on the Definitive Map and Statement as a BOAT

19. Having had the opportunity to view the Order route, I consider that the location, condition and appearance of the Order route is such that it is more likely to be used for the purposes for which footpaths and bridleways are so used. No evidence has been submitted to demonstrate that this is not the case. I conclude that, on a balance of probabilities, the character of the route is such that it satisfies the statutory definition of a BOAT found in section 66 (1) of the 1981 Act.

The impact of Section 67 of the 2006 Act

20. Section 67 (1) of the 2006 Act extinguished, as of 2 May 2006, any right the public had to use mechanically propelled vehicles (MPVs) over a route that was not shown in the definitive map and statement or over a route that was shown in the map and statement but only as a footpath, bridleway or restricted byway.
21. The general extinguishment provision of section 67 (1) is however subject to a number of exceptions which are set out in section 67 (2) to (8). It has not been argued that any of the saving provisions are applicable in this case; consequently I conclude that any right the public may have had to use the Order route with MPVs was extinguished on 2 May 2006. It follows that the Order route cannot be recorded on the Definitive Map and Statement as a BOAT. However, as the public's right to use the Order route with non-mechanically propelled vehicles is unaffected by the provisions of section 67 of the 2006 Act, it can be recorded as a Restricted Byway.

Width

22. That section of the Order route north of the Raylees Burn was set out under the 1731 Inclosure Award at a width of 14 yards (42 feet or 12.8 metres) and this is the width which should be recorded for the section of the Order route between point F and the Raylees Burn.
23. As to the section of the Order route south of Raylees Burn, the Council is of the view that there is no documentary evidence as to the historic width of the route and that it has consistently been shown to be a moorland track. In those cases where the route is not constrained by boundaries and where the legal width of the route is not defined, the Council is of the view that the width to be recorded is that which would be reasonable in the circumstances and submits that the Order should be modified to record a width of 5 metres between the Raylees Burn and the A696 as this would be sufficient for two vehicles to pass.
24. Whilst acknowledging the Council's views, the applicant submits that the inclosure award width should be recorded for the whole of the route; as an unenclosed cattle droving route as well as a public carriageway, the route would need to be wider than 14 yards as it would have been impossible for drovers to have constrained their cattle in such a narrow corridor. The applicant submits that the definitive statement should reflect the lateral extent of the historic right of way and not what may be seen as 'appropriate' today.
25. Whilst I acknowledge the arguments put forward for recording the whole of the route as having a width of 14 yards, there is no specific evidence as to the historic width used by the public south of the Raylees Burn whether for the driving of vehicles or for the driving of cattle. In the absence of any clear evidence as to the width of the route between the A696 and Raylees Burn, I consider that a width of 5 metres would be reasonable and sufficient to allow two vehicles to pass. Accordingly, I propose to record the Order route as having a width of 12.8 metres (14 yards) between point F and point X at the Raylees Burn and a width of 5 metres between point X and point A.

Conclusions

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

Formal Decision

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

throughout the Order and Order plan, replace any reference to Public Bridleway 45 and Public Bridleway 46 with Restricted Byway 45 and Restricted Byway 46;

in the Index insert 'Elsdon BR 5 Part Deletion NY 99 SW 121';

in the order plan replace the symbol used to identify Bridleway 46 and 46 (that is a bold broken line with cross bars in the intervals) with the symbol for a Restricted Byway (that is by a broken line with small arrowheads);

in the schedule for Restricted Byway No 45 amend part I to read 'Adding thereto a restricted byway, from a point marked B on Restricted Byway No 46, 10 metres west of Hillhead Cottage in a north-westerly then easterly direction for a distance of 675 metres, to a point marked F, on the C187 road, 420 metres north of Hillhead Cottage.';

in the schedule for Restricted Byway No 45 amend Part II to read 'A 12.8 metre restricted byway from Restricted Byway No 46, 10 metres west of Hillhead Cottage in a north-westerly direction for a distance of 465 metres, then in an easterly direction for a distance of 210 metres, to join the C187 road, 420 metres north of Hillhead Cottage.';

in the schedule for Restricted Byway No 46, amend part I to read 'Adding thereto a restricted byway, from a point marked A, on the A696 road, opposite that road's junction with Bridleway No 36 (Parish of Otterburn), 450 metres south-east of Blaxter Cottages, in a generally northerly then easterly direction for a distance of 1635 metres to a point marked B on Restricted Byway No 45, 10 metres west of Hillhead Cottage.';

in the schedule for restricted Byway No 46, amend Part II to read 'A restricted byway, from the A696 road, opposite that road's junction with Bridleway no 36 (Parish of Otterburn), 450 metres south-east of Blaxter Cottages, in a generally northerly direction for a distance of 1530 metres, and crossing Raven's Cleugh and the Raylees Burn, then in an easterly direction for a distance of 105 metres to join restricted byway No 45, 10 metres west of Hillhead Cottage. Width: between the A696 road and Raylees Burn: 5 metres, between Raylees Burn and Hillhead Cottage 12.8 metres.';

insert the following:

Elsdon		Bridleway No 5	(NY 99SW)
Part I	Map	Deleting thereto the public bridleway, from a point marked B, 10 metres west of Hillside Cottage to a point marked C, 20 metres north-west of Hillside Cottage. This deletion is a consequence of upgrading this section of	

bridleway to restricted byway (RB 45) status.

Part II State
 ment

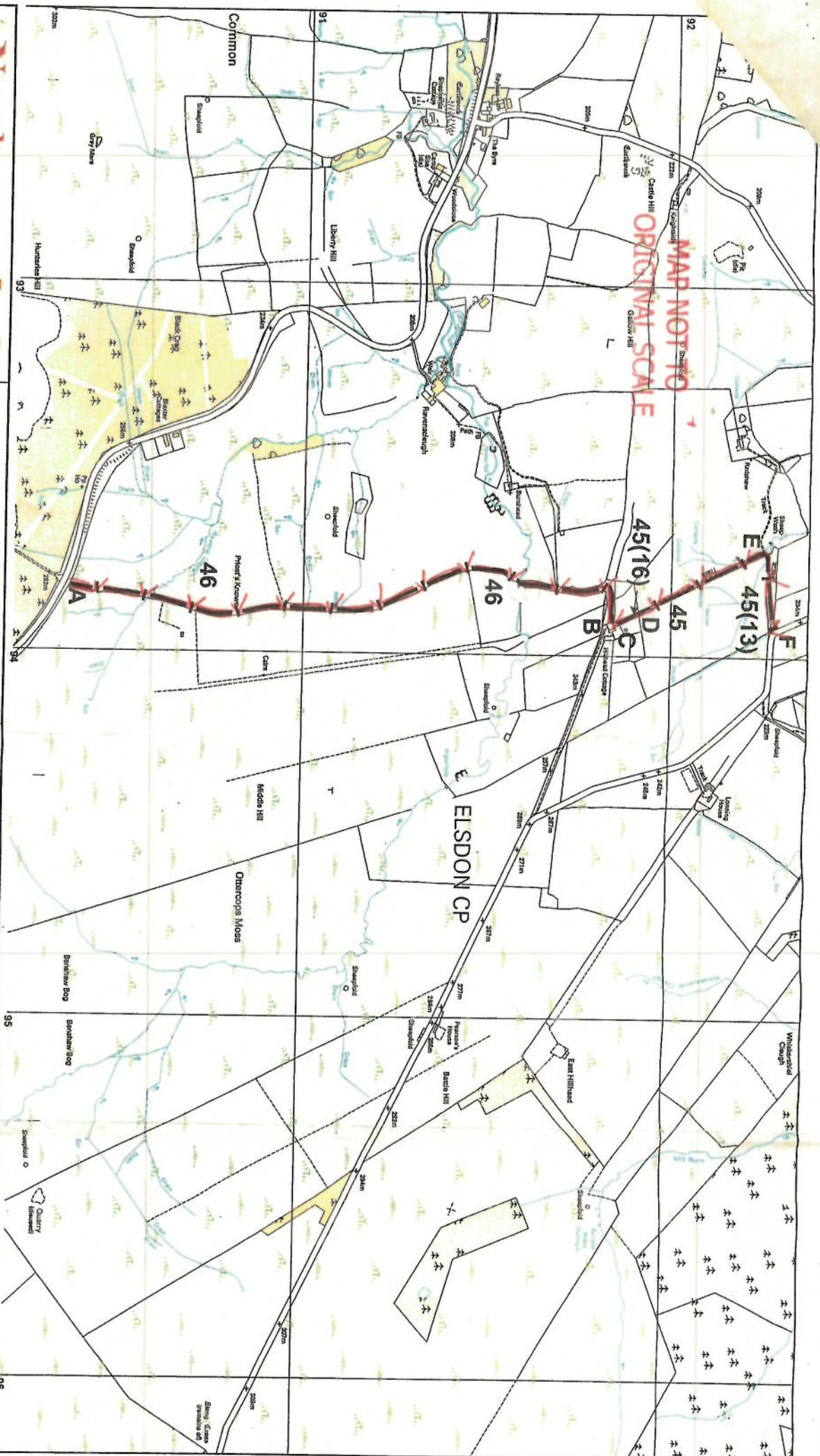
To be amended as follows:

From the Monkridge – Soppit road east of Monkridge in a north-easterly, easterly and south-easterly direction, crossing the Elsdon – Raylees road at Castle Hill, passing by Knightside, crossing Footpath No 14 and Footpath No 15, to join Restricted Byway No 45, 10 metres west of Hillhead Cottage. Resuming at a point 20 metres to the south-east, at the junction of Restricted Byways No 45 and 46, passing to the south of Hillhead Cottage and proceeding in a south-easterly direction to join the Elsdon – Harwood road south of Lonning House.

28. Since the Order as proposed to be confirmed would show as a highway of one description a way which is shown in the Order as a highway of another description and would affect land not affected by 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.

Alan Beckett

Inspector



Northumberland

Northumberland County Council

Sustainable Transport
Local Services

County Hall Morpeth Northumberland
Telephone 0845 600 6400 NE61 2EF

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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.6) 2012**

Public Right of Way closed

Public Footpath

Public Bridleway

Resituated Byway

Byway Open to All Traffic



O.S. Map NY 99 SW

Definitive Map No 121

Scale: 1/10,000

Former District(s) Alnwick

Parish(es) Elsdon

Date: July 2012