



Order Decision

Inquiry held on 24 July 2018

by Sue Arnott FIPROW

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

Decision date: 17 September 2018

Order Ref: ROW/3184365

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the County Council of Durham Public Rights of Way (Public Bridleway No. 211 Crook and Nos. 121 & 196 Witton le Wear Parish) Modification Order No.3 2017.
- The Order is dated 25 May 2017. It proposes to modify the definitive map and statement for the area by adding a bridleway between Railway Street, Howden le Wear and Bridleway 196 (Witton le Wear) and upgrading to bridleway status Footpaths 196 and 121 (part) (Witton le Wear), as shown on the Order map and described in the Order schedule.
- There were three objections outstanding when Durham County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs of which one has since been withdrawn.

Summary of Decision: The Order is confirmed with a minor modification as set out in the Formal Decision below.

Procedural Matters

1. I held a public local inquiry into the Order at the Civic Centre in Crook on 24 July 2018. During the previous afternoon I walked the route in question, unaccompanied. At the close of the inquiry, none of the parties present requested I make a further visit to the site and I did not consider it necessary.
 2. At the start of the inquiry Durham County Council (DCC) drew my attention to an administrative oversight which resulted in only 5 of the 9 landowners affected by the Order route being served notice of the Order on 31 May 2017. Other owners were served notice on 6 June 2017 with the exception of one – DCC itself. The Council's ownership of a small parcel of land to the east of the claimed bridleway and between numbers 10 and 20 Victoria Cottages was not discovered until after this but notification had followed.
 3. Although DCC's failings were criticised, no representations sought to challenge the notification process and I am satisfied that all those with an interest in land affected by the Order have had sufficient opportunity to make known their views.
 4. The Order is perfectly clear in its intention but it appears that the sealed copies contain 'tracked changes' so that corrected mistakes from an earlier draft are visible although crossed out. None of the objections have suggested there has been any confusion or misunderstanding of the Order and I am satisfied that no-one is likely to have been prejudiced as a result of this administrative mistake. However to ensure there is no possibility of any incorrect details being recorded on the definitive map and statement, I consider modifications to remove all 'tracked changes' from the Order would be sensible.
-

The Main Issues

5. The Order was made under sub-section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-sections 53(3)(c)(i) and (ii), namely the discovery of evidence which shows a right of way which is not recorded in the definitive map and statement subsists over land in the area to which the map relates, and that a highway shown on the map and statement as a highway of a particular description (namely as a footpath) ought to be there shown as a highway of a different description (in this case as a bridleway).
6. The case in support of this Order is based primarily on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to have occurred, there must have been use of the claimed route by the public on foot and with horses, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public bridleway. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public bridleway will be deemed to subsist.
7. In relation to the claimed use by cyclists, Section 31 of the 1980 Act as amended by Section 68 of the Natural Environment and Rural Communities Act 2006, and as read with Section 66 of the same Act, provides that use of a way by non-mechanically propelled vehicles (such as pedal cycles) is capable of giving rise to a restricted byway. However in this case, having particular regard to the previous status of part of the route¹, it has not been argued that anything other than a bridleway has been established.

Reasons

Historical background

8. An examination of Ordnance Survey maps dating from 1856 and 1895 show that the original housing at Victoria and Enginemans Terrace developed at some time between these two dates in association with the nearby colliery, coke ovens and pipeworks. The road that now forms the Order route was established as a through-road during this period though not necessarily as a public one. It continued to exist in much the same form into the twentieth century as illustrated on subsequent OS maps of 1915 and 1939.
9. It is also worth noting that these maps show that a Methodist Chapel was located to the east side of the road north of Point C dating back to 1915 (at least). This continued to exist until the late 1950s when it closed due to falling attendance, especially after most of the 60+ houses and cottages at Victoria were vacated and later demolished.
10. Records compiled for the 1910 Finance Act suggest that it was probably not then recognised as a vehicular highway although this is not conclusive and would not preclude the existence of a public right of way on foot or with horses at that time.

¹¹ As a 'road used as public path' (see paragraph 14 below)

11. DCC made a thorough search of information held in the Durham Record Office, discovering reference to this road in the Minutes of Council Committee meetings as early as 1931. Records show that complaints were made about the condition of the road and on several occasions the Council considered requests for action but this was deferred in the 1930s and again in the 1950s, latterly because of uncertainty over the future of housing at Victoria.
12. It has always been Mrs Smith's understanding that the road is a private one. Her family has maintained it for many years at great expense, as have other landowners along its length. Requests for assistance from DCC have in the past been rejected (despite being the owner of land with frontage to the road), the reason being that this is not recorded as a publicly maintainable highway.
13. That position seems to be consistent with the view taken in the 1930s and 1950s but has resulted in confusion over the status of the way as 'private' responsibility for maintenance has been mistaken for 'private' in the sense of there being no rights for the public to use it.
14. In the 1950s during the preparation of the first definitive map and statement under the National Parks and Access to the Countryside Act 1949 Footpath 196 was registered as a public footpath whilst Footpath 121 was initially identified as a 'Road Used as Public Path' (RUPP). Section 32(4)(b)² of the 1949 Act 1949 provided that the showing of a way as a RUPP in the definitive record was conclusive evidence that, at the relevant date, the public had a right of way on foot and a right of way on horseback or leading a horse but without prejudice to the existence of any other rights. Following a limited review in the 1970s, this was reclassified as a footpath (although apparently after little research).
15. Thus it is a matter of record that a public right of way on foot exists over the southern part of the route (marked as B-C-D on the Order map). Footpath 196 is therefore shown as a cul-de-sac although there is a clear inference that the public right of way did not simply stop at point B³. Indeed, the Order route is joined at both ends by publicly maintainable highways, the implication being that a public right of way of some description links Railway Street in the north with unclassified road 41.27 to the south.
16. Examination of these old records does strongly hint of a road which became well used by the local community but which was never maintained by the public purse. It is tempting to assume that long-standing and unchallenged use from the late nineteenth century through to the mid-twentieth must have established a public right of way along its length, at least on foot, and especially with the existence of a chapel near Point C, but in fact the evidence for this is equivocal.
17. The historical evidence alone is not sufficient to tip the balance. Indeed DCC's case is based on use by the public over a more recent 20 year period which it says will satisfy the legal test in order to demonstrate the right of way acquired by the public on foot, horse-back and riding a pedal-cycle.

² This was not repealed until the 1981 Act.

³ It is worth noting that the absence of any continuation northwards from Footpath 196 (between the points marked B and A on the Order map) may be explained by the presence of a parish boundary at that time separating the route into two jurisdictions for the purposes of the 1950s survey.

The case for statutory dedication

18. Following the approach set out in Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question.

Bringing into question

19. It is not disputed that the status of the Order route was challenged by signs attached to No. 10 Victoria Cottages which read "PRIVATE: NO PUBLIC RIGHT OF WAY" and "NO PUBLIC ACCESS OR RIGHT OF WAY". However there are varying accounts of exactly when these were first displayed.
20. DCC initially considered the most reliable date to be September 2014, this being when members of the public first alerted the Council to the matter; an officer made an inspection the following month. However Mrs Smith was sure that her (late) husband put up the signs in 2012 in response to an incident in which her mother was verbally abused on the road outside their house (No 10).
21. Mrs Smith said the signs had been erected to deter a particular group of young people who caused problems. The signs faced northwards⁴ as the miscreants always approached from that direction. In fact all the objections to the Order refer to challenges made to people behaving criminally, anti-socially or suspiciously. DCC submits that these do not represent a challenge to the public at large but rather to a specific group of people acting in a certain way. I concur with that view.
22. In addition to these signs, Mrs Smith and Mr Groves submitted there were many other times when access would have been prevented. These included occasions when maintenance works were carried out to the road, in 2005 whilst the road surface was restored following subsidence and in 2006 whilst a collapsed drain was repaired. At these times a standard highways "ROAD AHEAD CLOSED" sign was used to advise the public that the way was not accessible and sometimes a gate was closed. Further, there were times that passage was blocked because of parties at 20 Victoria Cottages and the road was closed on Christmas Day at Victoria Bungalow from 2004 onwards.
23. There were also other notices erected at various times stating "PRIVATE PROPERTY", "KEEP OUT", "PRIVATE ROAD", "RESIDENTS ONLY", "PLEASE KEEP DOGS ON LEADS", "BEWARE OF THE DOG", "SLOW DOWN" and "PERMISSIVE FOOTPATH". Claimants also state they saw other notices such as "KEEP DOGS ON A LEAD", "SLOW – CHILDREN PLAYING" and the standard warning signs seen at railway crossings.
24. However the evidence suggests that none of these signs or actions were intended to prevent pedestrian, equestrian or cycling access along the Order route and none resulted in any reaction from the public.
25. In contrast, the 2012 notices (possibly combined with the later locking of a gate across the road) led to the status of the way being brought into question, whereas it seems that earlier incidents had not. There have been various signs erected along the track subsequent to 2012, together with personal challenges and new gates, but this was the earliest one to prompt complaints to DCC. Consequently I propose to examine the twenty years preceding 2012.

⁴ Claimants approaching from the south could easily have missed the notices and been unaware of the challenge.

Evidence of use by the public 1992-2012

26. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed as of right, without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission.
27. At the inquiry I heard from five witnesses, four of whom had walked and/or ridden horses or bicycles over the whole of the relevant period and one who had ridden horses there since 1994. Each submitted to cross-examination and each gave credible accounts of their use.
28. In total I have before me evidence from 51 people who have used the Order route for varying periods between 1992 and 2012, 48 of whom completed standard user evidence forms, 12 also making further written statements and 3 who presented witnesses statements only. Of these, 26 people claim pedestrian use throughout the full 20 years or more, with 11 cycling over the same period and 6 riding horses. Some of these claimants used the route on a daily basis, some weekly and some less often but sufficient to represent a considerable quantity of frequent and regular usage by the public.
29. Mr Groves drew attention to the use of a parallel path on the east side of the bungalow and cottages (this being an unrecorded continuation of definitive Footpath 120) until this was blocked off. Recollections of the date on which this occurred vary but even if some people did walk this way during the relevant period, this will have been use on foot only. The evidence indicates that horse riders and cyclists did not use this alternative and therefore all the use claimed by them will, without doubt, refer to the Order route.
30. In fact the user evidence before me is largely unchallenged. There is no suggestion that at any time use was by force or conducted in secret. However, there is a question over whether it was 'with permission'.

Permission

31. Mr Groves said that in 1995 his father put up signs saying 'permissive footpath' and that these remained in place until 2002. However he was unsure exactly where this sign was located. Neither was there any corroborating evidence from users although it was suggested that such a sign may have related to a path leading to a memorial garden for the late Diana, Princess of Wales which was set up by Mr Grove's late father to the west of the Order route.
32. In the absence of further evidence it is difficult to be certain whether this signpost was intended to indicate a footpath to this garden, the parallel footpath prior to its blockage or the Order route. On balance there is not sufficient evidence to substantiate it and I must conclude the claimed use by the public did not take place with the express permission of the Groves' family.
33. Since Mrs Smith similarly could not substantiate the permission she says her own family had given to certain users, I am likewise unable to place any weight on her claim. I understand the point she made to the effect that claimants who were known to the landowners were unlikely to be challenged by them; however in the absence of express permission, all users were entitled to draw the conclusion that their use of the road was 'as of right', at least until the notice in 2012 made clear that the landowner denied any public right of way.

34. In addition to being without force, secrecy or permission, the claimed use must be continuous throughout the 20 year period and without interruption if it is to raise a presumption of dedication as a public right of way.

Continuous and without interruption

35. None of the temporary blockages referred to by the objectors appear to have interrupted use by the claimants. None of the witnesses at the inquiry had ever been prevented from using the road during the relevant 20 years (although only one person recalled actually using it on Christmas Day).
36. An exception to this is during the period in 2001 when Foot and Mouth Disease legislation enabled local authorities to close routes open to the public in order to prevent the spread of disease. Mr Groves said that his father closed the road to all but those needing private access by locking his gate for several months. Indeed some of the claimants recalled that they did not use the route at all whilst these restrictions were in place because the area was "in lock-down".
37. DCC argued that this temporary cessation should not be regarded as an interruption. I was referred to the cases of *Jones v Bates [1938]*⁵ and *Lewis v Thomas [1950]*⁶ as authority for the need of an actual physical blockage directed at users as the cause of an interruption. Also, in the case of *Fernlee Estates Ltd v City & County of Swansea & the National Assembly for Wales [2001]*⁷, walls constructed on the line of a footpath were not intended to stop public and therefore the use was not said to be interrupted.
38. Current advice⁸ states that temporary closure for this purpose should not be treated as an interruption to otherwise continuous use by the public. In following that advice, I am led to the conclusion that the break in user was not of a nature that qualifies as an interruption in this context. Closure in these circumstances is not of the landowners' choosing, nor the public. Since use of the Order route resumed as soon as the restrictions were lifted, I shall regard the claimed user as being continuous throughout the period at issue.
39. In conclusion, I am satisfied that use of the Order route by witnesses at the inquiry and by other claimants was 'as of right', continuous and without interruption, sufficient to raise a presumption of dedication as a public bridleway.

Intentions of the landowner(s) 1992-2012

40. I turn next to consider whether there is evidence to show that during the relevant period, the respective owners of the land demonstrated a lack of intention to dedicate a public right of way over the claimed route.
41. The initial three objectors were all owners of land which lies between points A and B on the Order map; two still do own the land but one has since sold the property now known as Victoria Bungalow⁹ (nearest point A) and has withdrawn the objection¹⁰. I have nonetheless taken into account the evidence provided, where relevant, along with information from the two other objectors.

⁵ *Jones v Bates [1938] 2 All ER 237*

⁶ *Lewis v Thomas [1950] 1KB 438*

⁷ *Fernlee Estates Ltd v City & County of Swansea & NAW [2001] EWHC Admin 360*

⁸ Planning Inspectorate Rights of Way Advice Note 15

⁹ Previously "Pyrenean Bungalow"

¹⁰ I note that the new owner, Mr Bloomfield, does not challenge the existence of a public bridleway but does not offer any evidence relating to use during the relevant period.

42. Mr Groves' parents bought No 20 Victoria Cottages in 1981 and were owners throughout the twenty years that are at issue here. So too was Mrs Smith's family at 10 Victoria Cottages.
43. As I have noted above, both Mr Groves and Mrs Smith have provided details of numerous occasions when they say maintenance works and repairs were carried out along the road, thereby obstructing passage by the public. On such occasions, a "ROAD AHEAD CLOSED" notice was put in place towards the northern end of the Order route.
44. DCC submitted that wording such as this is not sufficient to make clear to members of the public, other than those in motor vehicles, that they cannot use the road. It referred to the case of *Burrows v Secretary of State for the Environment, Food and Rural Affairs [2004]*¹¹ in support of this, references to 'road' in this context generally being interpreted as a vehicular way.
45. The same (or similar) "ROAD CLOSED" notice was said to have been displayed on Christmas Day at Victoria Bungalow but DCC again argued this would not have been interpreted as applicable to non-motorised traffic. Further, as in the case of *R (on the application of Ashgar Ali v Secretary of State for the Environment, Food and Rural Affairs [2004])*¹², a closure notice put up on Christmas Day is not a date on which the public might be expected to use the route; therefore the sign is unlikely to be sufficient to convey a clear message that the way is not intended to be a public one.
46. Mr Groves said his father had erected a "PERMISSIVE FOOTPATH" sign but I have not been able to establish exactly where this was located, or when, and whether or not it was intended to apply to the Order route. I am inclined to the view that it signposted the route to the Princess Diana Memorial but this has not been substantiated.
47. DCC also drew attention to the judgement in the case of *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007]*¹³ in which it was recognised that signs must be clearly and overtly inconsistent with dedication when viewed objectively by a reasonable user if they are to effectively rebut a presumption that a public right of way has been established.
48. I agree with DCC's submissions on these points; neither the road signs nor the various works would have conveyed to the people walking, cycling or riding horses along the way that it meant they were not doing so in exercise of a public right of way.
49. I heard from both Mrs Smith and Mr Groves that there had also been many times when people had been challenged whilst using the road, with some incidents involving the Police, but these were usually occasions involving criminal intent or anti-social behaviour in some form or another. That differs considerably from challenging law-abiding members of the public simply using the road as they would use any other public right of way. In fact at the inquiry both Mrs Smith and Mr Groves each said they did not have a problem with people using the way in principle, but they had always been concerned about those who mis-use the road or abuse the residents and they were indignant

¹¹ *Burrows v Secretary of State for the Environment, Food and Rural Affairs [2004]* EWHC Admin 132

¹² *R (on the application of Ashgar Ali v SSEFRA [2015])* EWHC Admin 893

¹³ *R (on the application of Godmanchester Town Council) v SSEFRA [2007]* UKHL 28

over the lack of any support from the highway authority for maintenance of the road surface.

50. It was not until the notices were erected at No 20 stating in clear terms "PRIVATE: NO PUBLIC RIGHT OF WAY" and "NO PUBLIC ACCESS OR RIGHT OF WAY" that the owners' position was unambiguously conveyed to users, thereby bringing into question the status of the way.
51. No maps, statements or statutory declarations have been deposited by any of the landowners concerned under the statutory procedures set out in Section 31 of the 1980 Act to formally rebut any presumption of dedication.
52. Overall, I find there is insufficient evidence that during the period 1992 – 2012 the relevant landowners made clear to the public a lack of intention to dedicate a public path along the route shown on the Order map.
53. Therefore I conclude that, under the statutory approach and on a balance of probability, a public bridleway can be presumed to subsist.

Other matters

54. It is apparent from the objectors' submissions and evidence contained within old Council Minutes that maintenance of the Order route has been the subject of great concern for decades. It seems that approaches have been made to the highway authority on many occasions in the past but no arrangements have ever been put in place to assist. The burden has fallen on the respective landowners along the route, despite a significant proportion of usage of the route being public rather than private. Whilst I understand the frustration felt by Mrs Smith and Mr Groves, maintenance of the route in future is beyond the scope of this Order and not a matter on which I can comment.
55. I have also noted comments about the likely effects of allowing the public to use this route in practical terms and the risks involved. As I explained at the inquiry, neither the merits nor any disadvantages of the claimed public bridleway are at issue here; the question for me in determining this Order is whether or not a public right of way has already come into existence as a matter of law.

Conclusion

56. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed with the modifications referred to in paragraph 4 above.

Formal Decision

57. I confirm the Order with the following modifications:

- Throughout the Order, delete each detail which appears in 'strikethrough' text¹⁴

Sue Arnott

Inspector

¹⁴ These also include intended modifications to the definitive statement (the 'strikethrough' indicating the deleted text) but are removed here for the sake of overall clarity.

APPEARANCES

In support of the Order

Mr N Carter Solicitor, Durham County Council

Who called

Mr J Bell

Mrs L Davis

Mr T Richardson

Mrs F Hillier-Brown

Mrs N Willis

Ms A Christie Senior Rights of Way Officer, Durham County Council

Opposing the Order

Mrs J Smith

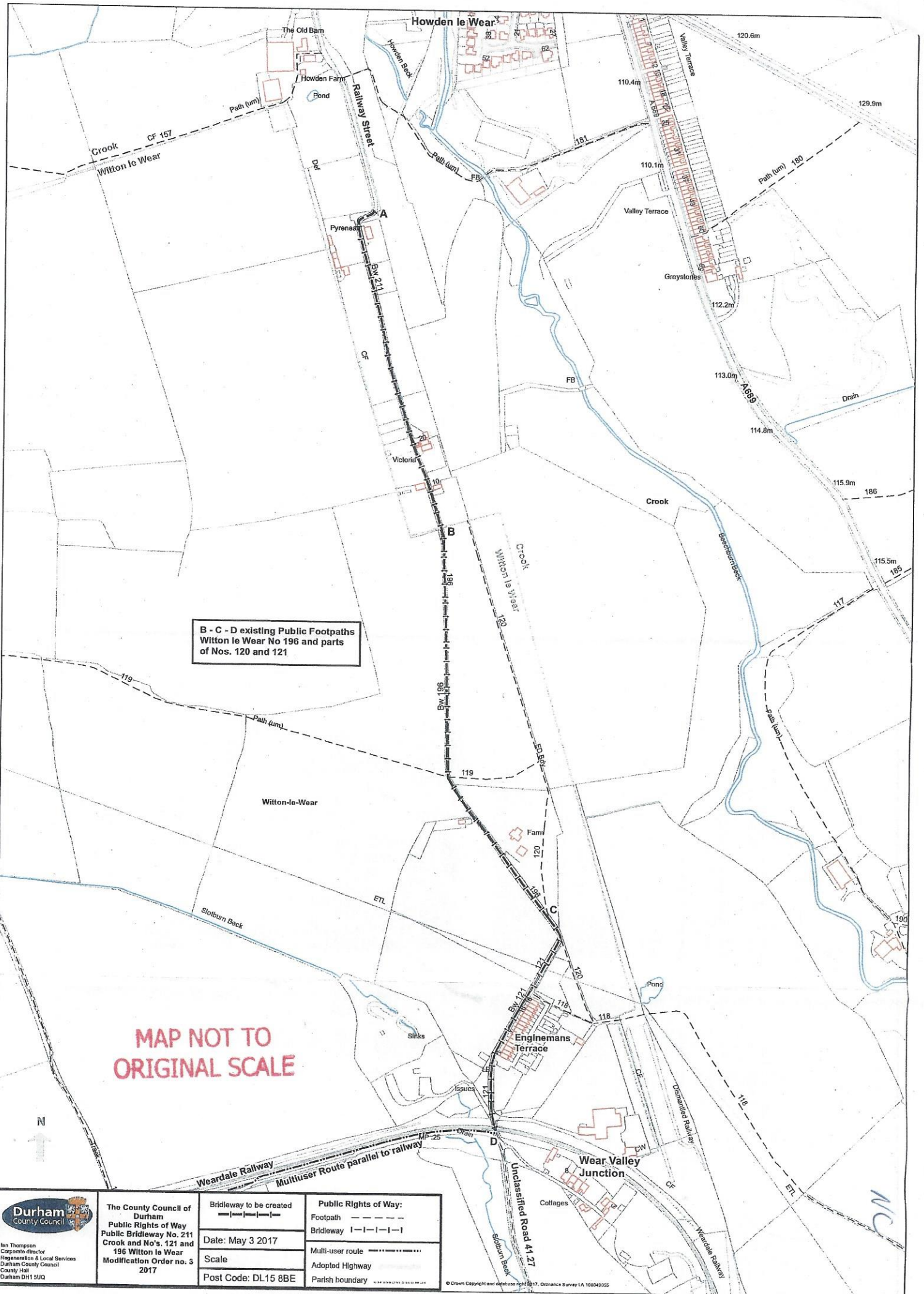
Mr J Groves On behalf of Mrs A M P Groves

DOCUMENTS

1. Copy of the 3 statutory objections (including one letter of withdrawal)
2. Statement of case on which it is considered the Order should be confirmed and comments on the objections submitted by Durham County Council together with bundle of relevant case documents
3. Proof of evidence of Ms A Christie on behalf of Durham County Council
4. Proofs of evidence of Mr J Bell, Mr M Brooksbank, Ms L Davis, Ms F Hillier-Brown, Mr T Richardson, Ms N Willis and Ms K Parkin

Submitted at inquiry

5. Updated copy of user evidence spreadsheet (replaces DCC Document G)
6. Additional user analysis (DCC)
7. Letter from Mrs J Smith to the Planning Inspectorate dated 3 April 2018 together with enclosures
8. Copy of email dated 24 July 2018 confirming DCC's response to notification of the Order
9. Letter dated 30 June 2018 from Mr J Broomhead



B - C - D existing Public Footpaths
 Wilton le Wear No 196 and parts
 of Nos. 120 and 121

MAP NOT TO
 ORIGINAL SCALE

Durham County Council

Ian Thompson
 Corporate Director
 Regeneration & Local Services
 Durham County Council
 County Hall
 Durham DH1 5UQ

The County Council of Durham
 Public Rights of Way
 Public Bridleway No. 211
 Crook and No's. 121 and
 196 Wilton le Wear
 Modification Order no. 3
 2017

Bridleway to be created
 Date: May 3 2017
 Scale
 Post Code: DL15 8BE

Public Rights of Way:
 Footpath
 Bridleway
 Multi-user route
 Adopted Highway
 Parish boundary

© Crown Copyright and database right 2017. Ordnance Survey 1A 100049005